



LEGISLATION ADVISORY COMMITTEE

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Chair
Social Services Committee
Parliament Buildings
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Dear Committee Members

VULNERABLE CHILDREN 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.

Orders with a punitive effect being imposed through civil proceedings

3. Part 2 of the Bill provides for new civil orders (Child Harm Prevention Orders, or “CHPOs”) to be made against those who pose a high risk of abusing or neglecting children in the future.

4. CHPOs have a punitive effect, despite the Bill stating in clause 44(2) that it is not the purpose of that Part to punish. Similar orders are presently before Parliament in the Victims Orders Against Violent Offenders Bill and the Public Safety (Public Protection Orders) Bill.
5. The LAC supports the preventive policy behind this Bill but it has concerns about these orders. There appears to be a growing tendency for law makers to seek to introduce forms of civilly imposed, punitive orders.
6. Any such proposal should not be progressed without detailed consideration of the practical implications of such orders. Orders with a punitive effect imposed through the civil jurisdiction raise concerns because the checks and balances on the exercise of power are different in the civil jurisdiction than the criminal jurisdiction. The rules governing civil proceedings reflect the fact that, generally, civil cases are between two parties of roughly equal power and the purpose of the proceedings is to reach a settlement between them. In contrast, the rules governing criminal proceedings reflect the fact that that one party has much greater power than the other, and the outcome of the proceedings may have a significant restriction on the rights of the party with less power.
7. The practical ramifications of establishing a two-tier enforcement system involving both civil and criminal procedures include issues such as double jeopardy/punishment or self-incrimination, which need to be dealt with by an established and consistent set of rules, before further civil enforcement regimes are bolted on to criminal ones.
8. In particular, it is not clear that standard civil procedural or evidential rules are appropriate for these forms of proceedings. The application of the privilege against self-incrimination in civil proceedings provides an example. Under section 60 of the Evidence Act that privilege applies to criminal proceedings, but section 63 states that the privilege does not apply to civil proceedings (however any self-incriminating evidence may not be used against the person in subsequent criminal proceedings). The LAC submits that a person who is defending proceedings for a CHPO, but who has not been convicted of any qualifying offence, should have the benefit of that privilege.
9. If the Select Committee agrees with this submission, it will be faced with the task of assessing how that privilege should be given effect to in the context of the High Court Rules. What impact, for example, should it have on the content of the statement of defence, the standard timetabling steps for civil proceedings, the rules of discovery, interrogatories and, most particularly how the defendant is to give evidence during the court hearing?

10. These are matters of detail that need to be worked through. The LAC submits that it would have been preferable for these matters to have been addressed at the policy design stage. Given their importance to the defendant and to achieving an appropriate balance between his/her rights and the needs of the regime, we suggest that they should be dealt with in the primary legislation.

Two Judges on Review Panel

11. Clause 64 of the Bill provides for an annual review of the continuing justification for a child harm prevention order and the terms imposed by the order. Clause 88 states that a review panel consists of 6 members appointed by the Minister of Justice, and the chairperson and deputy chairperson must be a High Court Judge or a District Court Judge.
12. The LAC questions whether it is necessary or workable to have two Judges on the review panel. It notes that any appeal of the decisions of the panel would be heard by a single Judge in the District Court. Consequently it would seem one Judge would be sufficient to lead a review panel of five

Strict Liability Offences

13. It is not clear to the LAC whether some of the offences in the Bill that omit the mens rea element are intended to be strict liability offences or not. The LAC Guidelines recommend that strict liability offences should only be contemplated if -
 - (a) *there is an overwhelming national interest in using the criminal law as an incentive to prevent certain behaviour occurring, regardless of fault; and*
 - (b) *there is a cogent reason in the particular circumstances for precluding a defence of total absence of fault (this will be rare).*
14. Part 2 of the Bill relating to child harm prevention orders provides for some offences with serious penalties and without a mens rea element. The defendant in some of these offences will be the person subject to a child harm prevention order, and there is no RIS discussion of whether they are intended to be strict liability offences and why. We suggest it would be preferable if the legislation expressly described the mens rea element or identified any defences if they are intended to be strict liability, rather than the Court possibly implying these critical elements.
15. These offences are listed for ease of further consideration by the committee. The offences are:
 - Breaching the terms of a child harm prevention order (conviction and up to 2 years imprisonment) - cl 60;
 - Publishing information provided by a CHPO review panel in a form that identifies a victim (conviction and 3 months

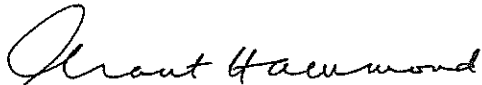
imprisonment or \$2000 fine) - cl 65(8);

- Failing to attend a review panel hearing in accordance with a summons (conviction and \$1000 fine) - clause 87(1)(a);
- Refusing to give evidence or answer questions of a review panel (conviction and \$1000 fine) - cl 87(1)(b);
- Failing to produce a document or thing in accordance with a summons (conviction and \$1000 fine) - cl 87(1)(c).

16. In contrast, we note that the Bill also creates strict liability offences in respect of employing or continuing to employ a person without ensuring a safety check of that person is completed (Clauses 25-27). These comply with the Guidelines in that they are regulatory offences and the defendant will be best placed to provide evidence of reasonable steps to comply. There is a defence in clause 29 of taking all reasonable steps to comply.

17. Thank you for considering the LAC's submission. The LAC does not wish to be heard on this submission.

Yours sincerely



Hon Sir Grant Hammond
Chair
Legislation Advisory Committee