LEGISLATION ADVISORY COMMITTEE

Secretary: Eva Hartshorn-Sanders, Ministry of Justice, P O Box 180, Wellington
Email: Eva.Hartshorn-Sanders@justice.govt.nz

18 August 2006

Chair
Finance and Expenditure Select Committee
Parliament Buildings
WELLINGTON

TELECOMMUNICATIONS BILL

Introduction

1. This submission is from the Legislation Advisory Committee (LAC), which was established to provide advice to Government on good legislative practice, legislative proposals and public law issues. The Committee produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.

2. The following members of LAC wish to appear before the committee to speak to the submission.

   - Rt Hon Sir Geoffrey Palmer, President
   - Professor John Burrows, Law Faculty, University of Canterbury
   - Rt Hon Sir Ivor Richardson
   - Dr Warren Young

3. Arrangements for the hearing should be made with Sir Geoffrey at the Law Commission, 04 914 4815.

Summary

4. Our remit does not extend to policy issues and our comment here is restricted to two aspects concerning good legislative practice. These are the:

- Civil Penalty Regime (Clause 54 inserting new Part 4A);
- Regulation making powers in relation to the Complaints Conciliator (Clause 55 amending Section 157);
- Information Disclosure Requirements (Clause 13 inserting new Part 2A).

Consultation

5. LAC met with officials of the Ministry of Economic Development to discuss the draft bill prior to its introduction and as a result, we understand, some changes were made. After introduction we received a report from the Law Commission on compliance with the LAC Guidelines. The issues discussed here were also raised with officials at our first meeting.

Issues

A Civil Penalty Regime

6. Clause 54 of the Bill inserts a new Part 4A and introduces a civil penalty regime to replace the existing criminal offences in Parts 2 and 3 of the Telecommunications Act 2001, with pecuniary sanctions against various breaches specified in new section 156A. The existing criminal offences in Part 4 in relation to networks are retained and will operate separately.

7. If the Commission decides to take enforcement action under Part 4A, it has two options:
   - It may apply to the High Court for an order requiring the person to

pay a pecuniary penalty to the Crown; or

- It may serve a civil infringement notice on the person.

8. The "civil infringement notice" procedure is a novel departure from current law and practice in New Zealand, which only uses infringements in the criminal jurisdiction. The effect of the Bill is that an infringement notice mechanism is adopted but only to impose a civil penalty. While civil penalties can currently be imposed under various statutes, these penalties are not currently imposed by way of infringement notices.

9. Civil penalty regimes are a relatively new regulatory tool, although they have been gaining increasing currency. While the LAC accepts that they are a useful public policy tool in the regulatory context, it is concerned that they are presently expanding in an ad hoc way, without the benefit of any consistent and principled framework within which they should be established and implemented. The ad hoc nature of their development is reflected in the adoption in this Bill of the "civil infringement notice" procedure. Although the passage of this legislation obviously cannot await the development of a consistent and principled framework for civil penalty regimes, we recommend that such a framework be developed as a matter of urgency, and certainly before other legislation of this sort is passed. We understand that the Ministry of Justice is undertaking work to this end.

10. More fundamentally, we do not believe that the case for a civil penalty regime to deal with the breaches set out in this Bill has been made out. In our view, a civil penalty regime can only be justified when two criteria are met:

    - the penalty provided is intended to operate as a deterrent by imposing a cost on the business for breaching its regulatory framework that will outweigh the profits derived from the breach;
    - a civil regime offers demonstrable benefits, in terms of both principle and the achievement of the policy objectives of the regime, which

make it preferable to the normal processes of enforcement through the criminal law.

11. While we acknowledge that the Bill is dealing with breaches of a regulatory framework within a particular business context and that the regime may therefore satisfy the first criterion above, we do not believe that the overall public interest requires the adoption of a civil regime.

Why a criminal regime is preferable

Pecuniary penalty

12. The provision that allows a pecuniary penalty to be imposed by the High Court through a civil process is, in the LAC's view, fundamentally unsound for the following reasons:

    - The potential fines available where an application is made to the High Court for an order for enforcement are very high: $1,000,000 for a breach in relation to the accounting separation requirements in s69C, and $300,000 in any other case (new s156K(3)). A further penalty may be imposed by the High Court for a continuing breach, of $50,000 a day for a breach of the accounting separation requirements, and $10,000 for any other case (new s 156L).
    - In view of the level of these maximum penalties, it is inappropriate to apply the civil standard of proof (on the balance of probabilities). The criminal standard of proof (beyond reasonable doubt) is to be preferred.
    - The level of fines and the lower standard of proof are particularly problematic when, as is proposed here, the usual mental elements that would need to be proved in relation to criminal offences are not required, and the usual criminal defences are not available.

13. It is of particular concern to LAC that the very high penalties provided for can be imposed without any statement of whether the defendant needs to have intended the breach or otherwise been at fault. Arguably even the

"no fault" defence available to defendants in relation to public welfare regulatory offences in the criminal law would not be available.

14. Some of the breaches in new s 156A are adapted from sections of the Telecommunications Act 2001, but as they now appear in the Bill, any fault requirement has now been removed from the "offences". For example, the "offences" which now appear in new s 156A (d) (e) and (f) were previously dealt with in s 46 of the principal Act. Previously the failures now listed in sub-sections (d) and (e) were qualified by having to be "without reasonable excuse", and the provision of false or misleading information in (f) had to be done knowingly. These qualifiers have been removed in the new s 156 (d) (e) and (f). Similarly, clause 40 of the Bill repeals s 82 of the principal Act, which provided that it was an offence to fail to comply with s 81 (production of information to the Commission) without reasonable excuse, or to knowingly provide false or misleading information or documents under s 81. Those matters now appear in new s 156A (i) and (j), with the references to knowledge and reasonable excuse removed.

15. Similar provisions in the Commerce Act 1986 (such as s57ZJ of the Commerce Act 1986 relating to information disclosure in the electricity sector) require a knowing failure to comply (although under that Act these offences proceed by way of summary prosecution). Even if the breaches set out in s156A were dealt with in the civil regime, it is undesirable in our view for the section to be silent on state of mind and possible relevant defences. It should be clear from the legislation whether fault is required or excluded for a breach of s156A.

16. It is acknowledged that there is reference to culpability in the Bill: new s 156C requires the Commerce Commission, in deciding what enforcement action to take, to consider the culpability of the person who is alleged to have committed the breach, among other things. This addresses the question of culpability within what are in effect legislative prosecution guidelines. In the LAC's view this is unsatisfactory in two respects:

- It makes culpability a matter to be taken into account by the prosecution in the exercise of its discretion, rather than a matter which dictates the guilt or innocence of the person or entity against whom the enforcement action is taken.
- If the Commerce Commission fails to take into account culpability (or for that matter any of the other factors which it must take into account under the new section 156C), the only available remedy is judicial review.

Civil Infringement Notice

17. In relation to the proposed civil infringement notice procedure, the penalties are comparatively low and the arguments against dealing with them by way of a civil process are less compelling than those that apply to the proposed pecuniary penalty in the High Court. Nevertheless, we still think that there are problems with the proposed regime, which we would summarise as follows:
    - As we have noted above, a civil infringement notice is a new concept, and we need to be most cautious about creating new types of "penalty" outside the normal safeguards of the criminal process.
    - The infringement notices are to be issued by a body which is not a court, and which is to act as both the prosecutor and judge in its own cause.
    - There seems to be no reason why a criminal infringement process (with the safeguard of a summary criminal trial if guilt is denied) should not be used. The reasons for abandoning the normal processes of the criminal law, when there is a sanction to be imposed that amounts to a penalty, are not apparent. Expedient and efficient administrative processes, and ease of proof, are not good enough grounds.

B Daily penalties

18. The LAC guidelines suggest that continuing offences with daily penalties are generally undesirable, as they introduce the possibility of large, indeterminate fines (LAC Guidelines para 12.6.2). The Bill provides that proceedings may be commenced within 3 years after the matter giving rise to the breach was discovered or ought reasonably to have been discovered (new s 156K(5)).

19. Potentially it would be possible for a person to incur a very large fine if they inadvertently breached the provisions of the Act, and the breach was not discovered for some time. We recommend that the legislation specifies a cap for the "further penalty" provisions.

C Complaints Conciliator

20. Clause 55 of the Bill amends s 157 of the Act, which relates to regulations which may be made under the Act. The new section allows the use of regulations to establish a complaints resolution system for dealing with consumer complaints. The regulations may provide for the appointment of a Consumer Complaints Conciliator, and prescribe his or her functions, powers and duties, and the procedures and minimum standards to be followed in dealing with complaints.

21. The view of the Committee is that too much has been left to regulation here and that the statute should delimit the conciliator's powers in more detail. This is because the jurisdiction is novel and also because the conciliator can potentially have powers to make orders of an unspecified kind.

22. The only limits on the regulation making powers are that the statute specifies a maximum penalty of $12,000 (new s 157(cg)), and that the conciliator's powers must not include search or seizure, or any power to require information to be supplied or evidence to be given (new s 157(2)).

23. Beyond that the Conciliator could be authorised to do just about anything. For example, the section anticipates that the Conciliator can make orders for payment of damages or for remedial action (s 157(cg)). The right of review or right of appeal in relation to decisions by the Consumer Complaints Conciliator is also left to be settled by regulation (cl 55).

24. The appointment of a Consumer Complaints Conciliator is an option that may or may not be provided for by regulations. This uncertainty does not prevent the statute containing provisions to guide regulation making for a Conciliator, should this course be adopted. In light of the potential powers of the Conciliator and the potentially serious penalties or other consequences for those regulated, the Committee considers the policy intent and limits of those powers should be specified in legislation.

D. Information disclosure requirements

25. The information disclosure requirements in Part 2A of the Bill appear to be unduly draconian and give rise to the risk of unproductive litigation. The Commerce Commission is given a virtually free hand to determine what information is provided by Telecom under new s 69C and by other access providers under new s 69D, and to stipulate the time limits within which they must do so. This may result in huge and potentially indeterminate costs on them without any statutory avenue for challenging the demands that impose those costs.

26. In this respect the Bill simply fails to incorporate appropriate checks and balances into the range of statutory obligations it creates. The fact that it is so distinctly one-sided creates the real risk that, if the Commission's demands are viewed by those from whom the information is sought as grossly unreasonable, in terms of either the volume of information sought or the timeframe within which it is required, the process will be tied up in expensive and protracted judicial review challenges with unpredictable results.

Recommendations

27. The Committee therefore recommends that:

- A consistent and principled framework for the creation of civil penalty regimes be developed before further legislation introducing such regimes is enacted;
- The breaches contained in Part 4A are recast so that the Commerce Commission can choose between a summary criminal prosecution or a criminal infringement notice;
- The Bill clarifies what element of fault is required and what defences are available, and should at a minimum provide that absence of fault on the part of the defendant constitutes a defence;
- There is a cap on the maximum penalty in relation to continuing breaches with daily penalties;
- The Bill specifies the functions, powers and duties of the Complaints Conciliator, and the procedures and minimum standards to be followed in dealing with complaints.
- The information disclosure requirement in Part 2A be revised either to provide greater specificity as to the nature of the information that may be required and the time limits imposed, or alternatively to provide an avenue for the Commission's demands to be reviewed on the grounds of unreasonableness.