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Chair  
Local Government and Environment Committee  
Parliament Buildings  
P O Box 18 041  
Wellington 6160

**FREEDOM CAMPING BILL**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
  - (a) 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;
  - (b) 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.
4. The LAC wishes to raise two issues concerning two aspects of the Bill that it considers to be problematic.

## Seizure powers

5. The Bill provides powers of seizure, the purpose of which is not apparent. Clause 35 empowers an enforcement officer to seize property in a local authority area or on conservation land if:
  - (a) the property is or has been used in the commission of an offence; and
  - (b) it is reasonable to do so or the requirements of clause 36 are satisfied; and
  - (c) the officer has directed the person to stop committing the offence, advised them that if they do not do so the officer has power to seize the property, and has provided the person with a reasonable opportunity to stop committing the offence.
6. Clause 36 provides that a boat, caravan, car, campervan, housetruck, or other motor vehicle may only be seized under clause 35 if the officer is satisfied on reasonable grounds that seizure is necessary:
  - (a) to avoid any risk to the health of the public;
  - (b) for the safety of the public;
  - (c) to protect significant flora or fauna; or
  - (d) to ensure access to the area.
7. Clause 37 provides for return of the seized property. Subclause (2) provides that it must be returned if:
  - (a) the property is in the future not likely to be used in any offence of the kind for which it was seized; and
  - (b) the owner or person has paid the costs of seizure.
8. Clause 38 provides for the disposal of seized property that has not been returned within 6 months of seizure. All costs of seizure and disposal are taken from the proceeds, with any surplus going to the owner of the property or the person from whom it was seized.
9. The LAC has a number of concerns about the seizure regime that these provisions put in place. Firstly, the purpose of the seizure provisions is less than clear. Secondly, it is not clear that these objectives will necessarily be effectively achieved through the provisions as they are currently drafted.
10. The LAC was advised by officials that the purpose of the seizure provisions is two-fold:

- (a) To enable the Department of Conservation and local authority officers to remove tents, vehicles and other camping-related property that is situated in areas where freedom camping is prohibited (in other words, the prevention of continuing offending); and
  - (b) To act as a deterrent to potential offenders.
- 11. The objective of preventing continuing offending is apparent in clause 35(1)(c)(i)-(iii), which requires an officer who is proposing to seize an item of property to direct the person to stop committing the offence, advise him or her that if they do not stop committing the offence the officer may seize the property, and give the person a reasonable opportunity to cease committing the offence. However, the extent to which this objective will be achieved is questionable given that clause 36 effectively imposes a higher threshold for the seizure of more valuable property such as boats, caravans, campervans, etc. This leads to the rather odd result, for example, that a tent may be seized where there is a continuing offence but a caravan cannot be unless one of the conditions in clause 36(a)-(d) exists. It is possible that the potential for harm from vehicles may be greater than the presence of such other property in the area.
- 12. Similarly, any deterrent effect resulting from these provisions will be uneven given that different thresholds exist for seizure of different types of property.
- 13. Officials advised the LAC that a higher threshold was imposed in clause 36 in relation to the more valuable types of property because of the higher value. Officials take the view that the seizure of higher value items of property should be subject to a higher test given that it represents more risk of financial loss for the owner should the property be disposed of. Further, the costs of impounding and storing a vehicle, for example, will be significantly higher than those arising from seizure and impoundment of a tent.
- 14. However, the LAC considers that this reasoning is illogical. It creates a perverse incentive – a person is better off to illegally freedom camp in a campervan, for example, rather than in tent, as a higher threshold for seizure of the campervan will apply if he or she is apprehended. Furthermore, as a matter of principle, legislation should not advantage one property owner over another in the same circumstances simply on the basis that one owns more valuable property than the other. The conditions in clause 36(a)-(d) should be applied to all seizures under the Bill, irrespective of the value of the property concerned.
- 15. The LAC also considers that clause 37 dealing with the return is also problematic. That provision provides that property will be returned if it is not likely to be used in the future in offending of the kind for which it was seized. In practice this would put the onus on the person seeking return of the property to establish that it will not be used for future offending. If they were unable to do so, the property would be retained and disposed of. Accordingly, it might be argued that clause 37 operates as a quasi-forfeiture regime.

16. Where property is seized under a statutory power, it is desirable that the interference with the owner's property rights cease as soon as the statutory objective underlying the seizure has been fulfilled. For example, in the Search and Seizure Bill currently before the House, the default position is that seized property must be returned as soon as it is no longer required for investigative or evidential purposes (unless it is subject to forfeiture etc.).<sup>1</sup> Under the Freedom Camping Bill property will be able to be retained even where the original offending justifying the seizure has ceased.
17. Furthermore, the non-return/forfeiture of property is carried out by officials without an order by a court, which is generally necessary in other contexts. The seizure and non-return of property/forfeiture of property is also entirely independent of the offence regime in the sense that there need not be an infringement notice or a prosecution for property to be seized and sold by the local authority or the Director-General.
18. Officials have advised the LAC that the seizure provisions in this Bill are modelled on those in the Local Government Act 2002, including clause 37 (which is very similar to section 167 of the Local Government Act). They consider that clause 37 will be useful to address repeat offending by allowing enforcement agencies to refuse to return property if they consider it likely that the property will again be used in the commission of a freedom camping offence. They also point out that the person may seek a review of the enforcement agency's decision in the District Court. The LAC sees at least two difficulties with this.
19. Firstly, given that it effectively operates as a reverse onus, it is difficult to see the basis on which the person seeking return of the property is going to satisfy the local authority or the Director-General of the matter set out in clause 37(2)(a).
20. Secondly, while these provisions may have a precedent in the Local Government Act, the LAC remains of the view that a significant interference with property rights such as the non-return/forfeiture of property should be, as a matter of principle, a decision taken by a court after it is satisfied that that is justified (e.g. because forfeiture ought to be imposed as a sentence for offending proven beyond reasonable doubt). By contrast, the decision is taken under this Bill by officials where the person seeking return has failed to establish the property will not be used in future offending (a matter that the LAC considers may well prove difficult to establish in practice).
21. In summary, the LAC considers that, if the purpose of these provisions is prevention of continuing offending, they do not achieve this in a consistent manner. Furthermore, the use of seizure powers as a deterrent is inappropriate. There also seems to be an implicit objective of seizing property in order to allow subsequent forfeiture. In the LAC's view, this is unjustified as such an interference with property rights should be based on conviction or

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<sup>1</sup> Search and Surveillance Bill, clause 143.

an infringement penalty, or at the very least made by court order. The ability to seek a court review of the decision after the fact is inadequate.

### **Immunity provision**

22. Clause 39 provides immunity for enforcement officers from claims resulting from seizing or impounding, “unless the actions are not in good faith or a result of a major departure from the standard of care expected of a reasonable person in the circumstances.” This provision is similar to that of s 127 of the Land Transport Act 1998. The result of such a provision is that it is possible that some property owners will not be compensated if their property is damaged even though due care is not taken in the care of the treatment of it. There is an argument that while such a provision might be justified in the context of the Land Transport Act, which involves the delaying and unloading of freight, a different policy justification is needed where enforcement officers are actually taking property into their possession.
23. The LAC wishes to raise with the Committee whether this is the intended policy of the section, or whether what is rather intended is to give a personal indemnity to the enforcement officers, while leaving the Crown or the local authority responsible to provide compensation. As it stands the removal of liability on behalf of the enforcement officers will prevent either Crown or territorial authorities being vicariously liable.
24. The LAC thanks the Committee for its consideration of these issues. The Committee does not wish to appear in support of this submission.

Yours sincerely



Sir Geoffrey Palmer SC  
Chair  
Legislation Advisory Committee