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PRIVATE SECURITY PERSONNEL AND PRIVATE INVESTIGATORS 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 does not seek to be heard on this submission.

Overall assessment of the Bill

- 5 The LAC is concerned about the Bill's overall lack of clarity, and believes that laypersons seeking to enter one of the occupations regulated by the Bill will

struggle to understand the requirements that it imposes. There are complex interrelationships between many of the Bill's provisions. The grounds on which licences or certificates of approval may be obtained, and the processes involved, are not easy to follow. Neither is it easy to follow the grounds or the processes for the taking of disciplinary action.

Definitions of occupational classes

6 The definitions of occupational classes in clauses 5, 6, 7 and 9 of the Bill have changed little from the current Act (Private Investigators and Security Guards Act 1974), despite the major technological and other changes that have taken place since 1974.

7 With regard to the definition of "private investigator" in clause 5:

- Subclause (4)(a)(i) (which is taken from the current Act) provides that a person is not a private investigator within the meaning of the Act by virtue of the fact that he or she seeks, obtains or supplies any information for or to the Crown, any member of the Police, or any local authority. It is not clear why such an exception should exist. Clause 15 provides that Police and other Crown employees do not require a licence or certificate of approval under the Bill, but there is no apparent reason why people who obtain information for the Crown but are not employed by it should be excluded from the definition of private investigator.
- Subclause (4)(a)(ii) is not taken from the current Act. It provides that a person is not a private investigator within the meaning of the Act by virtue of the fact that he or she seeks, obtains or supplies any information at the request of a person who is not a client of the business. It is hard to see the rationale for this provision. It is part of the definition in subclause (1) that a private investigator carries on a business seeking, obtaining or supplying information "for valuable consideration". If information is obtained or supplied to a person for valuable consideration, it would seem that that person becomes a client of the business. If information is supplied other than for valuable consideration, that situation is already excluded from the definition.

8 The definitions of "security technician", "security consultant" and "property guard", which are based on the definition of "security guard" in the current Act, seem too narrow and technology-specific. For example:

- They refer to specific types of technology: "a burglar alarm or similar warning device", "a locking device" and "a camera or similar device". Many other types of technology may be used in today's security industry, including electronic access devices, biometric identification devices, scanning devices and location-detection devices. Furthermore, technology is changing all the time. The Bill should as much as possible be made technology-neutral, and the definitions should be reframed in terms of activities rather than technologies. This would avoid the need

for Parliament to amend the Act in future to ensure its continued application in the event of technological changes.

- Clause 6(a)(ii) refers to “a locking device for a safe or a strongroom”. It is not clear why installation of locks other than on safes or strongrooms is not covered, and the words “for a safe or a strongroom” should perhaps be deleted.
- The definitions are restricted to activity on “premises”. It is not clear why installation or monitoring of alarms or cameras on, for example, vehicles or in open spaces should not be covered.
- Clause 6(b) refers to installing cameras or similar devices “for the purpose of detecting the commission of any offence”. There may be a range of other purposes for which security cameras are installed, such as health and safety monitoring.

- 9 We also note that all of the definitions in clauses 5 to 11 refer to “a person who ... either by himself or herself or in partnership with any other person” carries on certain forms of business. This wording suggests that “person” is being used in these clauses to mean a natural person, and therefore that only natural persons can be licensees. In fact, however, the Bill clearly contemplates that companies can apply to be licensed (see in particular clauses 18 and 20).

Power to exclude occupations by Order in Council

- 10 Clause 12 essentially provides that the Governor-General may, by Order in Council, exclude certain occupations or businesses from the definitions in clauses 5 to 11, either completely or subject to certain conditions; or may exclude persons from the definitions in clauses 5 to 11 during a specified period of time or in specified circumstances. Clause 13(3) provides that the Governor-General may, by Order in Council, exclude persons from the definition of “crowd controller employee”, including declaring that certain persons or classes of persons are not crowd controller employees for the purpose of their work at a specified event or type of event.
- 11 In general, it is not desirable to use delegated legislation to alter the application of the Act to particular persons or classes of person. The LAC has in the past expressed concern about Bills that provide a power to include or exclude particular occupations by regulation and to grant exemptions without criteria. The LAC considers that it should be possible, through proper consultation, to identify any occupations that should be covered by a legislative regime, and that if the coverage of particular occupations needs to be changed in future it should be done by statute.
- 12 If the power to amend the coverage of key occupational definitions in the Bill by regulation is to be retained, the Bill should provide criteria for doing so. Consideration could also be given to narrowing the scope of the exemptions that may be granted, perhaps limiting them to exemptions for specific events or circumstances.

Grounds of disqualification and grounds for cancellation of licence or certificate of approval

- 13 Clauses 17 and 41 list the grounds of disqualification for a person applying for a licence or certificate of approval. If one or more of these grounds apply, the Licensing Authority must, in deciding whether to grant the application, take into account the grounds on which the applicant is disqualified and the way in which that influences the suitability of the application (clauses 28(5)(a) and 49(5)(a)). Thus, the Licensing Authority has discretion to grant an application even if a ground of disqualification applies.
- 14 Clauses 73 and 76 list mandatory grounds for cancellation of licences and certificates of approval. Clauses 74 and 77 list discretionary grounds for cancellation of licences and certificates of approval. Both mandatory and discretionary grounds for cancellation can be the basis of complaints about licensees to the Licensing Authority. Grounds for disqualification are also grounds for mandatory cancellation, but only if the Licensing Authority is satisfied that, because of this, the licensee or certificate holder is not suitable to hold a licence or certificate. In other words, the Authority is still able to exercise discretion. In the case of discretionary grounds for cancellation, as the name suggests, the Licensing Authority *may* cancel the licence or certificate or take other action.
- 15 This approach, with multiple sets of grounds for disqualification and cancellation, seems unnecessarily complicated, especially as all of the grounds allow considerable discretion to the Licensing Authority. It is essentially a modified version of the approach in the current Act. Consideration could be given to simplifying the various grounds and making them more coherent and accessible.
- 16 In addition, further thought could be given to the offences, convictions for which are grounds for disqualification or cancellation. At present these offences are listed in clause 4 (the interpretation clause), the clauses relating to grounds for disqualification, the clauses relating to discretionary grounds for cancellation, and Schedule 1. Consideration could be given to consolidating them, ensuring that they are in the appropriate clauses of the Bill, and adding further offences to the lists. For example, Schedule 1 lists offences that are discretionary grounds for cancellation of a licence or certificate. Among these offences are “Any provision of the Arms Act 1983.” There may well be some offences under the Arms Act that should be grounds for disqualification rather than discretionary grounds for cancellation. There are also offences that should probably be added to the grounds for disqualification or cancellation, including offences under the intimate covert filming provisions of the Crimes Act 1961 and criminal offences under the Harassment Act 1997.
- 17 The grounds on which complaints can be made against licensees and certificate holders (clauses 67(4) and 68(4)) differ for no apparent reason. The Bill provides that a complaint can be made against a licensee on one or more of the

mandatory or discretionary grounds for *cancellation*, whereas a complaint can be made against a certificate holder on one or more of the grounds of *disqualification*. The effect is that a complaint cannot be made against a certificate holder on the various grounds for cancellation that are additional to the grounds for disqualification. In addition, because of the different ways in which the grounds for complaints are framed in the two clauses, clause 68(4)(d) includes the ground “that a false statement was made in the application for the certificate of approval”, even though this is also covered in clause 77(h).

- 18 Clause 100 provides for a licensee or certificate holder to apply to the Licensing Authority for a waiver of a ground of disqualification if, while the licence or certificate is in force, an event occurs that means that one or more grounds of disqualification now apply to that person. The effect of such a waiver is unclear, although it appears from the Explanatory Note that the intention is that a ground of disqualification for which a waiver had been obtained could not be a ground for bringing disciplinary action. It seems desirable to clarify this in the Bill. It is also not clear why this provision is located among the general provisions in Part 6 of the Bill rather than in an earlier part of the Bill.

Offences

- 19 Clause 65 (which largely repeats section 51 of the current Act) provides that a licensed private investigator must render an account within seven days of being requested to do so by a client, or in any case within 28 days of ceasing to act for a client; and must pay any money held for a client within seven days of being requested to do so, or within 28 days of ceasing to act for the client. A licensee who contravenes these provisions commits an offence and is liable on summary conviction to a fine of up to \$20,000. This could be seen as unduly harsh, especially in the absence of any defence such as “without reasonable excuse”.
- 20 The LAC is aware that clause 66 (which repeats section 52 of the current Act, with only the penalty for the offence being updated) may be contentious for private investigators. We note that this clause involves balancing the various legitimate interests served by private investigators’ inquiries against the right to privacy. Consequently, the Law Commission is examining this issue as part of its Review of Privacy, and its recommendation with regard to clause 66 should be available to the committee before the committee is due to report.

Hearings and decisions

- 21 The Private Investigators and Security Guards Regulations 1975 (SR 1975/188) currently include some provisions relating to hearings and decisions. Similar provisions should be included in the Bill, rather than being left to regulations.
- 22 Regulation 7 provides that hearings are to be held in public except where the interests of a person in having part or all of the hearing held in private outweigh the public interest. The LAC considers that the Bill should similarly provide that hearings (both application hearings and disciplinary hearings)

should be public in most cases. Section 238 of the Lawyers and Conveyancers Act 2006 could be a suitable model for such a provision. That section provides that hearings of the Disciplinary Tribunal are to be held in public, except when the Tribunal considers that it is proper, having regard to the interest of any person and to the public interest, to hold a hearing in private.

- 23 Regulation 8 provides that any party to a hearing may, on request, obtain a written statement of the reasons for the decision. The LAC considers that the Bill should provide that all parties to a hearing should, as of right, receive written notification of the decision, with reasons. At present, clauses 28(8), 49(8), 72(3) and 75(3) provide that a written statement of the reasons for a decision are required to be provided to the applicant, licensee or holder of a certificate of approval alone, and only in the case of a decision to refuse an application or cancel a licence or certificate of approval.

Alternative dispute resolution (ADR)

- 24 The Bill makes no provision for ADR, and clause 71(1)(a) provides that, if a complaint has been filed against a licensee or certificate holder and the complaint complies with the requirements of the relevant section, the Licensing Authority “must hold a hearing”. In many cases, a hearing will be the most appropriate means of dealing with the issues raised by the complaint. However, in some cases the use of a form of ADR may be an effective method of resolving a dispute. It could be desirable to give the Licensing Authority discretion to employ ADR processes in appropriate cases.

Disciplinary powers

- 25 Clauses 72 and 75 provide for the disciplinary powers of the Licensing Authority in respect of licensees and holders of certificates of approval respectively. The powers are largely the same for both categories of person. The range of disciplinary powers available seems narrow compared to other legislation regulating particular occupations, and consideration could be given to widening the range of disciplinary powers provided for.
- 26 Additional disciplinary powers that could be considered include powers to order that a person:
- must undergo training;
 - must, for a specified period, work under supervision;
 - must, for a specified period, work subject to conditions specified in the order;
 - shall be barred from reapplying for a licence for a specified period, or until specified conditions have been met; or
 - must refund all or part of any fees or expenses paid to that person by the complainant or another person.

Appeal

- 27 Clause 94 provides for appeals to a District Court from decisions of the Licensing Authority. Subclause (6) provides that the District Court's decision on the appeal is final. LAC Guidelines deal with the circumstances in which second appeals may be provided for, but state that any second right of appeal should usually be restricted to matters of law and should be by leave. The Law Commission in *Tribunal Reform* (SP20, 2008) has stated that a second tier of appeal is appropriate for most tribunals, but that it should be by leave and confined to questions of law. Consideration could be given to amending the Bill to provide for appeals by leave to the High Court on matters of law.

Complaints, Investigation and Prosecution Unit

- 28 Clause 93 provides that a Complaints, Investigation and Prosecution Unit is to be established as part of the responsible department. The responsible department is the department responsible for the administration of the Act, which will presumably be the Ministry of Justice. The LAC believes it is not desirable to have the enforcement unit located within the same department that is responsible for administering the Act. The Ministry of Justice will be responsible for advising people about compliance with the Act, and will provide administrative support to the Licensing Authority (clause 88), which is the adjudicative body for complaints. It is therefore inappropriate that it should also be responsible for investigation and prosecution.
- 29 We suggest that the Regulation and Compliance Branch of the Department of Internal Affairs could be an appropriate location for the Complaints, Investigation and Prosecution Unit. There is a precedent for this: the Ministry of Justice administers the Films, Videos, and Publications Classification Act 1993, while the Department of Internal Affairs enforces that Act.

Codes of conduct

- 30 Clause 106 provides regulation-making powers. Subclause (1)(l) empowers the making of codes of conduct; regulations may also provide that contravention of the code is misconduct. We believe that the Bill should simply provide that there shall be codes of conduct and that contravention of such codes is misconduct. The Bill should require that there be a code of conduct for each of the occupational classes in clauses 5 to 11 (including responsible employees of each of those classes). The Bill should also include provisions stating who is responsible for producing and approving codes of conduct, and should specify the legal status of the codes.
- 31 It would also be desirable for the Bill to state matters that codes of conduct must address. Examples of provisions in other Acts which specify matters to be included in codes of conduct for regulated occupations are section 37(2) of the Immigration Advisers Licensing Act 2007 and section 86 of the Financial Advisers Act 2008.

Transitional provisions

- 32 Clause 112(1) provides that a person who holds a licence as a security guard under the current Act will, once clause 112 comes into force, be deemed to hold a licence under the new Act as a security guard, private security prisoner guard, bodyguard, security technician, security consultant and crowd controller (note that some of these terms do not correspond to the terms defined in clauses 5 to 11). A licence deemed to be held under this clause will expire on 31 March 2011.
- 33 The definition of “security guard” in the current Act covers activities that, in the Bill, will be covered by the occupations of “security technician”, “security consultant” and “property guard”. It does not include the activities covered by the occupations of “personal guard” or “crowd controller”. It would seem, therefore, that currently-licensed security guards should only be deemed to be licensed as security technicians, security consultants and property guards. The same point applies to the transitional provisions in clause 113(1) for persons who currently hold certificates of approval as responsible employees of security guards.
- 34 The transitional provision in clause 112(4) provides that nothing in clause 38 (which requires licensees and certificate holders to update their information annually) applies to a licence deemed by clause 112 to be held under the new Act. It is not clear why clause 38 should not apply in this case, and it may be that the reference should be to a different clause. There is no equivalent provision in clause 113.

Cross-border issues

- 35 Clauses 74(1)(f) and 77(f) provide that it is a discretionary ground for cancellation of a licence or certificate of approval that a person has been convicted outside New Zealand of an offence; or has had an order imposed on him or her by a court or tribunal outside New Zealand, instead of passing sentence, that he or she be treated or cared for in relation to mental impairment. Clauses 19 and 42 provide that applications for licences and certificates of approval must state whether the applicant has ever been convicted, or ordered to undergo mental treatment in lieu of sentence, outside New Zealand. Apart from this requirement for information to be provided in applications, however, there is no provision in the Bill for the Licensing Authority to obtain information regarding overseas convictions or orders in relation to mental impairment.
- 36 The LAC Guidelines state that “if access to information overseas is likely to be critical to the effectiveness of a regulatory regime, it may be appropriate to provide for the New Zealand regulator to have the ability to receive information from, and provide information to, agencies with corresponding functions overseas.” It would seem appropriate to make such provision in this Bill. The Bill clearly recognises that there will be participants in the regulated

industries who have come from overseas. Given that a key objective of the Bill is to protect the public by ensuring that undesirable persons do not enter the security industry, some ability to gather information on relevant overseas convictions or orders seems desirable.

- 37 At the same time, it could be desirable to narrow the scope of the provision relating to overseas convictions in the Bill. Although it is a discretionary ground, any overseas conviction is a possible ground for cancelling a licence or certificate of approval. It would be preferable to limit this ground to convictions for offences equivalent to those offences under New Zealand law which are mandatory or discretionary grounds for cancellation.

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