LEGISLATION DESIGN AND ADVISORY COMMITTEE

12 May 2016

Scott Simpson MP, Chairperson
Local Government and Environment Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Simpson,

Wildlife (Powers) Amendment Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. The LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.

2. In particular, the LDAC's terms of reference include these dual roles:
    a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
    b. through its External Subcommittee, scrutinizing and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of the LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by the LDAC prior to their introduction.

4. The Wildlife (Powers) Amendment Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Matthew Smith, Brigid McArthur, and David Cochrane, with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Wildlife (Powers) Amendment Bill

Introduction

1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has recently begun considering Bills under the mandate given to it by Cabinet. The Subcommittee reviews introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles. We focus on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

2. This submission focuses on the scope of the search powers in the Wildlife (Powers) Amendment Bill (the **Bill**). Generally, we consider that the powers in the Bill are too wide, and go beyond what is necessary to achieve the policy objective (so far as this is stated in the RIS). We draw the Committee's attention to relevant parts of the Guidelines, particularly Chapters 16 (Creating a New Statutory Power) and 18 (Creating Powers of Search, Surveillance, and Seizure). We make suggestions where provisions of the Bill could be amended or reconsidered in light of principles in the Guidelines.

3. We have endeavoured to make suggestions that will result in appropriate powers that achieve the right balance between individual rights and providing rangers with the powers necessary to reduce offending.

The power to intervene to prevent or stop offending – new section 39C

We believe that this section can be substantially improved both in terms of clarity of what is meant by stopping and its relationship to other powers

The Committee should satisfy itself that this power is needed in light of other powers already in the Act

4. The Bill empowers rangers (other than fish and game, honorary, and part time rangers) to intervene to prevent or stop an offence.[1] The RIS explains that this power is necessary to allow an officer to prevent an offence occurring and uses the example of removing a trap set to catch geckos.[2]

5. Generally, new statutory powers should only be created if no suitable existing power or alternative exists that can achieve the policy objective. The Guidelines provide:[3]

> If there is already clear authority in existing legislation, it will be inappropriate to grant the same power in new legislation. This will lead to duplication and lack of certainty in the law, particularly where only one Act is amended (this may create an unintended distinction between the two provisions …).

6. If legislation grants new powers that appear to be covered elsewhere in existing legislation, the new provision should make clear how the powers fit together.

7. For example, it is not clear why the power in new section 39C is necessary to achieve the policy objective as illustrated by the example in the RIS when the power to remove traps already exists in the Wildlife Act 1953 (the **Act**). Section 39(1)(b) of the Act already contains extensive powers:

> Every ranger may … seize all nets, traps, firearms, ammunition, boats, vehicles, engines, instruments, appliances, or devices that are being used or are intended to be used or have been used in breach of this Act, or that he reasonably believes are so being used or are intended to be so used or have been used.

8. It is not clear how new section 39C will operate alongside existing powers. We submit either that the power be removed, or alternatively, we submit that new section 39C is amended to clarify the relationship with existing powers, such as that under section 39(1)(b).

[1] Clause 5, new section 39C.
[2] *Regulatory Impact Statement (RIS): Wildlife (Powers) Amendment Bill* (1 April 2015) at [31].
[3] LAC Guidelines (2014 edition) at 16.1. See also 18.1. relating specifically to search powers.

The provision should be clearer and include a higher factual threshold if it is a warrantless entry power

9. The power to intervene to prevent or stop an offence appears to be wide enough to permit warrantless entry powers to prevent an offence. If this is intended, it is not expressly addressed in the RIS.

10. The default position in the Guidelines is that all searches should be carried out pursuant to a warrant unless there are good reasons not to.[4] The Guidelines provide that "generally, a real risk must exist that some serious harm or damage will occur or evidence will be lost if officers are required to obtain a search warrant."[5] This reflects the general presumption that entry on to private property even to prevent offences should be tightly controlled and always expressly authorised.

11. The equivalent power of police requires a higher factual threshold to be met before it can be exercised. Under section 14 of the Search and Surveillance Act 2012 (**SSA**), police constables may exercise warrantless powers of entry to prevent an offence or respond to risk to life or safety. However, the power may only be exercised where: an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property; or, there is risk to the life or safety of any person that requires an emergency response. Comparatively, the threshold for warrantless entry in new section 39C is low, requiring only that the ranger must have reasonable grounds to believe that a person is committing or about to commit an offence, and that the intervention is in a manner that is reasonable in the circumstances.

12. Some warrantless search powers are provided for in the SSA. For example, Part 4 allows an enforcement officer to stop a vehicle and conduct a search without a warrant where he or she is satisfied that he or she has grounds to search the vehicle.[6] We note, however, that new section 39C goes beyond warrantless search of vehicles provided in the SSA. It is wide enough to capture any conduct by an enforcement officer so long as the reasonableness checks are met, including warrantless entry and search of a dwellinghouse.

13. If this new section is intended to be a warrantless entry power, we submit that:

    (a) the Committee should be satisfied that there are "compelling reasons" to justify a power to enter on private property, especially given that the power applies to all offences in the Act including non-imprisonable offences;

[4] LAC Guidelines (2014 edition) at 18.2.
[5] LAC Guidelines (2014 edition) at 18.2.
[6] Search and Surveillance Act 2012, section 120.

(b) the provision should be made clearer so that it is obvious to users of the legislation that the power is in fact a warrantless entry power. This could be done by adding a subsection (2) to section 39C that is to the effect that "For the purposes of subsection (1) to "**intervene**" includes to enter premises without a search warrant and to seize items found in those premises";

(c) the provision should be amended to make the threshold higher, for instance to make it based on the suspicion of likely offending, the urgency of the situation (not justifying taking the time to seek a search warrant), and/or the importance of protecting a particular species; and

(d) The provision should make it clear that it does not apply to private dwellings (as many inspection-type statutes do).

Power to stop persons or things in transit – new section 39B

Power to stop appears to be too broad

14. The Bill empowers rangers (other than fish and game, honourary, and part time rangers) to stop any person or thing or any article in transit.[7] The RIS states that this power is necessary in order to question a person or exercise other enforcement powers.[8]

15. This power strikes the Subcommittee as being too broad. It does not sufficiently identify the reason for stopping or what a ranger can do once a person or thing is stopped. As it is currently drafted, the provision appears to allow a ranger to stop a person without specifying a purpose for the stopping so long as there is reasonable cause, and may do anything once the person is stopped. By contrast, section 39(1)(d) of the Act is a good example of a more appropriate power where the purpose for stopping is clear, that is, to conduct a search.

16. We submit that this provision should be amended to clarify the purpose of stopping and what a ranger can do once a person or thing is stopped. For example, if there are specific powers that are intended to be exercised upon stopping a person, the provision should specify these. Alternatively, the end of new section 39B(1) could be amended to read "… any person or thing or any article in transit, in order to exercise any powers conferred on a ranger by this Act."

It is unclear whether the power to stop amounts to detention of a person - what happens if a person refuses?

17. It is unclear whether the power to stop is intended to confer a power of detention. The Subcommittee suggests that the provision should make that clear, if that is the intention, so the

[7] Clause 5, new section 39B.
[8] RIS at [31].

nature and scope of the power can be assessed for its conformity with the right to be free from arbitrary detention that is affirmed in section 22 of the New Zealand Bill of Rights Act 1990.

18. It is also unclear what a ranger can do if a person refuses to stop. Currently the power to stop does not allow a ranger to use reasonable force to detain a person if they refuse (unless the ranger is arresting a person under new section 39E). We submit that the Subcommittee may wish to consider how this power is intended to practically work and whether the provision should be amended to provide for these practicalities.

The power to seize evidential material has no proportionality check – new section 39A

19. The Bill empowers rangers (other than fish and game, honorary, and part time rangers) to seize any evidential material that the ranger reasonably believes relates to the investigation of an offence under the Act or relevant regulations.[9] Evidential material is defined in the Search and Surveillance Act as "evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence".[10]

20. The RIS states that this power will improve the ability of rangers to obtain the evidence necessary to build a case and assist the court, and it will be particularly useful for proving intent for commercial offences.[11]

21. The Subcommittee acknowledges the importance of allowing rangers to seize evidence. We note, however, that this power is very wide. The provision proposes to make this power available in respect of all offences under the Act without any proportionality check to ensure that the exercise of the power of seizure is a proportionate and reasonable response to the suspected offence and appropriate in the circumstances. While limitations of this nature will apply to the exercise of this power, by reason of section 21 of the New Zealand Bill of Rights Act 1990, it may be desirable to expressly provide for this in the text of section 39A. There is a precedent for this approach in sections 31 and 34 of the Maritime Security Act 2004, which provide (among other things) that a measure or step "must be proportionate and reasonable".

22. As it is currently drafted, section 39A would allow a ranger to seize a large, valuable item such as a boat or a car in relation to minor offending under the Act or regulations. Offences in the Act cover a broad range offending, from a minimum penalty of a $5000 fine[12] to a maximum penalty of two years imprisonment[13] (increased to five years if the offending is for commercial gain)[14]. The majority of the offending in the Act is at the lower end of the spectrum, where seizure of a large, valuable item may well be disproportionate.

[9] Clause 5, new section 39A
[10] Search and Surveillance Act 2012, section 3(1).
[11] RIS at [31].
[12] For example, penalties for offences in respect of game. See Wildlife Act 1953, section 67E.
[13] For example, penalties for offences in respect of absolutely protected wildlife. See Wildlife Act 1953, section 67A.
[14] Wildlife Act 1953, section 67I.

23. The Guidelines provide that "in the law enforcement context, search powers [including powers of seizure] should generally not be available for … offences that are not considered serious enough to warrant a sentence of imprisonment".[15]

24. The Subcommittee submits that a proportionality check should be included in the provision. For example, a check could be added that reads: "…that he or she reasonably believes relates to the investigation of an offence against this Act or any regulations made under this Act, and is proportionate and reasonable in relation to the level of suspected offence under this Act."

The power of arrest may be wider than necessary to achieve the policy objective – new sections 39D&E

25. The Bill empowers an authorised person to arrest a person without a warrant where he or she believes on reasonable grounds that the person has committed or is committing a serious offence under the Act that is punishable by imprisonment.[16] If the authorised person is not a constable, he or she must deliver the arrested person into the custody of a constable as soon as is reasonably practicable (unless the person is sooner released).[17]

26. The RIS frames this power as "a limited power of arrest" which enables the authorised person to "temporarily arrest a suspected offender until they can deliver the suspect into police custody … [The power] would enable the [authorised person] to gather evidence effectively as it restricts the ability of the suspect to abscond."[18]

27. The Subcommittee questions whether a power to arrest is necessary to achieve the policy objective. Framing an arrest power as "temporary" is odd. We consider that the "temporary" status suggested by the policy in the RIS would be better reflected by creating a power to detain a person until a constable arrives or the person can be delivered to a constable, who then arrests the detained person. As it stands, the power seems wider than necessary.

28. As noted in the RIS, rangers would require appropriate training in arrest procedures to ensure this power is exercised lawfully. The same level of training may not be required if the power is one of detention rather than arrest.

29. We suggest that the Committee consider whether the policy objective of this provision can be met by creating a power to detain rather than creating a power of arrest that is not fit for

[15] LAC Guidelines (2014 edition) at 18.1.
[16] Clause 5, new section 39 E. Serious offences include those in respect of absolutely protected wildlife; liberating wildlife; hunting, killing, buying, or selling marine wildlife, or robbing or disturbing the nest of marine wildlife; or obstructing the investigation of a serious offence.
[17] Clause 5, new section 39E(3).
[18] RIS at [40]-[41].

purpose. Search powers should be designed so that individual rights are limited as little as possible in order to achieve the policy objective.[19]

The penalty for failure to produce identification and date of birth may be inappropriate – new section 66A

30. The Bill empowers rangers to require a person to give his or her full name, residential address, date of birth, and to produce evidence of those things, if the ranger believes on reasonable grounds that a person has committed, is committing, or is about to commit an offence under the Act or regulations.[20] The power to require a person to give his or her full name and residential address can also be exercised by Justices, occupiers of land, holders of hunting licences, and other authorised persons.[21]

31. The Subcommittee acknowledges that this power is necessary to allow for the investigation of offences and proceedings to be filed against offenders. However, we consider that the penalty for failing to comply with this provision seems disproportionately high. The maximum penalty under this provision is $100,000 or one year imprisonment.[22]

32. The Guidelines provide that "a maximum penalty should not be disproportionately severe".[23] This is significantly higher than if a person fails to give particulars under section 32 of the Policing Act 2008 (maximum fine of $5000 and/or six months imprisonment).

33. That said, the Subcommittee acknowledges that an equivalent penalty is already used in the Wildlife Act for a similar offence – refer to section 66. In that section, the same penalty is applied for a failure to provide name, surname, and place of abode. The Subcommittee's view is that this is not necessarily justification for a disproportionately high penalty, but it does acknowledge that the context of the hierarchy of other offences and penalties in the Act is relevant.

Conclusion

34. Thank you for taking the time to consider the Subcommittee's submission. The Subcommittee wishes to be heard on this submission.

[19] LAC Guidelines (2014 edition) at 18.
[20] Clause 7, new section 66A.
[21] Clause 7, new section 66A(1). Authorised persons are defined in the Wildlife Act 1953, section 61(3).
[22] Wildlife Act 1953, section 67F(5).
[23] LAC Guidelines (2014 edition) at 21.6.

Yours sincerely

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Legislation Design and Advisory External Subcommittee