

Climate Change Response (Tort Liability) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

9 July 2026

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Climate Change Response (Tort Liability) Amendment Bill (**Bill**).
- 1.2 This submission has been prepared with input from the Law Society's Civil Litigation and Tribunals, Climate Change Law, and Public Law Committees.¹
- 1.3 The Law Society does not request an oral hearing.
- 1.4 The Law Society has significant concerns about the rushed process under which the Bill has progressed, the important principle that Parliament should not generally interfere with particular cases before the courts, and the Treaty and tikanga-related implications of pre-empting the *Smith v Fonterra* proceedings.² It is not the Law Society's role to comment on the merits of the policy underlying the Bill's proposed changes. However, in determining whether the Bill should proceed, we recommend that the select committee should carefully consider:
- (a) whether the urgency with which the Bill is being progressed is justifiable in this situation;
 - (b) the impact on the policy development process from the lack of consultation;
 - (c) the retrospective nature of the amendments;
 - (d) the desirability, arising from principles related to comity and the interaction between branches of government, of avoiding legislative interference while litigation is live and allowing the courts to complete their constitutional role of developing the common law;
 - (e) concerns arising from the Bill regarding te Tiriti o Waitangi (**the Treaty**) and tikanga Māori;
 - (f) technical issues relating to the wording of the statutory bar, and other matters; and
 - (g) New Zealand's international obligations.

2 Use of urgency

- 2.1 The Law Society considers that the progression of an important legal change at this pace, and the constraints that an accelerated process imposes on both consultation and the select committee process, are concerning. Good policy and legislative processes are an element underpinning the rule of law.³
- 2.2 As identified in our 2025 report *Strengthening the rule of law*, rushed policy development processes undermine aspects of the rule of law by limiting or preventing meaningful

¹ More information about the Law Society's law reform sections and committees is available on the Law Society's website: [NZLS | Law reform committees](#).

² *Smith v Fonterra Co-operative Group Ltd & Ors* CIV-2019-404-1730.

³ New Zealand Law Society *Strengthening the rule of law in Aotearoa New Zealand* (June 2025) at [6.4]–[6.13]; Dean Knight "The Rule of Law in Aotearoa New Zealand: A Democratic Health Check?" (paper delivered to CLE New Zealand Law Society, Public Law Conference, May 2026).

consultation and proper scrutiny of policy proposals, including identification of issues affecting the implementation of the policy, and analysis of unintended consequences.⁴ This may affect the clarity, certainty and stability of the resulting law.

- 2.3 The use of urgency within the legislative process can also undermine the rule of law. Shortening the time available to debate and scrutinise a bill can prevent or limit the identification of drafting deficiencies, unintended effects, or other potential issues with implementing the legislation.⁵ Significantly, “[w]hen urgency is taken, the public can be left with a sense that Parliament is not following its own rules, and that legislation is being ‘rammed through the House at the will of the executive’.”⁶ This undermines public confidence in Parliament’s adherence to the rule of law.
- 2.4 The Law Society has noted its concern about the rising frequency with which Bills are being progressed through all stages under urgency,⁷ and/or habitually progressing legislative change at a rapid pace, often with an abbreviated select committee process. The present Bill, introduced to the House on 2 July, with a direction to report the Bill back to the House no later than 30 July — while not being progressed by way of urgency through all its legislative stages — will receive a significantly shortened select committee consideration (less than one month). This allows fewer than 10 days for public submissions.
- 2.5 The constraints placed on select committee scrutiny and on the ability of members of the public, including constitutional and legal experts, to provide feedback on the proposals are exacerbated by concerns relating to lack of consultation that would ordinarily have been part of the policy development process. We note, further, information which has emerged relating to the timing of various pieces of Ministerial advice. According to media reports, which have published the relevant documents in full,⁸ the first piece of advice provided to Minister Hon Paul Goldsmith on a legislative response to *Smith v Fonterra* was dated 23 February 2024. The Ministry was directed on 18 June 2025 by the Minister to develop policy options (ie, a year ago).
- 2.6 It appears to the Law Society, therefore, that there was no inevitable need for such a condensed legislative process. We discuss the timing of the Bill’s introduction further below, in relation to Waitangi Tribunal proceedings which we are advised had been in train. Acknowledging that the Government would like to progress the Bill well before the substantive proceedings in *Smith v Fonterra* are to be heard, to ensure that court time is not spent in preparing for a matter which will not proceed, we remain unconvinced in the circumstances of the need for such sudden expedition.
- 2.7 Not only is the timing rushed: in the Law Society’s opinion, it is a significant step to exclude tortious liability without proposing a suitable alternative. By way of analogy, the removal of the right to sue for personal injury was replaced by a code of social legislation

⁴ Law Society, above n 3 at [6.5].

⁵ Law Society, above n 3 at [6.6].

⁶ Law Society, above n 3 at [6.6], citing Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What’s the Hurry? Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, 2011) at 1.

⁷ Law Society, above n 3 at [6.7]–[6.13].

⁸ Lillian Hanly “[Missing climate briefing note: who knew what, and when?](#)” (RNZ, 4 June 2026).

that followed a Royal Commission. The justification provided for the Bill is that existing legislation (the Climate Change Response Act 2002 or **CCRA**) is the more appropriate legal mechanism to manage the issue. However, the CCRA was neither intended nor designed as a code, and does not address the issue as claimed. The Bill excludes the potential — or even the avenue to explore the legal possibility — that the common law may contribute to address areas not explicitly covered by the CCRA. This is both a concern and a source of new legal uncertainty.

3 Lack of consultation

3.1 The RIS documents concerns with the limited consultation permitted by the process that the Bill has followed.⁹ Because of this, consultation with affected stakeholders will be an important part of the select committee process, to the extent possible under the accelerated timeframes imposed. As noted above, the very short timeframes will affect this process.

3.2 The RIS identifies that consultation has been limited, to such an extent that it has hampered officials' ability to substantiate the policy problem initially identified (that is, concern about the impact of ongoing litigation in the *Smith v Fonterra* case on business and investor confidence):¹⁰

We have undertaken very limited engagement with legal experts and no engagement with business. We have not identified any evidence that the ongoing court proceedings have had a measurable impact on business confidence. This may reflect the relatively early stage of the case and that we have not consulted with businesses.

3.3 There was also no engagement with Māori,¹¹ despite, as next discussed, the Bill specifically putting an end to a legal claim that, in the opinion of the New Zealand Supreme Court, raises tikanga issues. As the Supreme Court noted: “the specific loss pleaded by Mr Smith in this case is in part tikanga-based. Since that form of loss is an essential fact, in addressing this part of the claim the trial court will be required to engage with tikanga.”¹² In clause 4 of the Bill, proposed new section 272(2), defining “emissions-related climate change effects” for the purposes of the statutory bar under section 271(1)(b), refers to “harm, impairment, or loss, or a conception (*including, without limitation, a tikanga Māori conception*) of harm, impairment, or loss ...” (our emphasis).

3.4 This gives rise to concerns relating both to the common law development of tikanga, and to Treaty obligations.

4 Treaty obligations and tikanga Māori

4.1 It is likely that questions will arise in respect of the Bill's Treaty consistency. The Law Society notes with concern that the inclusion of “tikanga conceptions of harm” within the statutory bar — and the application of that bar to proceedings in *Smith v Fonterra* —

⁹ Ministry of Justice “Regulatory Impact Statement: Targeted reform of emissions-related torts” (21 April 2026).

¹⁰ At [25] and see further [36]–[37].

¹¹ At [36]–[37].

¹² *Smith v Fonterra* [2024] NZSC 5 at [182].

may have the effect of stifling the exploration and development of tikanga at common law.

- 4.2 We further note that the Bill was introduced while the Waitangi Tribunal was deciding whether to produce an urgent report on the Bill and the policy leading to its introduction.¹³ As the Waitangi Tribunal has no jurisdiction in respect of any Bill that has been introduced into the House of Representatives, claimants cannot have their claims heard and reported on. While the Tribunal will have jurisdiction to consider the Bill and its effects once it becomes law, it is concerning that the Crown has denied itself the opportunity to receive and consider a Waitangi Tribunal report at a time when any findings and recommendations could have a practical effect on the Bill.
- 4.3 On these matters, we endorse the concern expressed in the RIS, that the Bill “could engage several Treaty of Waitangi obligations and may give rise to claims of inconsistency, especially if enacted without consultation.”¹⁴ In the Law Society’s view, impeding the opportunity to develop legal understanding of tikanga, pre-empting Waitangi Tribunal consideration of the government policy in this matter, and the Bill’s potential Treaty inconsistency, would each alone be sufficient to warrant close consideration by the select committee of these issues, and whether the Bill should proceed.

5 Retrospective legislation affecting active litigation

- 5.1 The Bill relates to active litigation and has retrospective effect. The Law Society agrees with the Legislation Design and Advisory Committee (**LDAC**) Guidelines,¹⁵ and with statutory principles regarding the caution required when introducing legislation that has retrospective effect.¹⁶ Parliament should only pass retrospective legislation in exceptional circumstances and where it can demonstrate there are good reasons for doing so.
- 5.2 We acknowledge some factors in the present case that may make this particular Bill comparatively less offensive to the general principle against retrospectivity than some other instances on which the Law Society has recently commented:¹⁷
- (a) Prior to the Supreme Court decision in *Smith v Fonterra*, the lower courts had struck out tortious claims based on climate change effects. In this respect, the Bill may be seen as only confirming the pre-existing understanding of tortious common law duties.

¹³ Wai 3325, #2.6.35.

¹⁴ RIS at [46] and [66].

¹⁵ Legislation Design and Advisory Committee *Legislation Guidelines: 2021 edition* (September 2021) at ch 12.

¹⁶ Legislation Act 2019, s 12; see too the principles of responsible regulation in [s 9 of the Regulatory Standards Act](#), in force from 1 July, which state that “the law should not adversely affect rights and liberties, or impose obligations, retrospectively”.

¹⁷ New Zealand Law Society “[Credit Contracts and Consumer Finance Amendment Bill](#)” (23 June 2025); New Zealand Law Society “[Marine and Coastal Area \(Takutai Moana\) \(Customary Marine Title\) Amendment Bill](#)” (15 October 2024).

- (b) It follows that the Bill will not “interfere with accrued rights and duties” in the way this is commonly understood.¹⁸ The proposed law causes less interference with reasonably-held reliance interests than, for example, amendments previously progressed relating to the marine and coastal area, which cut across previous court decisions, requiring rehearings for some parties to whom rights had been awarded.
 - (c) A prompt intervention by Parliament to reverse the result of the test case while it is still pending means that nobody is left in the position of having followed law that they then found out does not apply.
- 5.3 That said, significant concerns remain, which reinforce the need for the select committee to carefully consider these matters:
- (a) The Bill clearly contemplates introducing a legislative bar to tortious claims the Supreme Court held had a reasonably arguable basis.
 - (b) As a matter of natural justice, denying a litigant their legal entitlement to be heard is significant.
 - (c) The Bill will effectively determine the outcome of the *Smith v Fonterra* litigation. This engages the convention that Parliament should not generally interfere with particular cases before the courts. Distinct from retrospectivity concerns, this remains a separate important principle, as we next discuss.
 - (d) In this case, the RIS prepared by the Ministry of Justice has identified multiple factors weighing against retrospective legislation at this time, at least until the *Smith v Fonterra* proceeding has concluded.¹⁹

6 Interaction between the branches of government

- 6.1 The RIS notes the concern that the interaction between the respective branches of government gives rise to several constitutional matters.²⁰ As advised by officials, “[t]he core constitutional principle of the separation of powers requires mutual respect and restraint”.²¹
- 6.2 The case in *Smith v Fonterra* has not yet been decided. The Bill pre-empted the outcome of the proceeding. In the Law Society’s view, it would appear more compatible with principles of comity to wait to see what the outcome is, before moving to consider legislation. This was also the Ministry of Justice’s view:²²

On the limited evidence the Ministry has gathered, it is unclear whether there is a problem that requires a legislative response ahead of the High Court issuing its decision. We do not consider a retrospective statutory bar that would interfere with cases already underway is warranted at this time.

¹⁸ LDAC Guidelines, above n 15 at ch 12.

¹⁹ At [59].

²⁰ At [13].

²¹ At [15].

²² At [59].

- 6.3 The Ministry's preferred option would have been to avoid legislative interference while litigation is live, allow the courts to complete their constitutional role of developing the common law, and "preserve the ability for a legislative response later, if required".²³ In light of the points we have noted at [5.3], the Law Society likewise recommends this approach.

7 Comments on technical issues

- 7.1 In the limited time available, the Law Society has sought to carefully review the Bill to identify any potential technical issues, such as drafting deficiencies or unintended consequences. The risks of technical issues are particularly acute when bills are progressed under urgency.

The scope of the statutory bar

- 7.2 The Bill appears to define the scope of the statutory bar in line with what is anticipated in the Explanatory Note and the types of claims considered by the Supreme Court in *Smith v Fonterra*.
- 7.3 First, the wording appears to encompass the types of claims (including additional novel claims) that may be raised by litigants, through:
- (a) The definition of "emissions-related climate change effects" (s 272(1)), which encompasses damage, harm, interference, loss, obstruction or wrong "to the extent that it was or may have been... caused or contributed to by climate change".
 - (b) The definition of "tort liability" (s 273), which extends beyond monetary damages to both interim/interlocutory and final relief of all types, including declarations, injunctions or any other remedies. (This is because the declarations and injunctive relief sought in the *Smith* litigation are technically equitable remedies rather than the traditional tortious remedy of damages.)
- 7.4 This appears to capture the sorts of "novel forms of loss" referred to by the Explanatory Note.
- 7.5 Second, the wording of the proposed section does not appear inadvertently to capture unintended matters. The Explanatory Note refers to "ash residue" and "odours" that may be caused by carbon emitters to nearby properties. To the extent these emissions cause (or may cause) climate change, the statutory bar would apply. To the extent the issues cause physical or economic loss to neighbouring properties, which should remain actionable, the statutory bar would not apply because these are not emissions-related climate change effects (being neither climate change, nor caused or contributed to by climate change). The statutory bar should not apply to neighbours suing carbon emitters for forms of damage and loss (such as physical harm from ash) that can be pleaded and proved without reference to climate change effects.

²³ At [65].

- 7.6 The Bill also does not address public law and other non-civil claims, such as judicial review proceedings about whether the Executive has properly considered climate change considerations.²⁴ This appears to be a separate topic outside the scope of the Bill.
- 7.7 However, the select committee will wish to be alert to any potential drafting deficiencies or unintended consequences identified during submissions.

Other technical factors to consider

- 7.8 The Law Society also notes a few high-level points around how the statutory bar has been drafted, on which the select committee may wish to reflect.

Wording of the statutory bar

- 7.9 First, the wording of the statutory bar differs from comparable statutory immunities. Statutory immunities may take different forms. In 1997 the Law Commission identified about 200 statutes conferring statutory protections on persons acting under them.²⁵ However, the Bill's drafting differs from two key comparable statutory bars:
- (a) The most comparable is the legislative bar on tort claims in the Accident Compensation Act 2001 (**the ACC bar**). Section 317(1) states that "No person may bring proceedings independently of this Act, whether under any rule of law or enactment, in any court in New Zealand, for damages arising directly or indirectly out of" personal injury.
 - (b) The Limitation Act 2010 also introduces time bars to various claims. For example, section 11(1) states that "It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based...".²⁶
- 7.10 The wording of the Bill's proposed section 271(2) (a person "has no tort liability") is perhaps deliberately different from the ACC bar ("No person may bring proceedings...") because it will apply to the *Smith v Fonterra* proceedings that have been underway for some time. The select committee may wish to consider whether, at least for future lawsuits, the more familiar wording of the ACC bar or Limitation Act may be preferable.

An affirmative defence

- 7.11 Second, the Bill's statutory bar takes the form of an "affirmative defence". In other words, the elements of the defence must be affirmatively pleaded and proved by the defendant to rely on the statutory bar. This is the common approach to comparable statutory immunities, such as limitation and the ACC bar. However, the wording of the Bill does appear to impose more stringent requirements than comparable statutory bars. Draft section 271(1) seems to require that the defendant must prove they have: carried out an

²⁴ See for example *Students for Climate Solutions Inc v Minister of Energy and Resources* [2025] NZSC 197, [2025] 1 NZLR 1021.

²⁵ See para C1 of [Crown Liability and Judicial Immunity: A Response to Baigent's Case and Harvey v Derrick \[1997\] NZLCR 37](#).

²⁶ See also Limitation Act 2010, ss 29 to 32, which also provide "It is a defence..." to a particular type of claim if the defendant can prove a specified period has elapsed since the claim arose.

activity that caused or contributed to emissions; and the emissions caused or contributed to emissions-related climate change effects.

- 7.12 The intention is presumably that emitters can rely on the defence without engaging the court and the parties in extensive and time-consuming evidence on scientific points. It is not clear to what extent this practical aspect has been considered in formulating the proposed new clause. As a drafting matter, there is also an issue of consistency with the wording of new section 272(1). To address this, the select committee may wish to amend section 271(1)(a) and (b) to reflect the wording of section 272(1), so that, respectively (proposed insertions **underlined**):

- (a) the activity (subs (a)) “**does or may** causes or contribute to emissions ...”
- (b) the emissions (subs (b)), “**do or may** cause or contribute to emissions-related climate change effects”.

8 International obligations

- 8.1 Lastly, the RIS indicates a redacted comment was received on the Bill from the Ministry of Foreign Affairs and Trade when that Ministry was consulted.²⁷ It is not clear whether there were concerns regarding how the proposed statutory bar would impact on New Zealand’s international commitments and trade obligations.
- 8.2 In the past year, the International Court of Justice (**ICJ**) has clarified that protecting the climate is a legal duty grounded in treaties, customary law and human rights, and States that fall short risk legal responsibility and claims for repair.²⁸ On 20 May 2026, New Zealand voted in support of this resolution.²⁹
- 8.3 While it is for the New Zealand government to decide how it gives effect to this duty, the Law Society queries whether any impact arises on the New Zealand government’s recent endorsement of the ICJ ruling that breaches of climate instruments are actionable. It would seem desirable for Parliament to take care that this this legislation is not enabling of such breaches.
- 8.4 The Committee may wish to seek advice on this point, before ascertaining that the Bill should proceed. The Select Committee will be better placed to assess any consistency issues with the benefit of the redacted advice.

Nāku noa, nā



David Campbell
President

²⁷ At [48].

²⁸ On 23 July 2025: see <<https://press.un.org/en/2026/ga12760.doc.htm>>.

²⁹ [New Zealand explanation of vote on UN General Assembly resolution on ICJ climate change Advisory Opinion | New Zealand Ministry of Foreign Affairs and Trade](#) (20 May 2026); for the legal text of the resolution, see further document [A/80/L.65](#).