NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Racing Reform Bill

4/6/2019

Submission on the Racing Reform Bill 2019

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Racing Reform Bill (the bill).

1.2 The Law Society has no comment to make on the policy content of the bill but wishes to bring one issue of significant concern to the select committee's attention.

2 The penalty regime lacks sufficient independence from the enforcement agency

2.1 Clause 21 of the bill inserts a new Part 6AA (new sections 65AA – 65AX) into the Racing Act 2003, to provide a legal framework for the collection of offshore betting charges. That includes new penalty provisions (sections 65AS – 65AW). New section 65AS provides that the designated authority (the Department of Internal Affairs) may issue a penalty notice to an offshore betting operator in certain circumstances.

2.2 The Departmental Disclosure Statement (DDS) for the Bill records that the Ministry of Justice has recorded strong objections to these penalty provisions. There is however no response to these objections in the DDS, and nor are they responded to or even mentioned in the other materials accompanying the bill (the Regulatory Impact Statement and explanatory note to the bill).

2.3 The Ministry's concerns are set out here in full, for the committee's information:[1]

> "The Ministry of Justice (MoJ) [was] consulted during the development of the now discharged Racing Amendment Bill 2017, regarding the appropriate types of penalties for non-compliance with the offshore charges. **The MoJ advised in 2017 that the creation of criminal offences is not appropriate in these circumstances**. The Offshore Racing and Sports Betting RIS includes this advice from MoJ (paragraph 240).
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> MoJ was again consulted as this Bill reintroduces these penalties for offshore operators. MoJ's comment primarily relates to the offence proposal at clause 65AS which provides that when an offshore betting operator fails to pay or provides false information about payment, **DIA (or a 'designated authority') is empowered to make a finding of liability and hand down a penalty accordingly**.
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> **MoJ considers that regimes in which determinations of liability are made by non-judicial bodies are irregular and should be strongly discouraged. Judicial oversight provides protection against possible abuses, or the appearance of abuses, of regulators' powers. MoJ believes it important that the regulator, enforcer, and adjudicator are distinct from one another**. Proper thought must be given at each stage of enforcement as to how to proceed. When these decisions are taken by the same body, there is a real risk that these decisions can be 'collapsed' into one choice to (or not to) proceed. Judicial oversight protects against the regulator determining and handing down penalties unchecked. Regimes in which the regulator determines penalties can also create a perception that the regulator uses penalties to gather

[1] *Racing Reform Bill: Department Disclosure Statement, 10 May 2019*, at 3.4.1.

revenue. MoJ believes no justification has been provided for the irregular choice of penalty structure in this regime.

MoJ notes that DIA have provided for the ability for the court to review DIA or the designated authority's decision, which provides some judicial oversight if the party chooses to appeal.

MoJ have also commented that it has not been made clear how the extra-territorial nature of this offence, including its review mechanism, will operate in practice. Extra-territorial offences are unusual because they extend New Zealand's jurisdiction and create cross border enforcement difficulties. They therefore generally require clear justification and explanation as to how the offence will be given practical effect to if the offending occurs overseas.

For the reasons articulated above, MoJ has significant concerns about both the construction of the offence and penalty provisions in this Bill, and how they operate in practice." (emphasis added)

2.4 The Ministry's concerns reflect legislative best practice as set out in the Legislation Design and Advisory Committee's *Legislation Guidelines*:[2]

Pecuniary penalties should be imposed by a court

Generally, decisions about liability for pecuniary penalties and the amount of the penalty should be made by a court, and not the enforcement agency. Judicial imposition of the penalty provides open and transparent consideration of liability and any aggravating or mitigating circumstances, and the avoidance of allegations of a conflict of interest by the enforcement agency (if the enforcement agency is both the complainant and the judge).

In very limited circumstances, penalties could be imposed by an independent non-judicial body. Current examples are the quasi-judicial Rulings Panels established under the Gas Act 1992 and the Electricity Industry Act 2010. This model may be appropriate if specialist knowledge is absolutely essential to the decision on liability and penalty or if there is a particular need for a fast and efficient enforcement system. Such models should have a process for appeal and review. Consideration should also be given to requiring the chair or other members of the body to have legal expertise.

2.5 The Law Society shares the Ministry's concerns. Given the strength of the concerns expressed by the Ministry, the lack of a response and justification for including the penalty provisions as currently drafted is highly unsatisfactory.

2.6 The Law Society recommends that, at a minimum, the committee seek an explanation from officials why the provisions on pecuniary penalties have been included despite the Ministry's concerns. The Law Society also recommends that the Committee request advice from officials on how these provisions might be redrafted to address the Ministry's concerns and

[2] *Legislation Guidelines: 2018 edition* at 26.2, available at http://ldac.org.nz/guidelines/legislation-guidelines-2018-edition/.

bring the bill into line with the principles of best legislative practice as outlined in the extract from the *Legislation Guidelines* set out above.

3 The consultation timeframe is too short

3.1 The timeframe for scrutiny of this legislation also warrants comment. The bill is on a fast-track: it was introduced to the House only recently, on Tuesday 21 May 2019, had its first reading the following Tuesday, 28 May, the deadline for public submissions is Tuesday 4 June, and the committee is due to report back to the House by Tuesday 11 June.

3.2 This means that only four working days (excluding Monday 3 June, which is a public holiday) have been allowed for interested parties to comment on the bill.

3.3 Providing adequate time for the public to make submissions to select committees on bills (and to allow select committees more time to consider bills and report back to the House) is a cornerstone of good law-making. Allowing for proper public input facilitates better understanding and buy-in, as well as better quality (and more enduring) legislation. As this committee will know, select committees in New Zealand provide the scrutiny usually performed by a second parliamentary chamber and are therefore a crucial bastion of our democratic process. Unrealistic deadlines imposed on the select committee process seriously hinder the public's input into legislation and the proper scrutiny of bills.

3.4 The Law Society appreciates the need for a swift legislative response in relation to some bills, but in the present case it is not clear what the justification is for the very truncated consultation period.

4 Conclusion

4.1 The Law Society would appreciate the opportunity to speak to this submission in person.

Tiana Epati
President
4 June 2019