NEW ZEALAND LAW SOCIETY
NZLS EST 1869

Law Society Building, 26 Waring Taylor Street, Wellington,
DX SP20202, Wellington or PO Box 5041, Lambton Quay,
Wellington 6145, New Zealand

TEL +64 4 472 7837 • FAX +64 4 473 7909
E inquiries@lawsociety.org.nz
www.lawsociety.org.nz • my.lawsociety.org.nz

30 January 2017

Mr Raymond Huo
Chair, Justice Committee
Parliament Buildings
Wellington

By email: ju@parliament.govt.nz

Dear Mr Huo

Statutory review of the Returning Offenders (Management and Information) Act 2015

A Introduction

1. The New Zealand Law Society (**Law Society**) welcomes the opportunity to make a submission to the Justice Committee as part of its review of the Returning Offenders (Management and Information) Act 2015 (**Act**).

2. This submission addresses three topics:

   a. Part B addresses the nature of this statutory review. In summary, the Law Society notes that the review was provided for because the Act was passed under urgency and not subject to the usual select committee scrutiny. The review should therefore include public consultation, including calling for submissions and making the Ministry of Justice's report publicly available. Doing so is consistent with assurances given by the then Minister of Justice shortly after the Act's passage, the understanding of other members of the House when the Act was passed and the decision of the Justice and Electoral select committee in the last parliament.

   b. Part C raises concerns about the appropriateness of the regime established by the Act which the Law Society did not have the opportunity to submit on prior to its enactment (given the absence of a select committee process). In summary, the Law Society is concerned that the Act contravenes the prohibition in section 26 of the New Zealand Bill of Rights Act 1990 on retroactive penalties and double jeopardy. If the Committee is minded to recommend that the Act remain in force, it will need to be satisfied that these concerns can either be addressed or that the interference is demonstrably justified in a free and democratic society.

   c. Finally, Part D recommends a series of amendments (assuming that the Committee is minded to recommend that the Act remain in force).

B The nature of the review

3. In light of the history of the Act (discussed below), the Law Society submits that the Committee's review of the Act should be open to the public. In particular, the Law Society urges the Committee to invite public submissions and to make the Ministry of Justice's statutory review report dated 4 July 2017 (Ministry's report) publicly available.

4. The Act was introduced and passed under urgency on 17 November 2015 and came into force the following day. The Act was not referred to select committee and consequently there was no opportunity for select committee scrutiny and public input.

5. However, section 37 of the Act required a select committee determined by the Clerk to "review the operation of [the] Act and prepare a report on that review". The Returning Offenders (Management and Information) Bill (**Bill**) initially proposed that the review take place two years after the commencement of the Act but, after concerns were raised during the Bill's passage, this period was shortened to 18 months.

6. In the absence of select committee consideration of the Bill, it is particularly important that the review involves public consultation. Doing so is consistent with comments made at the time of the Bill's passage. In particular:

   a. In introducing the Bill, the responsible Minister the Hon Amy Adams described the review as a "key addition" to the government's proposals which had previously been announced.[1]

   b. Following the passage of the Act, the Law Society wrote to the Minister outlining various concerns it had with the Act. In response (see appendix A), the Minister noted that: [T]he Act includes provision for a review by a select committee of the way it has operated 18 months after its commencement. This will provide an opportunity for the Law Society **and others** to express their views."[2]

   c. Other members of the House also appear to have understood that the select committee review would include public consultation. For instance, during the passage of the Bill there was debate about the timing of the review. In discussing the timing of the review, the now Prime Minister clearly envisaged that there would be public consultation. She commented that: "Make [the select committee review] over the same time period that you would usually receive submissions on a bill, so nice and tight. **Receive submissions**, collect your data and evidence, review the operation of the legislation …".[3]

7. After 18 months had passed, the Law Society wrote to the Justice and Electoral select committee asking it to include public consultation as part of the review. On 27 July 2017, the clerk of the committee advised that the letter had been considered, and reported as follows (see Appendix B):[4]

> The committee discussed the review, including the request of NZLS that the committee allow NZLS and other organisations to make submissions to it. Given the very short time remaining before the dissolution of this Parliament, the committee agreed to hold the matter over to the 52nd Parliament, to allow for a new committee to consider opening the review to public submissions. The committee is not able to bind a future committee, but it **hopes that this decision will allow the next committee the time to receive and hear public submissions on the matter**.

8. The Law Society understands that to date, the Committee has not called for public submissions as part of the review and has not made the Ministry's report publicly available. The Law Society asks it to do so, given:

   a. the absence of select committee consideration of the Bill during its passage;

   b. the important constitutional matters and individual rights affected by the Act;

---

[1] Amy Adams, First Reading speech (17 November 2015).
[2] Emphasis added.
[3] Jacinda Ardern, speech during Committee of the whole House (17 November 2015) (emphasis added).
[4] Emphasis added.

c. the Minister's assurance in February 2016 that there would be an opportunity for public input into the statutory review;

d. the understanding of other members (including the current Prime Minister) that there would be public submissions; and

e. the previous committee's decision to hold this matter over for the current parliament to allow time to receive and hear public submissions.

9. The Law Society submits that in order to be meaningful and effective, the review needs to be based on relevant information including input from professionals involved in the operation of the Act and input from those subject to the Act. Academic commentators may also have valuable contributions to make. In that regard, the Law Society is aware of a note about the Act by Professor Kris Gledhill which is described as "an early commentary as to matters that should be examined as part of this review".[5] A copy of that note is attached as Appendix C. The Law Society encourages the Committee to consider the points raised by Professor Gledhill as part of its review.

10. Calling for public submissions will allow this type of input (from professionals, those subject to the Act and academics) into the review.

C Retroactive penalty and double jeopardy

11. The Law Society is concerned that the regime established by the Act contravenes the prohibition against retroactive penalties and double jeopardy set out in section 26 of the New Zealand Bill of Rights Act 1990.

12. The legislation may apply retroactively. The Act applies to convictions in respect of offending which occurred before the Act was passed.

13. Moreover, an order under the Act may have an element of double jeopardy or additional punishment. This is particularly true of special conditions which, as noted by the Attorney-General's report under section 7 of the New Zealand Bill of Rights Act 1990, may involve a "significant limitation on the freedoms of movement and residence and association".[6] An order under the Act may arise even if the overseas sentence has completely expired (including any parole period). For example, if someone received a 15-month sentence in Australia, served half of that and was then held in immigration detention for eight months and then returned to New Zealand, he or she would still be a returning prisoner and subject to a further six-month period of supervision in New Zealand. This amounts to an extension of the penalty imposed in Australia.

14. The imposition of additional punishment also creates an inconsistency of treatment between New Zealand offenders and overseas offenders. New Zealand offenders are not subject to similar release conditions in addition to their New Zealand sentence. They may have parole conditions but these are part of the New Zealand sentencing and prison regime. By contrast, overseas offenders are subject to release conditions (in addition to their overseas sentence and any parole conditions imposed overseas prior to their return to New Zealand).

15. If the Committee is minded to recommend that the Act remain in force, it will need to be satisfied that these concerns can either be addressed or that the interference with the right to be free of retroactive penalties and double jeopardy is demonstrably justified in a free and democratic society (as required by section 5 of the New Zealand Bill of Rights Act 1990).

---

[5] Kris Gledhill "Legislation Note: The Returning Offenders (Management and Information) Act 2015" [2016] NZCLR 19.

[6] *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* at [18].

D Recommended amendments

16. This section of the submission sets out a series of recommended amendments (assuming that the Committee is minded to recommend that the Act remain in force).

Use of standard and special conditions

17. The Law Society draws the Committee's attention to a significant concern about how the Act is operating in practice, namely that special conditions appear to be being imposed in all cases. Special conditions are more restrictive and appear to be imposed simply because the Department of Corrections cannot make a thorough determination of the returning offender's needs or risk level before they arrive in New Zealand, rather than on account of an individualised risk assessment of the offender. This is inconsistent with the Attorney-General's stated expectations when the Act was passed.

18. Under the Act, a returning prisoner is subject to standard release conditions.[7] The standard release conditions are essentially the standard release conditions set out in the Parole Act 2002 (which apply to prisoners released from New Zealand prisons).[8] In addition, the Act allows a court (on an application by Corrections) to impose special conditions (including on an interim basis).[9] The subject matter of special conditions is not limited but can include a requirement for residence, adherence to curfews and electronic monitoring.[10]

19. The Attorney-General's report concluded that imposition of the standard conditions was a justified limitation on the returning prisoner's freedom of movement and residence and their freedom of association.[11] The report recognised that special conditions "cause a more significant limitation on the freedoms of movement and residence and association".[12] The legislation as drafted contemplated that such special conditions would be imposed only if they were necessary to address special circumstances where there are increased risks posed by an individual prisoner. The Attorney considered that the limited circumstances in which these conditions would be imposed and the fact they could be imposed only by a court provide sufficient protection.

20. However, the Ministry's report reveals that the Act has not operated as intended. It discloses that for "almost every returning prisoner and … returning offender" Corrections has sought interim and final special conditions.[13]

21. It is inherently unlikely that every returning offender meets the special circumstances of the increased risk threshold contemplated by the legislation. The Ministry's report confirms that Corrections is not basing its apparently routine applications for special conditions on individualised assessments of increased risk posed by returning offenders. Rather, interim special conditions are obtained because Corrections considers that it cannot make a proper assessment of risk in sufficient time.[14] Final special conditions are routinely sought because "[i]n a wider sense" Corrections considers that they assist to manage the risk of reoffending and to promote reintegration.[15]

---

[7] Returning Offenders (Management and Information) Act 2015, s 24(1).
[8] Returning Offenders (Management and Information) Act, s 25 and Parole Act, s 14.
[9] Returning Offenders (Management and Information) Act, ss 26 and 27.
[10] Returning Offenders (Management and Information) Act, s 26(4).
[11] *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* at [12].
[12] At [18]
[13] Ministry of Justice "Statutory Review of the Returning Offenders (Management and Information) Act 2015" at [67].
[14] At [61].
[15] At [62].

22. As a result, the Act is operating in a way that is far more restrictive than was intended and outside of the Attorney-General's assessment of what would be a justified limitation on fundamental rights and freedoms.

23. It is also apparent from the Ministry's Report that the Attorney-General's assumption – that the court process of approving special conditions would act as a protective measure – may not have been borne out. The Ministry reports that the court has only once declined to impose an interim condition and has refused to impose a final special condition in only four cases.[16]

24. The Law Society submits that the small number of cases in which the court has declined to impose special conditions suggests problems in the way the Act is operating. A possible explanation for the problem is a lack of legal representation. The Ministry's report does not disclose how many prisoners were legally represented during the process. Those without representation are unlikely to have had the ability to challenge the imposition of the conditions, particularly given the isolation and inherent vulnerability of those subject to the Act.

25. The small number of cases in which conditions have been declined is likely also partially explained by the lack of clarity about the court's role, the appropriate standard of proof and the type of evidence Corrections is required to produce (points noted by the Ministry in its report).[17]

26. In order to address these problems, the Law Society recommends that:

    a. The criteria for the imposition of special conditions is amended so that special conditions may only be imposed where the court is satisfied, on the basis of individualised evidence relating to the returning prisoner in question, that the standard conditions are inadequate and special conditions are necessary to achieve the purposes of section 26(3) of the Act.

    b. The Committee obtain further information about the percentage of returning prisoners responding to applications for interim and final special conditions who are legally represented.

    c. If that information shows that a significant number of returning prisoners are not legally represented, the Act is amended so that it is mandatory for Corrections to notify returning prisoners that legal aid is available and how it can be accessed.

The position where the original conviction is overturned or quashed

27. When the Law Society wrote to the Minister in January 2016, it expressed concern that the Act does not provide for the discharge of conditions where a relevant conviction of a returning offender or returning prisoner is overturned by an appellate court or a pardon for the offence is granted. The Law Society recommended that if a conviction is overturned or a pardon granted, any status dependent on the conviction should also be rescinded. The Law Society recommends that this issue is addressed as part of the review.

28. In response to the Law Society's submission, the Minister suggested that the select committee review could consider whether an explicit provision was necessary to deal with this issue. However, she suggested that it may not be given that:

    a. section 28 allows the court to vary or discharge standard and special conditions; and

    b. section 22(5) provides that nothing in the Act precludes an offender from seeking judicial review, which would provide a mechanism for dealing with this issue.

29. Having considered these alternatives the Law Society submits that an explicit provision is warranted.

---

[16] At [67].
[17] At [67]–[69].

30. With respect to discharge under section 28, the court may only discharge standard release conditions on the application of a probation officer.[18] In addition, the court must not discharge a standard release condition with effect from a date that is less than six months after the date of service of a determination notice.[19] As a result, if an underlying conviction is quashed or a pardon granted, the person would be dependent on a probation officer making a discharge application and even then would remain subject to standard release conditions for the balance of the six-month term.

31. Although the ability to bring judicial review may provide a mechanism to set aside release conditions, the Law Society submits that it would be an unnecessarily onerous requirement for a person to have to commence judicial review proceedings in the High Court. It would also involve an unnecessary waste of Crown and judicial resources.

32. In addition to the two mechanisms referred to by the Minister, the Law Society notes that there is also the possibility of a returning prisoner applying under section 22 for an internal review of the Commissioner's determination that a person is a returning prisoner. However, this does not provide an adequate means of addressing the situation where a conviction is quashed or a pardon issued because any application for review must be made within 15 working days of service of the determination notice.[20] It is therefore not available if the conviction is quashed or a pardon issued after that time.

33. The Law Society recommends amending the Act to include a provision that if the underlying conviction is quashed or a pardon issued, all release conditions terminate and the determination notice is cancelled.

Challenging the validity of the overseas conviction

34. The Act is predicated on the assumption that the overseas conviction is valid and properly obtained and provides no mechanism for a person to challenge that. That is out of step with New Zealand's approach to extradition where the court is required to engage in an assessment of the evidence.[21] This has the potential to result in miscarriages of justice. For example, issues could arise if:

    a. Although the person has been convicted overseas, the evidence would be insufficient to support a conviction in New Zealand.

    b. The conviction was the result of trial procedure that would be inadequate in New Zealand and did not meet the procedural standards contained in section 25 of the New Zealand Bill of Rights Act 1990.

    c. The overseas provisions for a defence (eg self-defence) are stricter than those contained in New Zealand law and the person might have had a defence under the New Zealand provisions. The same issue might arise in relation to the provisions relating to a mental disorder and the person's fitness to stand trial (ie the person was found fit by the overseas system but would not have been found fit to stand trial in New Zealand).

    d. The person was under the New Zealand age of criminal responsibility at the time of the offending but old enough to be tried and convicted in the overseas jurisdiction.

35. The Law Society submits that the Act's current approach is out of step with New Zealand's approach to extradition and that these issues should form part of the select committee's review. It recommends that the Act be amended to allow, in appropriate cases, a mechanism for challenging the validity of the overseas conviction.

---

[18] Returning Offenders (Management and Information) Act, s 28(1)(b).
[19] Returning Offenders (Management and Information) Act, s 28(2).
[20] Returning Offenders (Management and Information) Act, s 22(2).
[21] See Extradition Act 1999, s 24.

E Conclusion

36. In conclusion, the Law Society submits that the Committee should:

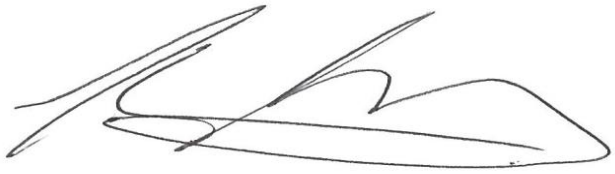
    a. Allow for public participation in the review, including calling for public submissions and making the Ministry of Justice's report publicly available.

    b. Satisfy itself that the retroactive penalty and double jeopardy concerns can be addressed or that the interference with these rights is demonstrably justified in a free and democratic society.

    c. Make the amendments recommended in Part D of this submission.

37. Although the Law Society does not seek to appear before the Committee in person, it is happy to do so if that would be of assistance to the Committee.

Yours sincerely



Kathryn Beck
President

Appendix A: Minister of Justice's letter to NZLS dated 9 February 2016

Appendix B: Justice and Electoral select committee clerk's email to NZLS dated 27 July 2017

Appendix C: Kris Gledhill, *Legislation Note: The Returning Offenders (Management and Information) Act 2015*, [2016] NZCLR 19