



LEGISLATION ADVISORY COMMITTEE

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Justice and Electoral Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear Committee Members

PUBLIC SAFETY (PUBLIC PROTECTION ORDERS) BILL

Legislation Advisory Committee

1. The Legislation Advisory Committee (“LAC”) was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It produces and updates guidelines for legislation, known as the Guidelines on the Process and Content of Legislation. These have been adopted by Cabinet.
2. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

General comments

3. The Bill aims to protect the public from a small number of people who pose a very high and imminent risk of serious sexual or violent reoffending. We recognise that this is an issue that governments are struggling to grapple with world-wide.

4. The LAC Guidelines set out the fundamental common law principle in favour of the liberty of the subject. This principle flows from the old common law presumption that penal statutes should be interpreted narrowly in favour of the subject. The Bill characterises the regime as civil and not penal. There are however aspects of the regime that have penal characteristics since a person subject to an order is retained within prison precincts, and subject to prison-like administrative powers of search, interception of phone calls and other correspondence.
5. We consider this regime can be improved so that it both achieves its purpose of protecting the public, and provides a pathway of rehabilitation. The LAC considers that aspects of the proposed regime pose a litigation risk to the Crown, as counsel could argue that the regime does not strike the right balance between protecting the public, and ensuring that the rights of the person subject to the order are sufficiently protected. The LAC therefore make a number of suggestions to reduce this litigation risk, and to better give effect to the policy intent of the regime, which the Committee may wish to consider:
 - Amend cl 4 to make rehabilitative treatment for the purpose of facilitating the detainee’s safe reintegration into society an objective of the Bill.
 - Amend cl 15(3) to make it mandatory for the manager of a residence to implement the review panel’s recommendations on a detainee’s management plan.
 - Amend cl 13 so that a judge must explicitly consider less restrictive options before making a public protection order.

Prospective effect

6. The LAC Guidelines note the “general principle is that statutes and regulations operate prospectively, that is, they do not affect existing situations”. There are two sets of offenders for whom the public protection order regime would be prospective: offenders currently serving a finite prison term for a serious sexual or violent offence; and those subject to an extended supervision order with a condition of full-time accompaniment or monitoring. The prospective effect of the public protection order regime has a particular impact in relation to this second group of offenders. While a public protection order does not change the immediate situation for those still in prison (it changes their future expectations and their situation once they are released), such orders have an immediate and disadvantageous effect on those who have already been released and are currently subject to an extended supervision order. A public protection order imposes a regime on these people that is more restrictive than that which they are currently subject to.
7. Making public protection orders wholly prospective (by restricting orders to people who have been sentenced after the Bill comes into force or excluding people currently subject to an extended supervision order) would defeat the

purpose of the Bill. However, we recommend that the Committee consider an alternative option for people who have already been released and are subject to an extended supervision order. For this group, the current maximum 10 year term for an extended supervision order could be extended. This approach would avoid retrospectively imposing a regime on people who have been released that is more restrictive than that which they are currently under.

Search and seizure provisions

8. The Bill provides a manager of a residence with numerous powers of entry and search. The LAC has two concerns with clause 57, the personal search provision.
9. First, the terms “strip-search” and “a search of any resident” are not defined. Given the invasive nature of a search of a person, it is highly desirable that the ambit of such a power is clear. Both the Corrections Act 2004 and the Search and Surveillance Act 2012 contain definitions of “rub-down” searches, and the Corrections Act contains a definition of “strip-search”, to provide clarity over what is authorised. We note that cl 57(6) provides that a search must comply with any guidelines or instructions issued. Any publicity available guidelines or instructions should be available to residents.
10. Second, we are concerned about the mandatory requirement for a strip-search each time the resident enters or leaves the prison where their residence is located. The equivalent provision in the Corrections Act 2004 provides officers with a discretion as to whether to strip-search a prisoner when they leave or enter a prison. There does not seem to be any reason why a strip-search should be discretionary for prisoners but mandatory for people in residences. The mandatory nature of the requirement does not seem necessary or practicable, for instance if a resident needs to be taken to hospital urgently.
11. Accordingly, we recommend that the Committee consider replacing the word “must” with “may” in clause 57(3) so that a strip-search of a resident who enters or leaves the prison in which their residence is located is discretionary rather than mandatory, consistent with the Corrections Act.

Review panel

12. The Bill creates a new review panel of 6 members appointed by the Minister of Justice by written notice. The review panel reviews orders and makes recommendations to the chief executive or the manager of a residence. Although a member may resign from office, there is no provision allowing the Minister of Justice to remove a member for reasons of neglect of duty or misconduct which is contained in other legislation (see, for example, s 121 of the Parole Act 2002 and s 108 of the Search and Surveillance Act 2012). We recommend that the Committee consider whether such a provision should be added to the Bill.

13. Thank you for considering the LAC's submission. The LAC wishes to be heard on this submission.

Yours sincerely

A handwritten signature in black ink that reads "Grant Hammond". The signature is written in a cursive, flowing style.

Hon Sir Grant Hammond
Chair
Legislation Advisory Committee