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Chairperson
Justice and Electoral Select Committee
Parliament Buildings
WELLINGTON

Criminal Procedure (Reform and Modernisation) Bill

1 The Legislation Advisory Committee (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.

2 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.

3 In December 2010 the LAC established a subcommittee of 3 members to consider the Criminal Procedure (Reform and Modernisation) Bill. The subcommittee reported to the LAC and the LAC has resolved that a number of issues raised by the subcommittee should be forwarded to the committee for its consideration.

4 By way of opening remarks this legislation represents a substantial improvement over existing legislation governing criminal procedure, which is split between the Summary Proceedings Act 1957, the District Courts Act 1947, and Parts 12 and 13 of

the Crimes Act 1961. The benefits, in terms of comprehension and accessibility, are particularly noticeable in Parts 4 to 6, dealing with the trial, general provisions, and appeals. The provisions are rewritten in short sections (which are easy to read) and are structured logically, and different topics can easily be located.

5 There are, however, a number of matters worthy of comment that the LAC considers should be drawn to the committee's attention. We raise them under the relevant headings dealt with in the LAC Guidelines.

Understandable and accessible legislation

6 It would be highly desirable to integrate infringement offence procedures (currently set out in section 21 of the Summary Proceedings Act 1957) into this Bill to improve the clarity and accessibility of legislation dealing with criminal procedure.

7 Over 1 million infringement notices are issued each year and the existing provision governing the issuing of processing of those notices (section 21 of the Summary Proceedings Act 1957) is byzantine in its complexity. Rewriting and simplifying section 21 and relocating it (in a number of clauses) in this Bill would also have the following advantages:

(a) it would simplify the existing Summary Proceedings Act 1957 (retitled by the Bill as the **Enforcement of Infringement Offences and Fines Act 1957**), by removing all existing content except the provisions relating to enforcement of fines:

(b) it would facilitate subsequent amendment to that Act (because it would deal only with one topic) and make it easier to repeal in due course.

8 The provisions of subpart 2 in Part 8 (Conservation of the peace) (*clauses 363 to 369*) are based on archaic provisions of the Summary Proceedings Act 1957. The interrelationship between this regime and the commonly used protection regimes such as those in the Domestic Violence Act is unclear. If the conservation of the peace provisions are used in practice as a type of "catch all" for undesirable behaviour not otherwise constituting an offence they should be replaced by a more targeted regime. In the opinion of the LAC, officials should be asked to report to the committee on the desirability and feasibility of replacing these provisions.

9 There are various provisions spread throughout the Bill dealing with the effect of failing to comply with certain procedures in the Bill for example, *clause 71* (which relates to the effect of a "protocol offence" tried in wrong court) and *clauses 377 and 393* which contain similar "no invalidity rules". These rules are largely carried over from existing legislation and are "piecework in nature".

10 The effect of failure to comply with the statutory rules governing criminal procedure frequently gives rise to difficulties, as it is often not clear whether the failure to comply results in a nullity, an error that is "curable" if it does not result in a miscarriage of justice, or is simply immaterial to the outcome of the case. Retrospective validating legislation has been required on at least 3 occasions in the

last 30 years to deal with technical deficiencies, in 1980 to cure the invalidity of trials held in unwarranted courts; in 1997 to cure the invalidity of convictions and sentences in relation to trials held in the District rather than the High Court; and in 2010 to cure the invalidity of convictions and sentences resulting from summary trials, when the offences in law were purely indictable.

11 This Bill represents a golden opportunity to rationalise "no invalidity" rules and apply them in a principled and consistent way. In general there is scope for reducing the opportunity for challenges in relation to breaches of the law which can be characterised as "purely technical" in character, while allowing the opportunity for retrial (perhaps on an application by the defendant where some real miscarriage of justice has occurred). In the opinion of the LAC, officials should be asked to report to the committee on the desirability and feasibility of rationalising rules about invalidity using this Bill as a vehicle for this reform.

Basic principles of New Zealand's legal and constitutional system

12 The Bill provides for a large proportion of criminal procedure to be set down by rules or regulations. Clause 382(2) lists a large number of aspects of criminal procedure about which the Rules Committee can make rules. The Select Committee should carefully consider whether it is appropriate for so many details to be left to the Rules Committee. A number of the provisions would be unworkable or are sparse without the "prescribed" requirements. For the new system to function, a great deal of further work is required of the Rules Committee

13 We understand that a lot of the arrangements in the Bill regarding the role of the Rules Committee in relation to rules and regulations, as distinct from the very extensive rules set out in primary legislation, have been "negotiated" with representatives of the judiciary. It must be acknowledged that judicial co-operation is essential if the Bill, when enacted, is to be effective. However, it is wise for the Select Committee to carefully consider whether the Bill strikes an appropriate balance between powers it vests in the judiciary and the Rules Committee on the one hand, and the matters reserved for Parliament through the use of specific statutory rules contained in the Bill itself, on the other hand. Also, it may generally be in the interests of users of the justice system (for example, both defendants and victims) for the key rules and procedures to be set out in primary legislation where they are likely to be subject to less frequent change than Rules of Court (which are frequently amended in the civil jurisdiction).

14 An example of something that should possibly be set out in primary legislation is the requirement to keep court records. Under s 353 of the Crimes Act and s 71 of the Summary proceedings Act there was a fair amount of detail set out in primary legislation. This is heavily reduced under clause 189, which provides for more detail to be prescribed in rules.

15 The Bill delegates what may be argued to be a legislative function to the Chief Justice and the Chief District Court Judge through the definition of "protocol offences".

Under *clause 68(1)* the Chief High Court Judge and the Chief District Court Judge must establish a protocol that identifies those category 3 offences in relation to which the level of trial court for any particular offence charged must be determined in accordance with clauses 69 and 70 (which involve a District Court Judge making a recommendation to a High Court Judge in accordance with specified criteria).

16 There is no requirement for the protocol to be publicly notified (eg, by notice in the *Gazette*). There are no criteria to guide the Chief Justice and the Chief District Court Judge in determining what offences should be categorised as a protocol offence. There is no requirement for consultation before the protocol is agreed to or revised. The LAC considers that it is appropriate for such matters to be dealt with in primary legislation.

17 It would usually be expected that a decision of this nature (which replaces the category of "middle band" offences currently set out in primary legislation (Part 1 of Schedule 1A of the District Courts Act 1947) would be specified in primary legislation or regulations. The current law allows offences to be added or removed from Schedule 1A by regulation. The committee should carefully consider whether determinations now to be included in a "protocol" involve matters of judgment of a policy kind that are more appropriate for the legislative or executive branch of government.

18 The Bill involves the delegation of a great deal of decision-making about the form of the law of criminal procedure to the Rules Committee (which is dominated by the judicial branch of government). At present in practice, most of the legislation governing the law of criminal procedure is set out either in primary legislation or in regulations made by the Governor-General by Order in Council under section 212 of the Summary Proceedings Act 1957.

19 Under the Bill a substantial body of law is reserved for the Rules Committee. In particular, the matters referred to in *clause 382(2)* (which lists the matters in respect of which rules may be made by the Rules Committee) include a number of matters currently provided for in primary legislation (eg, *clause 382(2)(b)* (which relates to authentication of documents), *clause 382(2)(f)* (prescribing procedures for service of documents), *clause 382(2)(g)* (prescribing who may serve documents), *clause 382(2)(i)* (prescribing time periods for steps to be taken in proceedings) *clause 382(2)(j)* (specifying time periods within which certain prosecutors may withdraw or amend charges), and *clause 382(2)(l)* (which relates to the manner in which proceedings are to be transferred between courts).

20 It is suggested that a careful scrutiny needs to be undertaken by the Select Committee of the reasons for, and appropriateness of, the transfer of law-making functions in relation to these matters from the legislature to the Rules Committee. It is important that the Rules Committee is not vested with law-making powers that may involve issues of public or political controversy otherwise Parliament may come into conflict with the judiciary (which is, in the long term, undesirable for the reputation of the judicial branch of Government).

21 As a general observation, legislation like this Bill (which will prescribe considerable detail in both primary legislation and secondary legislation) tends to be less durable than legislation contained either in whole or mainly in primary legislation or, alternatively, legislation contained mainly in secondary legislation. The reason for this is that there is potential for conflicting expectations among the designers of the legislation about precisely what will be covered in secondary legislation. Those designers then frequently discover after the Act is passed that what was wanted to be included in secondary legislation is inconsistent with, or duplicates provisions in, the primary legislation, or ought to have been included in primary legislation rather than left to secondary legislation. This is a particular risk when there has been no or inadequate time to test the workability of the regulation or rule-making powers by comparing draft rules or regulations with the primary legislation, and spotting gaps in the empowering provisions. This suggests that this Bill (once enacted) will require more frequent amendment than would otherwise be the case if there had been more time to work through the detail of the interface between the Bill and the associated secondary legislation. This is unfortunate. The LAC also notes that it would be useful for officials to advise the committee on the rationale that has been adopted in determining what matters should be dealt with in primary legislation and what matters in Rules of Court or regulations (including whether that rationale has been influenced by any cost/benefit analysis or other regulatory disciplines such as those used to produce Regulatory Impact Statements).

Relationship to existing law

22 An issue arises with provisions dealing with the presence or otherwise of the defendant in court at trial. There are very detailed rules dealing with the attendance or non attendance of the defendant or prosecutor at trial (see *clauses 124 to 134*). These provisions need to be read with and sit alongside, the provisions of the Courts (Remote Participation) Act 2010 (which sets out a new regime authorising the use of audio visual links). This new regime is expected to be used very frequently in relation to criminal trials. It would be helpful to prosecutors, defendants, Judges, and readers if the relevant provision of that Act (approximately 17 sections) were integrated with the provision in *clauses 124 to 134* of the Bill to ensure that all the relevant primary legislation about personal appearance, and appearances by means of technology, in criminal proceedings, is contained in one place. The LAC suggests that officials be asked by the committee to report on the desirability and feasibility of integrating the provisions of the Courts (Remote Participation) Act 2010 into this Bill.

23 The interrelationship between the rights of appeal conferred by this Bill and the criteria set out governing leave to appeal to the Supreme Court under the Supreme Court Act 2003 (sections 12 to 16) and the powers of that Court to deal with an appeal (sections 24 to 32) need further consideration. It would be desirable to further simplify the interface between this Bill and the Supreme Court Act 2003.

Delegation of legislative power

24 *Clause 399* provides a broad transitional regulation-making power which may be

exercised to insert supplementary provisions or displace provisions of the Bill for a period of 2 years. It is similar to a number of provisions that have recently been inserted in other statutes to facilitate the transition from one statutory regime to another (for example, the Land Transport Act 1998, the Local Electoral Act 2001, various Acts dealing with local government in Auckland and the Immigration Act 2010). This provision is arguably consistent with the Government response in 1995 to the report of the Regulations Review Committee in 1994 (which dealt with the question of transitional regulation-making powers).

25 It is, however, unusual to apply transitional regulation-making powers enabling primary legislation to be replaced or modified by regulations, in the context of criminal law or procedure. It would be helpful, if the clause is retained, to provide that the clause itself (as well as the regulations made under it) expires 2 years after its commencement.

26 *Clause 400* enables **permanent** amendments to primary legislation to be made for the purposes of making a limited range of consequential amendments. This clause is highly unusual and is not consistent with the Regulations Review Committee report of 1994 or the Government response to that report. On the other hand approximately half the Bill (Schedules 6 and 7) (pp 271 to 526) are devoted to consequential amendments of the kind, and it is unrealistic to expect that all amendments of the required kind can be detected (particularly in the case of legislation proceeding through Parliament (contemporaneously with this Bill).

27 An exception to the general rules regarding "Henry VIII" powers (powers to make regulations that amend statutes) appears justified in the particular case of this Bill having regard to the scale and size of the whole exercise, the difficulty in locating all required changes, and the relatively limited number of changes authorised by *clause 400*. It might however be appropriate to consider whether such changes ought to be validated and confirmed by Parliament in one of the yearly Subordinate Legislation (Confirmation and Validation) Acts. The LAC suggests that officials be asked to report to the committee on whether a change of this nature ought to be made.

Yours sincerely

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Legislation Advisory Committee