25 August 2018

Mr David Bagnall
Clerk to the Justice Committee
Office of the Clerk of the House of Representatives
Parliament House
Private Bag 18041
WELLINGTON 6160
By email: David.bagnall@parliament.govt.nz

Dear David

SUPPLEMENTARY REPORT TO JUSTICE COMMITTEE: ARBITRATION AMENDMENT BILL 2018

1.0 Introduction

1.1 I refer to your email of 9 August 2018, which followed the meeting of the Justice Committee held earlier that day. A further meeting has been scheduled for 10am on 6 September 2018, which I shall attend.

1.2 In anticipation of the next Committee meeting, I have been asked to consider further the policy decisions that the Committee will need to make in deciding how to proceed with the Bill. My views and recommendations are set out in this report. Particular policy choices in respect of issues involving the ability to arbitrate trust disputes and confidentiality are set out for ease of reference in Schedule 1 to this letter.

1.3 I was given permission by the Committee to obtain further information, on a confidential basis, from the Chief Justice, Sir David Williams QC and Mr John Green, of the New Zealand International Arbitration Centre. I summarise the information provided in Schedule 2 to this letter, and attach further documents that may be of assistance to the Committee.

1.4 In the case of the Chief Justice, I refer to a letter that she sent to the Chair of the Committee on 9 August 2018. This letter was written following my discussions with the Chief Justice and Hon Justice Sir William Young the previous day. Although the
points that the Chief Justice raises involve confidentiality, I make it clear that she has not seen that part of my report of 12 July 2018 that relates to the confidentiality regime. I was authorised only to release to her the introductory parts of that report and the section dealing with arbitration of trust disputes.

1.5 In preparing this report, I have also had regard to the position paper provided to the Committee and myself by Andrew Bayley MP, in anticipation of the meeting on 9 August 2018. Although I do not refer specifically to that document, I have taken it into account when identifying the policy points to be considered and making recommendations.

2.0 An overarching concern

2.1 In its current form, the Bill raises two issues with significant policy implications. One concerns the question whether Parliament should endorse the idea that an arbitration clause in a trust instrument should be equated to a contractual arbitration agreement. The second concerns the confidentiality regime that was introduced, following recommendations made by the Law Commission, through the Arbitration Amendment Act 2007.

2.2 In both of those cases, the form of the Bill released for public consultation did not contain provisions of the type the Committee is now considering in its assessment of public policy implications. That means, with two qualifications, the public has not had an opportunity to make submissions on the broader question. The first involves the supplementary submissions made by invited submitters in open session on 14 June 2018, at the request of the Committee. The second concerns information gathered as a result of the Committee’s decision to authorise me to discuss certain aspects on a confidential basis with the Chief Justice, and key market participants.

2.3 In her letter to the Chair of the Committee of 9 August 2018, the Chief Justice questioned whether material changes should be made to a Private Member’s Bill when (as the Chief Justice put it) under “normal pre-introduction process for government bills, proposals dealing so directly with the function of the courts would not be developed without consultation with the judiciary”. The Chief Justice also raised questions of scope, under Standing Order 292(1), by reference to the Supreme Court’s recent decision in Hartono v Ministry for Primary Industries [2018] NZSC 17. The Chief Justice described that case as being “concerned [with] an amendment to the Fisheries Act 1996 resulting from a private members bill which had undergone radical change in the select committee process”. The Chief Justice indicated that it would be helpful for an “exposure draft of what is proposed” to be made available, along with the opportunity for further comment, if the Committee were to decide to proceed further.
2.4 As I have indicated previously, I do not claim any expertise in Parliamentary procedure. I leave it for the Clerk to advise the Committee on questions of scope and whether any other mechanism exists which may (if the Committee wishes) be used to enable further consultation to occur. I am making these comments to assist the Committee's deliberations on whether it is appropriate to proceed with major policy aspects of the Bill without some form of further public consultation.

3.0 Trusts

3.1 An amended version of the policy questions identified in my report of 12 July 2018 are set out in Schedule 1.

3.2 My sense is that the Committee considers that, if, by statute, an arbitration clause in a trust instrument were equated to a contractual arbitration agreement that there would need to be protections for unascertained and legally incompetent beneficiaries. Particular concerns are:

(a) The appointment of appropriate counsel to represent the interests of unascertained or legally incompetent beneficiaries. The idea is that this be done by the High Court. (I add that I agree with Mr Bayley's suggestion that unascertained or legally incompetent beneficiaries should be defined in the same way in both the Arbitration Bill and the Trusts Bill, if the latter were to contain any arbitration provision).

(b) The need for the court to scrutinise any award before making an order recognising or enforcing it. That could be done by a Judge reviewing the award irrespective of whether there is formal opposition to entry as a judgment. Query, however, how the court could scrutinise adequately for the purpose of deciding whether there was any arguable question of law that a party may have wished to seek leave to have heard by the High Court.

(c) While privacy is an important consideration in family disputes, the position may not be the same in respect of institutions with a public persona, such as charitable trusts. Is it appropriate for the legislation to deal with all trusts in the same way?

3.3 The Chief Justice has expressed the view that endorsement of arbitration of trust disputes creates an access to justice issue. In contrast to a party to an arbitration agreement, anyone other than the settlor (or in some cases the trustees) will not have given consent to use of a private process. The Chief Justice is properly concerned to ensure that the supervisory jurisdiction of the High Court over trusts is not undermined.
3.4 In the Departmental Report, officials recommended that proposed amendments in relation to trusts should be removed from the Bill and considered separately in the context of the Trusts Bill, presently before this Committee. I have previously expressed the view to the Committee that all arbitration provisions should be collected together in the Arbitration Act.

3.5 On reflection, given the need to consider the form of protections for unascertained or legally incompetent beneficiaries and the access to justice issues, it may be better to consider this question in the context of the Trusts Bill, which was introduced by the Government. I invite the Committee to consider whether, having regard to its deliberations to date, it may be preferable for all dispute resolution issues to all be addressed in the context of the Trusts Bill. If so, I would still recommend that any decision to endorse arbitration in trust disputes be set out in a separate Arbitration Amendment Bill that could be split off from the Trusts Bill before enactment.

4.0 Confidentiality regime

4.1 The policy questions that the Committee need to consider are squarely focussed on a balancing of the open justice principle against the desirability of increasing confidentiality in respect of Court aspects of the arbitral process, in order to promote New Zealand as a seat for international arbitration. The latter seems to be the only policy justification for altering the presumptive position presently set out in the Arbitration Act 1996.

4.2 The options identified in my report of 12 July 2018 are set out in Schedule 1. Following discussions within the Committee, there are three options available:

(a) To create different confidentiality regimes for domestic and international arbitrations respectively

(b) To retain the existing confidentiality regime but to add provisions that provide greater accessibility to relevant aspects of New Zealand law dealing with the Court’s ability to prohibit publication of information provided in open court. (That would go some way to promoting New Zealand as a seat of international arbitration, while not differentiating between domestic and international arbitration in the way in which the relevant rules were expressed).

(c) To retain the existing confidentiality regime, without amendment.

4.3 The ways in which the Committee might wish to consider different approaches for domestic and international arbitrations are set out at paras [65]–[70] of my report of 12 July 2018. Additional information gathered since the last Committee meeting on 9 August 2018 is set out in Schedule 2.
5.0 Technical amendments

5.1 I am now in a position to make recommendations on the technical amendments. I do not consider that there are significant policy issues involved.

(a) Proposed art 16(4)  

5.2 I recommend a new article 16(4) be added, with one significant amendment to the way in which it is presently drafted. While deferring to Parliamentary Counsel on appropriate drafting techniques, the essence of what I propose is the replacement of the words “the failure to submit a timely request to the High Court under paragraph (3)” with the phrase “the failure to prosecute a request to the High Court under paragraph (3) in a timely manner”.

5.3 In my view that change is needed because otherwise the new art 16(4) does not sit easily with art 16(3), a Model Law provision. If parties have 30 days within which to make a request for the High Court to determine the issue of jurisdiction, it would be inconsistent, in a new art 16(4), to suggest that any request should be submitted earlier than that time. But, an obligation to “prosecute” in a timely manner any request that has been made within the 30 days would be appropriate.

5.4 This issue is addressed at paras [71]–[87] of my 12 July 2018 report. I observe that this amendment will only affect a late challenge to jurisdiction if a participant elects to participate in the arbitration and challenge jurisdiction at that time. It will not affect the ability of a party to decline to participate in the arbitration and save any jurisdictional point to be raised by way of opposition to any application to recognise and enforce an award. That is consistent with orthodox arbitral practice.

(b) Proposed changes to arts 34 and 36  

5.5 I recommend that the proposed amendments to art 34(2)(a)(i) and 36(1)(a)(i) not be adopted. Those provisions reflect the Model Law, and it seems likely that the proposed change to arts 34(2)(iv) and 36(1)(a)(iv) will solve the identified problems. Generally, see the discussion of this topic at paras [88]–[107] of my 12 July 2018 report.

5.6 I recommend that arts 34(2)(iv) and 36(1)(a)(iv) be amended to replace the words “this schedule” with “this Act”. That provides consistency with the Model Law. In making that recommendation I correct an aspect of para [100](b) of my 12 July 2018 report. The change from “this schedule” to “this Act” would not necessarily have saved the award in Carr, but would have provided a discretion for the Court to take that course in an appropriate case.
(d) Clause 1 of Schedule 2 and art 11(7)(b) of Schedule 1

5.7 I recommend that cl 1(4) of Schedule 2 be repealed, for the reasons set out in paras [112]–[130] of my 12 July 2018 report. Although the proposed repeal is not contained in the Bill, there was public consultation on this issue when the Law Commission’s 2003 report was prepared, and a recommendation made for its repeal.

5.8 I do not recommend repeal of art 11(7)(b) of Schedule 1. At para [134] of my 12 July 2018 report I suggested there was no empirical evidence to suggest repeal was necessary, having regard to the short time that part of the Act has been in force. For example, a dispute could arise legitimately in respect of the appointment process used by AMINZ if it were alleged that one of the decision makers was biased. Article 11(7)(b) may have utility in that situation.

5.9 As I have emphasised at meetings of the Committee, while the proposed repeal of cl 1(4) of Schedule 2 is not contained in the Bill and a question of scope arises, it is the most important practical issue from the perspective of the arbitration profession. It would be undesirable for an arbitration that had continued for many months to be challenged successfully at a late time on the basis that AMINZ had no power to make the appointment. Clarity is required.

5.10 If members of the Committee were not prepared to consider the amendment in scope, I would recommend that some other statutory vehicle be found for urgent legislation; such as a Statutes Amendment Bill. In saying that, I do not offer any advice on whether this proposed amendment is in scope or whether another appropriate mechanism exists for its enactment. My point is that, whatever decision is made by the Committee, there is a need for prompt repeal of cl 1(4) of Schedule 2.

6.0 Conclusion

6.1 I am happy to answer any questions when I appear before the Committee on 6 September 2018.

6.2 If members have any additional queries they would like me to answer prior to the proposed meeting time, I would be happy to do so, through the Clerk.

Yours sincerely

[Signature]

Paul Heath

c.c. Joanne Guzman (by email joanne.guzman@parliament.govt.nz)
SCHEDULE 1

Summary of policy points

1. Trusts: proposed s 10A
   (a) Is it appropriate to equate a settlor’s or will-maker’s desire to have internal disputes involving the trust be determined by arbitration to an agreement between arm’s length parties to the same effect?
   (b) If it were considered appropriate for a settlor to impose an arbitral dispute resolution regime for all internal disputes, ought the High Court to have some role nevertheless in protecting the interests of unascertained or legally incompetent beneficiaries?
   (c) Should provision be made for an adult beneficiary to retain a right of access to the Court if he or she were concerned about the appropriateness of resolving any dispute by arbitration?

2. Confidentiality regime

   The policy options set out in my 12 July 2018 report were:

   (a) Retain the present confidentiality regime without any amendment; or

   (b) Retain the presumption that any Court proceedings be open to the public, but (whether the hearing is in open Court or in private) provide specifically for the protection of confidential information; including the ability to anonymise any judgments of the Court; or

   (c) Create different presumptive regimes for domestic and international arbitrations; open justice would inform the former, and confidentiality the latter.
SCHEDULE 2

1.0 Additional information: confidentiality and international arbitrations

1.1 In this part of Schedule 2, I identify information gathered in the course of my further consultations with the Chief Justice, Sir David Williams QC and Mr John Green, of the New Zealand International Arbitration Centre.

1.2 I attach the Chief Justice’s letter of 9 August 2018. In that correspondence, the Chief Justice makes the point that any changes to the existing confidentiality regime would confer on the parties an inappropriate ability to control the Court’s exercise of judicial functions and subordinate the public interest in open justice to the private interests of a specific class of litigant. That is a powerful policy factor in favour of retaining a presumption of open information from which the Court may depart, in appropriate circumstances. I add that, if confidentiality were the presumptive position, there would rarely be anyone involved who would want to apply to have the information made public. On the other hand, if the presumption remains in favour of openness, the Court can weigh competing considerations in the context of the particular dispute to determine whether confidentiality is the preferable outcome.

1.3 Sir David Williams QC offered insights into the use of confidentiality provisions overseas and some reasons why it might now be an appropriate time to promote New Zealand as a seat for international arbitration.

1.4 For context, I attach a paper which sets out confidentiality provisions that are used in England and Wales, Singapore and Hong Kong. At pp 7–9 of that document there are extracts from recent cases in England which explain that jurisdiction’s approach to privacy and confidentiality considerations. I urge Committee members to read this paper as it identifies the points of difference among those jurisdictions.

1.5 I summarise the points made by Sir David Williams:

(a) The Asian Development Bank has embarked on a project to improve international arbitration law in the South Pacific. For the Committee’s information I attach a background paper identifying the nature of that project and refer, in particular, to the summary of the International Arbitration Act 2017, recently enacted in Fiji. Under the heading “Impact in the Region” the paper stated:

The Act’s purpose is to facilitate increased investment in the region. This may also lead to increased international arbitration activity in the region. As a neighbouring country with strong pro arbitration laws, Australia may well find itself as a popular choice for the seat of international arbitrations involving Fijian parties and other Pacific
Island States if, as is hoped, the Act promotes further international arbitration law reform in the region.

(Committee members will not be surprised to learn that the author of that part of the report is Australian).

(b) If New Zealand's law were to be updated to reflect international preferences for confidentiality in proceedings that go to Court, it may be possible for New Zealand to take advantage of the Asian Development Bank's project and to promote South Pacific arbitration in New Zealand. (I note that the New Zealand International Arbitration Centre was represented by Mr Green at the Fiji conference and is endeavouring to secure work from that source. AMINZ also has a committee which is encouraging international arbitration in New Zealand. It too was represented in Fiji).

(c) So far as the anonymisation of judgments is concerned, a recent decision of the Commercial Court in London identifies the way in which that can be done, even in a complex case. I attach a copy of Poppewell J's judgment in P v Q. The anonymised judgment was produced on 9 February 2017, following a hearing on 3 February 2017.

(d) Anecdotally, adoption of confidentiality rules akin to those in force in England and Wales, Hong Kong and Singapore (or aligned to one of their models) is likely to promote international arbitration in New Zealand.

1.6 I attach for the Committee's consideration, a copy of a letter that I received from Mr John Green, dated 8 August 2018. In that letter, he refers to a survey conducted by Queen Mary University of London in 2018. A copy of that report is also attached. The empirical evidence indicates that those who prefer international arbitration as a means of resolving disputes tend to regard confidentiality as an important aspect of the process, with many taking the view that parties ought to be able to opt out of confidentiality arrangements rather than to opt in.

2.0 Possible models for a confidentiality regime

2.1 A bifurcated model would have the advantage of retaining an existing presumption of open justice for domestic arbitrations, to ensure that New Zealanders would have access to information of public interest debated in their Courts while providing presumptively for confidentiality for international arbitrations so that New Zealand could be promoted as a seat for international arbitration.

2.2 In considering whether a bifurcated model should be adopted, the Committee may take into account the fact that if there were a presumptive regime favouring confidentiality in international arbitrations, there may be no incentive for any party to
that arbitration to apply to have information disclosed publicly. That may limit the ability of New Zealanders to obtain information about something of public interest to them that has been resolved through a private arbitral process.

2.3 If a single model were preferred by the Committee, the existing regime could be retained. Alternatively, the status quo could be modified by the addition (if the Committee thought it appropriate) of provisions that would replicate r 7(1) and (2)(c) of the Senior Courts (Access to Court Documents) Rules 2007 and (perhaps in an “for avoidance of doubt” type provision) refer to the High Court’s inherent powers to suppress publication of information given during the course of an open court hearing and to permit anonymisation of judgments. It would be for Parliamentary Counsel to endeavour to find a suitable means by which those principles could be expressed in a way that would not inhibit development of that aspect of the law.

2.4 By way of balance, I convey the Chief Justice’s opposition to those aspects of the inherent jurisdiction being set in concrete by a statute. Her concern is that the Judges ought to develop such principles on a case by case basis without any inhibition from the terms of a particular statute. The Chief Justice opposes any change to the existing confidentiality regime.