19 March 2008

Clerk of the Committee
Law and Order Select Committee
Select Committee Office
Parliament Buildings
WELLINGTON

POLICING BILL (195-1)
SUBMISSION FROM THE LEGISLATION ADVISORY COMMITTEE

To the Law and Order Select Committee

Introduction

1. This submission is from the Legislation Advisory Committee (LAC).

2. The LAC was established in February 1986 by the Minister of Justice. It is serviced by the Ministry of Justice, and generally meets every six weeks. The terms of reference of the LAC are:

   (a) to provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;

   (b) to report to the Minister of Justice and the Legislation Committee of Cabinet on the public law aspects of proposals that the Minister or that Committee refers to it;

   (c) to advise the Minister of Justice on any other topics and matters in the field of public law that the Minister from time to time refers to it;

   (d) to scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

   (e) 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.

3. The current members of the LAC are:

   Sir Geoffrey Palmer, Chairperson and President of the Law Commission
   Sir Ivor Richardson, Former President of the Court of Appeal
   Graeme Buchanan, Deputy Secretary, Legal, Department of Labour
   Professor John Farrar, Dean of Law, Waikato University

Andrew Geddis, Senior Law Lecturer, Otago University
Ivan Kwok, Treasury Solicitor
Mary Scholtens QC, Wellington Barrister
Dr John Yeabsley, Senior Fellow, New Zealand Institute of Economic Research
Guy Beatson, Counsellor (Economic), New Zealand High Commission
Professor John Burrows, Commissioner
Jack Hodder, Partner, Chapman Tripp
Grant Liddell, Director, Serious Fraud Office
Dr Warren Young, Deputy President of the Law Commission
Hon Justice Robertson, Judge of the Court of Appeal
George Tanner QC, Commissioner
Jeff Orr, Chief Legal Counsel, Ministry of Justice

4. Geoffrey Palmer and Warren Young would like to be heard in person, to speak to this submission on behalf of the LAC. To arrange this, please contact:

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Executive summary

5. In general, the LAC largely supports this Bill's purpose, substance and drafting. However, there are several matters that we consider need to be addressed.

6. Clause 27 provides for the Governor-General to amend Schedule 1 of the Bill by Order in Council on the recommendation of the Minister of Police. This is known as a "Henry VIII" clause. It envisages the amendment of primary legislation by delegated authority. It delegates a function that would otherwise be a Parliamentary function. "Henry VIII" clauses are not supported by the LAC. Clause 27 is a particularly problematic example of the use of such a clause, because of the nature of Schedule 1. That Schedule provides for the conferral of specified coercive policing powers on police employees who are not constables. This is an important policy matter that should receive close Parliamentary attention.

7. Our preference would be not to provide for use of the Henry VIII procedure at all, and thus to omit clause 27 from the Bill. If amendments to Schedule 1 are required from time to time, they should proceed by way of primary legislation in the usual way. However, if the Committee prefers to retain the Henry VIII approach, we recommend provision for an alternative form of Parliamentary oversight, by way of the annual Subordinate Legislation (Confirmation and Validation) Act.

8. Clause 36 provides that a constable who has good cause to suspect that a person has committed or is committing or is attempting to commit the offence of intentionally killing or injuring a Police dog may require that person to provide identifying details. This provision has been carried over from the Police Act

1958. However, in this Bill it is redundant, and should be removed. It offers nothing that cannot be achieved under the general power to detain for the purpose of taking identifying details in clause 32.

9. Finally, some aspects of three of the offence provisions are problematic: clauses 48, 49 and 52.

10. In clauses 48 and 49, we recommend changes to explicitly incorporate a mental element ("mens rea") of intention or recklessness, which would in turn allow some other aspects of the drafting of these provisions to be corrected.

11. Clause 52(1)(c) criminalises an attempt, subject to the same maximum penalty that attaches to the completed offence. This provision is unnecessary and should be deleted. Sections 72 and 311 of the Crimes Act 1961 address the matter and are all that is required; these are generally applicable provisions that, respectively, define attempt and provide for a maximum penalty of not more than half of the maximum that would have attached to the completed offence.

General position on the Bill

12. The Policing Bill has been developed to replace a 50-year old Act, the Police Act 1958, which is quite clearly no longer fit for purpose. The LAC considers that the policy development and drafting process has been thorough and robust, and that the resulting Bill is, in general, similarly robust.

13. However, there are several matters that we consider need to be addressed.

Clause 27: power to amend Schedule 1 by Order in Council

14. Clause 27 provides for the Governor-General to amend Schedule 1 of the Bill by Order in Council on the recommendation of the Minister of Police. Schedule 1 describes policing roles that the Commissioner may, by warrant, authorise a police employee to perform, and sets out the powers conferred on such an employee for the purpose of each role. Under clause 27, the Governor-General may add to, omit from, or otherwise amend any power specified in relation to any particular policing role; add a new policing role and specify powers in relation to it; or omit a specified policing role.

15. Clause 27 is what is known as a "Henry VIII" clause. It envisages the amendment of primary legislation by delegated authority. It delegates a function that would otherwise be a Parliamentary function. In general, "Henry VIII" clauses are not supported by the LAC.

16. The Regulations Review Committee has similarly said that Henry VIII clauses should only be used in exceptional circumstances: Report of the Regulations Review Committee "Inquiry into the Resource Management (Transitional) Regulations 1994 and the principles that should apply to the use of empowering provisions allowing regulations to override primary legislation during a transitional period" [1995] AJHR I16C, 15. This report notes that Henry VIII clauses are in most cases justified only because they do not involve policy issues

or because of extreme urgency requiring action whether or not the House is sitting.

17. In the view of the LAC, clause 27 fails to meet these criteria, and is in fact a particularly problematic example of the use of a Henry VIII clause, because of the nature of Schedule 1. That Schedule provides for the conferral of specified coercive policing powers on police employees who are not constables.

18. The LAC recognises the policy purpose that will be served by Schedule 1, and fully supports it. What we do not support is delegation of the ability to develop new policing roles, with coercive powers attached, on an ad hoc basis. This is an important policy matter that should receive close Parliamentary attention.

19. Our preference would be not to provide for use of the Henry VIII procedure at all in this context, and thus to omit clause 27 from the Bill. If amendments to Schedule 1 are required from time to time, they should proceed by way of primary legislation in the usual way.

20. However, if the Committee prefers to retain clause 27, we recommend provision for additional Parliamentary oversight. A degree of oversight is already envisaged under clause 27(2), which provides that an Order in Council made under this section is a regulation for the purposes of the Regulations (Disallowance) Act 1989. Under that Act, regulations must be laid before Parliament, which may by resolution disallow them, amend them, or revoke them and substitute other regulations.

21. However, in addition to this, a number of precedents exist whereby regulations must also be confirmed by an Act of Parliament within a specified period of time if they are to continue in force: see, for example, section 138 of the Biosecurity Act 1993; section 42C of the Civil Aviation Act 1990; section 12 of the Commodity Levies Act 1990; and section 80 of the Customs and Excise Act 1996. In practice, regulations to which those sections apply are confirmed and validated by way of an annual Subordinate Legislation (Confirmation and Validation) Act, which is dealt with in accordance with the usual legislative procedure, including consideration by the Regulations Review Committee.

22. If clause 27 remains in the Policing Bill, we recommend the inclusion of a further clause analogous to the examples listed above, providing for express confirmation of any such Order in Council within a specified period by Act of Parliament.

Clause 36: power to require name and address for suspected offence of killing or injuring Police dog

23. Clause 36 provides that a constable who has good cause to suspect that a person has committed or is committing or is attempting to commit the offence of intentionally killing or injuring a Police dog may require that person to provide identifying details. This provision has been carried over from the Police Act 1958.

24. In the 1958 Act, there was no general power to take identifying details from those suspected of committing offences. However, clause 32(2) of this Bill now

provides that a constable who has good cause to suspect a person of committing an offence may, for the purpose of enabling the commencement of a prosecution against that person, detain that person at any place in order to take the person's identifying details.

25. In this new environment, clause 36 is therefore redundant, and should be removed from the Bill. It offers nothing that cannot be achieved under the general provision in clause 32.

Clauses 48, 49 and 52: offence provisions

26. The LAC supports the framing of most of the offence provisions in the Bill, and their penalties. However, clauses 48, 49 and 52 are problematic.

Clauses 48 and 49: mens rea and other matters

27. The state of mind ("mens rea") required for criminal liability needs to be expressly provided for in clauses 48 and 49, and there are several other problems with the present formulation of those clauses.

28. Clause 48 provides that:

> (1) A person commits an offence who, without reasonable excuse, and in circumstances reasonably likely to lead a person to believe that the person is a Police employee,–
>
> (a) pretends to be a Police employee by his or her words, conduct, or demeanour; or
>
> (b) assumes the name, designation, or description of a Police employee.
>
> (2) A person commits an offence who, without reasonable excuse, uses any of the following things in circumstances reasonably likely to lead a person to believe that the user is a Police employee,–
>
> (a) a Police uniform, or item of that uniform, or a Police article:
>
> (b) a uniform, or item of uniform, or article that closely resembles a Police uniform, or item of that uniform, or Police article.
>
> (3) A person commits an offence who, without reasonable excuse, represents any vehicle, craft or other conveyance as being in the service of the Police in circumstances reasonably likely to lead a person to believe the vehicle, craft, or conveyance is in the service of the Police.
>
> (4) A person who commits an offence against this section is liable to imprisonment for a term not exceeding 12 months, to a fine not exceeding $15,000, or to both.

29. Clause 49 provides that:

> (1) A person commits an offence who, without reasonable excuse, carries on an activity under an operating name that includes the word "Police" or the words "New Zealand Police", in a manner reasonably likely to lead a person to believe that the activity is endorsed or authorised by the Police or any part of the Police.
>
> (2) A person who commits an offence against this section is liable,–
>
> (a) in the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $5,000:
>
> (b) in the case of a body corporate, to a fine not exceeding $20,000.

30. In the view of the LAC, amendments to both of these clauses are necessary to:

- Explicitly require a mental element of intention or recklessness. This is an appropriate safeguard on the scope of offences that carry relatively heavy maximum penalties (in particular, a term of imprisonment).
- Remove the following formulation: "circumstances reasonably likely to lead a person to believe …". In legal terms, this language is quite novel, and, as such, its intended effect is unclear. We note that it differs from the equivalent language in the existing section 51A of the Police Act 1958 ("circumstances likely to lead any person to believe"). If recklessness is provided for, as we suggest, it will incorporate a similar, but commonly understood, concept. In New Zealand, to be legally reckless means to foresee a risk that an event may result from the conduct in question, and take the risk, when it is unreasonable to do so having regard to the degree and nature of the risk. In cases in which the mental element of intention, rather than recklessness, is satisfied, we consider that the culpability of the accused would be such that it is appropriate to remove what would otherwise operate as a safeguard for defendants ("circumstances reasonably likely to lead a person to believe …"). As a minimum, in our view, if these clauses are not reframed as we suggest, the existing section 51A language is to be preferred.
- Omit the defence of "without reasonable excuse". Again, we consider that in cases in which recklessness is in issue, that concept builds in all of the appropriate safeguards without the complexity of introducing a reverse onus; and in cases in which the conduct is intentional, culpability would be such that no defence of reasonable excuse should be permitted.

31. Overall, therefore, while the detail of the drafting is a matter for Parliamentary Counsel, we are proposing that these two clauses should be reframed as follows:

48 Personation and representing vehicle, etc, as Police vehicle

A person commits an offence who:

(a) pretends to be a Police employee by his or her words, conduct, or demeanour;

(b) assumes the name, designation, or description of a Police employee;

(c) uses a Police uniform, or item of that uniform, or a Police article;

(d) uses a uniform, or item of uniform, or article that closely resembles a Police uniform, or item of that uniform, or Police article;

(e) represents any vehicle, craft or other conveyance as being in the service of the Police;

intending to lead, or being reckless as to whether it is likely to lead, any other person to believe that the person is a Police employee or otherwise acting in the service of the Police.

49 Use of term Police or New Zealand Police in operating name

A person commits an offence who carries on an activity under an operating name that includes the word "Police" or the words "New Zealand Police" intending to lead, or being reckless as to whether it is likely to lead, any other person to believe that the activity is endorsed or authorised by the Police or any part of the Police.

Clause 52: attempt

32. Clause 52(1)(c) criminalises an attempt to hold any communication with or deliver any thing to a prisoner in the custody or charge of Police. At present, such

an attempt would be subject to the same maximum penalty that attaches to the completed offence.

33. This provision is at odds with the general approach to attempts reflected in sections 72 and 311 of the Crimes Act 1961. Section 72 defines an attempt. It is generally applicable to all attempted offences, not merely those in the Crimes Act. Section 311 provides for a maximum penalty of not more than half of the maximum punishment to which the offender would have been liable if he or she had committed the completed offence.

34. Clause 52(1)(c) should therefore be deleted. Sections 72 and 311 address the matter and are all that is required.

Sir Geoffrey Palmer
President, Legislation Advisory Committee