NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Courts Matters Bill

16/02/2018

Submission on the Courts Matters Bill

1. INTRODUCTION

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Courts Matters Bill (Bill).

1.2 The Law Society supports the objectives of the Bill to contribute towards the goal of a modern, efficient and effective courts system.

1.3 In this submission, the Law Society sets out comments on the Bill with a view to improving its clarity, workability, and to ensure there is consistency with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). (A list of recommendations is attached as Appendix A.)

1.4 The Law Society does not wish to be heard but if the committee or officials advising the committee would like to discuss any aspect of this submission, the Law Society would be pleased to do so.

2. COURTS SECURITY ACT 1999

2.1 A key function of the Bill is to amend the Courts Security Act 1999 (CS Act) to expand the powers of Court Security Officers (CSOs) to enable them to deal with low-level offending and disruptive behavior in a more efficient way. This includes expanding CSOs' power to deny entry to or to remove individuals from court areas, and to expand the powers and circumstances in which a CSO may detain individuals and seize items.

2.2 The Law Society supports the orderly operation of courts and tribunals,[1] and the Bill's clarification that a person may enter and remain in the court premises provided they comply with any directions or requirements legitimately imposed upon them by the CS Act.[2]

Extension of 'court' and 'courtroom' – clause 6

2.3 Clause 6 of the Bill proposes to extend the definitions of 'courtroom' and 'court' to include all parts of the building that are used for court-related activities, including the court cells and the footpath immediately outside the court entrance. The Law Society accepts that court users need to be able to safely enter or leave the premises and safely move around the building. However, the Law Society does not support extending CSOs' powers beyond the precincts of the court grounds and onto public property, namely "any footpath between the building and the road".[3]

1 Courts Matters Bill, clause 4.
2 Courts Matters Bill, clause 7.
3 Courts Matters Bill, clause 6(3).

2.4 As the Bill proposes an expanded list of specified offences[4] to include offences such as disorderly behavior, willful damage, graffiti and vandalism, there is the risk that a person acting in a legitimate capacity on the footpath (such as protesting) could be detained by a CSO. Although a CSO exercises traditional police powers under the CS Act, the Law Society considers the public area beyond the court precinct should properly fall to the Police to supervise, given their training, wider statutory powers and well established public role.

Power to deny entry to disruptive people – clause 11

2.5 Clause 11 of the Bill empowers a CSO to refuse a person access to, or direct a person to leave, court premises if the CSO believes on reasonable grounds that the person –

a) is harassing or intimidating another person; or

b) is causing a serious risk of violence within, or damage to, court premises; or

c) is significantly disrupting proceedings, the administration of a court, or the conduct of lawful activities on court premises.

2.6 Clause 11 makes no distinction between an individual attending court as a spectator, and an individual who has a duty to appear (ie, criminal defendants and family/civil law clients). This creates a tension between the right to deny entry in order to protect public safety and the orderly operation of the courts, and the right and obligation of those required to appear. There is an inconsistency between clause 11 (denial of entry or removal from court), and existing statutory provisions that state certain defendants must attend court unless specified exemptions apply (section 118 of the Criminal Procedure Act 2011) and that an inability to attend court due to being denied entry or removed is not a valid reason for not attending a hearing (section 22(2) of the CS Act).[5]

2.7 The Law Society is aware of occasions where a defendant has been denied entry and then a warrant to arrest for failing to appear and charges for failing to answer bail have followed. While these matters are eventually resolved, they tend to add cost, delay and complexity to the system. The orderly business of the courts is promoted by defendants, parties and witnesses being available and ready when their name is called.

2.8 The Law Society suggests an alternative approach should be considered, that would involve less of an intrusion into individual rights[6] than clause 11 while promoting court safety and the requirement for people to appear in court. The alternative approach is that disruptive spectators

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4 Courts Matters Bill, clause 5.

5 Clause 17 requires that a CSO must inform the person of the fact that denial of entry or removal from court does not itself give the person a reasonable excuse for failing to appear.

6 An individual's right to freely access the courts is an important principle and, on the face of it, clause 11 is inconsistent with section 18(1) of the NZBORA, which provides that everyone has the right to freedom of movement.

who are not required to be present should be removed, and a disruptive person who has a duty to appear could be detained for a short 'cooling off' period, in which the person can reflect on the consequences of non-appearance and any counsel instructed and present can potentially also be informed and intervene. If the person subsequently complies with a CSO's requests, he or she may be entitled to re-enter.[7]

Power to detain for specified offences – clauses 12 and 13

2.9 The CS Act currently permits a CSO to detain a person only if the CSO has reasonable grounds to believe that person has committed a specified offence. Clause 12 proposes a new power to detain in other defined circumstances, and includes circumstances where a CSO has reasonable grounds to believe that a person has committed any offence on court premises and has refused to give his or her full name, address, and date of birth on request (proposed new section 19A(1)(c)).

2.10 The proposed power to detain a person who has persisted in refusing to give their full name, address and date of birth, arises after a person commits *any* offence, not just those specified in the CS Act. This is broad reaching and appears contrary to the right provided by section 23(4) of the NZBORA to refrain from making any statement. The power to detain in these circumstances effectively forces a suspect to provide identifying details to a potential witness against them. The law limits the occasions on which people are obliged to provide identity details to the State. The Law Society does not consider powers beyond those currently provided for in section 12 of the CS Act to be necessary.

Power to pursue – clause 14

2.11 Clause 14 contains a new power to pursue a person who is to be detained or is otherwise in lawful custody on court premises. The Bill states a CSO may pursue that person "while he or she is within a short distance of the CSO". The phrase "short distance" is not defined in the Bill and arguably may extend to a wider geographic area than that intended. The Law Society does not support this proposed new power to pursue because it could take CSOs away from the court building. The Law Society considers these circumstances are more appropriately dealt with by the Police, given their training, statutory powers and well-established role.

Children and Young Persons

2.12 The Law Society is concerned about the application of the proposed courts security amendments, particularly the new clause 11 – 12 powers of detention, to children and young persons. Section 214 of the Oranga Tamariki Act 1989 places restrictions on enforcement officers' powers of arrest in relation to a child or young person. The Bill is inconsistent with that section. The Law Society recommends that safeguards (in the form of comparable provisions to section 214, Oranga Tamariki Act 1989) for children or young persons be added to the Bill in relation to the new power to detain.

[7] Courts Security Act 1999, s 22.

3. BAIL ACT 2000

4.1 The Bill proposes to amend the Bail Act 2000 in several ways, most notably to standardise the procedures that apply for appeals against the decision grant or decline bail (clause 87). The Law Society supports this aspect of the Bill.

4. CARE OF CHILDREN ACT 2004

5.1 The Bill contains various amendments to the Care of Children Act 2004.

Clause 93 – Section 47B amended (Mandatory statement and evidence in application)

5.2 Clause 93 contains a proposed new section 47B(3) for the Care of Children Act 2004 (COCA), which provides a number of exemptions from the requirement that an applicant for parenting orders has attended a parenting information programme. The exemptions include cases where the application relates to a child who is the subject of proceedings under Part 2 of the Children, Young Persons, and Their Families Act 1989 (the 1989 Act).[8]

5.3 That exemption in new section 47B(3)(d) does not provide for situations where Oranga Tamariki—Ministry for Children (the Ministry) has contacted an extended family member (for example a grandparent) and asked them to undertake the care of a child/young person. In many of these cases, proceedings will not have been brought under Part 2 of the 1989 Act and the Ministry routinely advises the family member to apply to the Family Court for parenting orders under the COCA. In these cases, there should also be an exemption from the requirement to attend parenting information programmes,[9] which are heavily focused on separating parents rather than the situation of a child or young person being in the care of a family member.

5.4 The Law Society accordingly recommends that clause 93 be amended so that the proposed new section 47B(3) includes an exemption from the requirement to complete a parenting information programme where the Ministry has agreed that another adult, including a family member of a child or young person, should take on the care of a child or young person and where proceedings under Part 2 of the Oranga Tamariki Act 1989 have not been brought.

Clause 94 – Section 49A amended (Interim parenting order where parent does not have day-to-day care for, or contact with, child)

5.5 Clause 94 amends section 49A COCA, to provide that if an interim parenting order is made on a without notice application, the other parent (who has neither the role of providing day-to-day care for nor contact with the child) may give notice to the court that they wish to be heard. At the hearing the court may replace the interim order with a further interim order or a final parenting

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8 Since the Courts Matters Bill was drafted, the title of the Children, Young Persons, and Their Families Act 1989 has changed, and is now the Oranga Tamariki Act 1989/Children's and Young People's Well-being Act 1989. The reference in proposed section 47B(3)(d) will need to be updated accordingly.

9 The exemption would only need to apply to on-notice applications, as there is no requirement for attendance at parenting information programmes in urgent/high risk cases (without notice applications).

order. However, the proposed new section 49A(4) does not allow for the interim order to be rescinded. Rule 34 of the Family Court Rules 2002 provides a mechanism for orders to be rescinded but it is not available for Part 2 (guardianship and care of children) COCA applications, including section 49A applications.[10] If rule 34 were available in relation to COCA without notice applications, it would provide a remedy where the application contained false allegations or insufficient or incomplete evidence was put forward.

5.6 The Law Society accordingly recommends that a new section 49A(4)(c) is inserted, enabling the court to rescind interim orders. Alternatively, rule 416A should be amended to enable rule 34 to apply to Part 2 COCA applications.

Clause 95 – Section 133 amended (Reports from other persons)

5.7 Clause 95 amends section 133(15), relating to disclosure of a court-appointed psychologist's report ("the report") and the report-writer's notes and other materials used in preparing the report ("the notes and materials").

5.8 New section 133(15)(a) enables the court to permit disclosure of the report where it is satisfied disclosure is required to assist a party to prepare for cross-examination – as is currently the case under existing section 133(15). Section 133(15) currently also allows disclosure of the notes and materials on the same basis. However, proposed new section 133(15)(b) would only allow access to the notes and materials where the court is satisfied that disclosure is required to assist a party to prepare for cross-examination *and* there are "exceptional circumstances".

5.9 The Law Society does not support this proposed amendment. It appears that a higher threshold for disclosure of the notes and materials relating to reports written by court-appointed psychologists is proposed because of a perception that parties attempt to use the current disclosure provision as a 'fishing expedition' and that this prolongs proceedings. It is not, however, the experience of the Law Society's Family Law Section that parties attempt to use the current provision as a 'fishing expedition'. It is a principle of natural justice to allow evidence to be appropriately tested in court, and that right is affirmed by section 27(1) of the New Zealand Bill of Rights Act 1990. In appropriate circumstances this may necessitate the disclosure of the report and related notes and materials where a judge is satisfied it is necessary to assist a party to prepare their cross-examination. A party cannot fairly and properly respond either to the issues raised or the conclusions reached by the psychologist without having the opportunity to review the psychologist's materials and notes in their totality.

5.10 For these reasons, it is the Law Society's view that section 133(15) should not be amended and should remain as currently worded.

[10] See Rule 416A(2), Family Court Rules 2002

5. AMENDMENTS TO PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988

6.1 Subpart 9 makes a number of amendments to the Protection of Personal and Property Rights Act 1988 (PPPRA). The Law Society considers that two additional amendments could also usefully be included in the Bill, to address some important matters that are not covered by the current legislation.

Without notice applications

6.2 The Law Society considers that the PPPRA should be amended to enable applications and orders to be made on a without notice basis under Part 1 and 3 where the circumstances require orders to be made on an urgent basis – for example, to avoid delays in transferring a person from hospital to specialist care. Currently the PPPRA only allows applications on notice. This creates delays that can cause a person to be without protection when it is urgently required.

6.3 The inability to apply without notice is problematic, given the reality of life for many of those who come within the jurisdiction of the Act. The process is that an application is filed, triaged by the registry, sent to counsel appointed under section 65 with the standard form of instructions, and then counsel reports to the court. It is after the consideration of counsel's report and recommendations that interim and/or temporary orders are made. There are delays inherent in that process, frequently compounded by a registry under time and resource pressures, which means a person can be without protection when it is urgently required.

6.4 The Law Society submits that there should be an ability in appropriate circumstances for applications to be brought and orders made on a without notice basis. If orders are made, a judge can direct counsel appointed under section 65 to report to the court within a two-week period on the continuing need, or otherwise, for the orders.

Section 11 – Order to administer property

6.5 The current threshold for orders to administer property (section 11(2)(a) PPPRA) means that a property manager must be appointed for property valued at greater than $5,000. There are costs associated with the property manager discharging his/her duties, which must be met by the property under management, and this has an adverse financial impact on the protected person where the asset pool is low. The $5,000 asset threshold appears now to be too low, and section 11(2)(a) of the Act could be amended to increase the threshold to $15,000. An increase to $15,000 would be consistent with the threshold for probate in regulation 4 of the Administration Prescribed Amounts Regulations 2009. Alternatively, section 11(2)(a) allows for the threshold amount to be prescribed by Order in Council, and this may be a preferable way to keep the asset threshold aligned with inflation.

6. CRIMINAL PROCEDURE (MENTALLY IMPAIRED PERSONS) ACT 2003

7.1 Subpart 5 of Part 4 of the Bill amends Subpart I of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (CPMIP Act).

7.2 The CPMIP Act includes the procedure for assessing a defendant's fitness to stand trial. Currently, a court can only decide whether a defendant is unfit to stand trial once it is satisfied, on the balance of probabilities, that the defendant caused the act or omission that forms the basis of the offence charged (section 9, CPMIP Act). The section 9 requirement is known as an 'evidential sufficiency' hearing.

7.3 The principal amendment in the Bill is to relocate the timing of the evidential sufficiency hearing, so that the procedure occurs *after* a finding of unfitness to stand trial. No amendment to the substance of the provision, or the procedure enabling it, is proposed. Practically, this means that the inquiries into a defendant's involvement in an offence would only occur when a court has determined a defendant is mentally impaired to the extent they are unfit to stand trial.

7.4 This amendment has been made in response to growing criticism of the location of the evidential sufficiency hearing *before* a determination of unfitness, contrary to practice in every other jurisdiction which provides for an equivalent procedure. (In Australia, the procedure is generally known as a 'special hearing'; in England and Wales, it is referred to as a 'trial of the facts'.)

7.5 In 2009 the Court of Appeal raised a concern about whether the section 9 evidential sufficiency hearing ought to come after a fitness to stand trial assessment had been made. In *R v Te Moni* [2009] NZCA 560 at [96], the Court of Appeal said:

> Our discussion in relation to s 9 reveals areas of concern (as did the earlier discussion in *McKay*). We raise for consideration whether the s 9 requirement ought to come after the fitness to stand trial assessment has been made, so that a s 9 hearing would occur only where there is to be no trial. It seems to us that the current provisions require an accused person whose fitness to stand trial is in doubt to undergo a form of trial as part of a process to determine whether he or she is fit to do so. If the s 9 hearing happened after the assessment of fitness to stand trial, the process could be tailored to deal with the reality that the accused person could not properly participate. And the possibility that a complainant in a sexual case would be required to give evidence twice would be avoided.

7.6 The Law Society supports the change in timing for the evidential sufficiency hearing that is implemented by the Bill, essentially for the reasons stated by the Court of Appeal. However, the Law Society is concerned that the Bill does not go further and address other, broader issues with evidential sufficiency hearings that also require reform.

7.7 In changing the location of the evidential sufficiency hearing, the Bill clearly signals an intention that the revised procedure should be identical in form and substance to the one that it replaces (the new wording is identical to the present section 9 in the relevant material respects). However, the current section 9 lacks sufficient detail to guide the courts as to the scope of the inquiry, the

nature and scope of evidence that may be admitted at such hearings, the fault elements to be proved, and the character of any final determination of non-responsibility.

7.8 These issues have attracted considerable attention in comparable jurisdictions overseas. Notably, a recent report of the England & Wales Law Commission has recommended major changes to the "trial of facts" procedure[11] and Australian case law has examined the issues arising in the context of "special hearings" in detail at an appellate level.[12] The Law Society considers the care with which these matters have been addressed overseas raises serious questions about the adequacy of the reforms proposed in the Bill.

7.9 Although the relocation of the evidential sufficiency hearing is a welcome reform, the Law Society recommends that further investigation should also be undertaken of the Australian and English models with a view to crafting a comprehensive legislative regime that is better fit for purpose in the modern human rights environment.

Kathryn Beck
President
16 February 2018

Appendix A: list of recommendations

11 See Law Commission *Unfitness to Plead Volume 1: Report*, Law Com No 364, January 2016.

12 See *Subramaniam v The Queen* (2004) 79 ALJR 116 (HCA) and *R v Ardler* [2004] ACTCA 4; (2004) 144 A Crim R 552.

Appendix A

Courts Matters Bill – NZLS recommendations

Rec #	Submission: paragraph #	Topic	Recommendation
Courts security			
1	2.3-2.4	Extension of CSO powers outside the court precinct: cl 6	The Law Society does not support extending CSOs' powers beyond the precincts of the court grounds and onto public property, namely "any footpath between the building and the road". The Law Society considers the public area beyond the court precinct should properly fall to the Police to supervise, given their training, wider statutory powers and well established public role.
2	2.5-2.8	Denial of entry: cl 11	The Law Society suggests an alternative approach [outlined at [2.8]] should be considered, that would involve less of an intrusion into individual rights than clause 11 while promoting court safety and the requirement for people to appear in court.
3	2.9-2.10	Detention – identification details: cll 12-13	The Law Society does not consider powers beyond those currently provided for in section 12 of the CS Act to be necessary, and recommends that proposed new section 19A(1)(c) be deleted.
4	2.15	Power to pursue: cl 14	The Law Society does not support the proposed power to pursue because it could take CSOs away from the court building, and recommends the committee seeks advice as to the extent to which CSOs should pursue absconding persons and whether pursuit outside a court building should more appropriately be undertaken by the Police.
5	2.16	Courts security amendments, esp. cll 11-12 detention	The Law Society is concerned about the application of the proposed courts security amendments, particularly the new clause 11 – 12 powers of detention, to children and young persons, and recommends that safeguards (in the form of comparable provisions to section 214, Oranga Tamariki Act 1989) for children or young persons be inserted in the Bill.
Care of Children Act 2004 amendments			
6	5.2-5.4	Mandatory attendance at Parenting Information Programme: cl 93	The Law Society recommends that clause 93 be amended so that the proposed new section 47B(3) includes an exemption from the requirement to complete a parenting information programme where the Ministry has agreed that another adult, including a family member of a child or young person, should take on the care of a child or young person and where

			proceedings under Part 2 of the Oranga Tamariki Act 1989 have not been brought.
7	5.5-5.6	Interim parenting orders: cl 94	The Law Society recommends that a new section 49A(4)(c) is inserted, enabling the court to rescind interim orders. Alternatively, rule 416A should be amended to enable rule 34 to apply to Part 2 COCA applications.
8	5.7-5.10	Disclosure of report / notes & materials: cl 95	For the reasons set out at [5.7]-[5.9], the Law Society recommends that section 133(15) is not amended and remains as currently worded.
Protection of Personal & Property Rights Act 1988 (PPPRA): **further amendments recommended by NZLS**			
9	6.2-6.4	Without notice applications	The Law Society considers that the PPPRA should be amended to enable applications and orders to be made on a without notice basis under Part 1 and 3 where the circumstances require orders to be made on an urgent basis.
10	6.5	Order to administer property	The Law Society considers that section 11(2)(a) PPPRA could be amended to increase the threshold to $15,000. Alternatively, section 11(2)(a) allows for the threshold amount to be prescribed by Order in Council, and this may be a preferable way to keep the asset threshold aligned with inflation.
Criminal Procedure (Mentally Impaired Persons) Act 2003: **further amendments recommended by NZLS**			
11	7.6-7.9	Evidential sufficiency hearings: Subpart 5, Part 4 of the Bill	The Law Society supports the Bill's proposed change in timing for the s 9 evidential sufficiency hearing. However, broader reform of s 9 is required (as outlined at [7.7]) and the Law Society recommends that further investigation should be undertaken of the Australian and English models with a view to crafting a comprehensive legislative regime that is better fit for purpose.