



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill

23/04/2015

SUBMISSION ON THE DRUG AND ALCOHOL TESTING OF COMMUNITY-BASED OFFENDERS AND BAILEES LEGISLATION BILL

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill (Bill). The Law Society's comments focus on how the alcohol and drug testing is intended to be implemented: who the appropriate decision-makers should be, and the consistency of parts of the Bill with current practice and with the New Zealand Bill of Rights Act 1990 (Bill of Rights).

Consistency with the New Zealand Bill of Rights Act

2. The rules that will govern the proposed alcohol and drug testing are yet to be made. This makes informed discussion of their consistency with the Bill of Rights impossible. The Law Society is also concerned that both the detail of the scheme, and the decisions over how and when to test, will be made by the same organisations.
3. The Bill has been subject to the usual Bill of Rights assessment required by section 7 of the Bill of Rights. The conclusion was that the rules will comply because there is a degree of Parliamentary oversight (the proposed rules being, once made, disallowable instruments that must be presented to the House when made) and because (as is correct) the proposed rule-making power must be read so as *not* to permit rules that are inconsistent with the Bill of Rights.
4. The Law Society has concerns about the delegation of rule-making powers on such a matter, where the impact upon rights in the Bill of Rights is readily apparent from the subject matter (monitoring, searching, and seizing bodily samples). While it is true that rights-inconsistent rules can be challenged and invalidated, such rules may be acted upon until they are challenged. Further, while it is acknowledged that the Bill sets out principles by which the rules must abide, there are other principles in play as well. For example:
 - (a) The Law Society would be concerned if the results of an alcohol bracelet were themselves used as evidence of a breach of a condition, instead of an alcohol bracelet being used as a trigger for immediately requiring an evidential sample in the usual way (which could then be challenged and tested). In the absence of draft rules, the Law Society is not able to progress submissions on this and other issues, as it is not known what is proposed.

- (b) A requirement to blow into an alcohol pre-screening device during a bail check is a relatively minor infringement of liberty. A requirement to provide a saliva sample or urine sample is a greater imposition, but still likely to be reasonable in most circumstances. However, the possibility of mandatory blood tests, including of those on bail, is highly likely to raise major concerns with respect to the prohibition on unreasonable search.
- (c) The Committee will be aware of the drug-testing regime that applies to serving prisoners. Section 124(5) of the Corrections Act explicitly prohibits mandatory blood tests, and this prohibition applies even when there is good cause to suspect drug use. The Bill's amendments to bail, sentencing and parole legislation specifically provide for blood testing. The Committee should be vigilant to ensure that this deviation from present practice is justified in the circumstances. If even prisoners cannot be compulsorily blood tested, can there be sufficient justification to require a compulsory blood test on release, or before conviction?

Subordinate legislation

- 5. The Law Society is also concerned at the proposal that any testing regime will be contained in rules. While the sort of detail involved is properly contained in subordinate legislation (controlled by specific empowering provisions that should limit what is permitted), the Law Society considers that details of the proposed testing regime should be contained in regulations rather than rules.
- 6. The prescriptive rules for the drug testing regime in prisons are contained in the Corrections Regulations. The Law Society considers that a similar approach should be taken in respect of the rules to be made under the each of the Bail Act, the Parole Act and the Sentencing Act.
- 7. Providing for the detail to be contained in regulations will not only place oversight at the appropriate level, but will also ensure the agencies involved will not be both the enforcers of the rules and the people writing the rules .
- 8. In any event the Law Society considers that those implementing the legislation will need to take particular care to ensure that the regime complies with the New Zealand Bill of Rights Act. A full Bill of Rights analysis should be undertaken, and required to be published, in respect of any rules or regulations implementing the regime.
- 9. The balance of this submission sets out further concerns of this type that must be taken into account when rules or regulations are made to implement the proposed regime.

Judicial Oversight of Continuous Monitoring

10. Concerns arise in particular with respect to the powers to require people to be subject to continuous monitoring. Across all groups, but bailees in particular, a requirement to wear a drug monitoring device or alcohol monitoring device is a major infringement of liberty. It will be possible to justify it in some circumstances, but certainly not in respect of all people who are subject to alcohol or drug abstinence conditions. There should be judicial oversight of decisions to impose continuous monitoring, and no person should be subject to a condition of continuous monitoring without judicial approval.
11. New sections 30AA(2) of the Bail Act, 16A(2) of the Parole Act and 18ZN(2) of the Sentencing Act will prohibit judicial involvement in the imposition of bail, sentence and release conditions requiring the wearing of drug monitoring devices or alcohol monitoring devices. While the Law Society appreciates that the resource implications identified in the Regulatory Impact Statement may give rise to a concern that judicially-mandated continuous monitoring may impose burdens beyond the level to which Police or Corrections are resourced, the solution is not to place sole discretion with the Police or Corrections and to forbid judicial involvement. Instead the law could prohibit the Parole Board or a judge considering sentence conditions or bail conditions from imposing continuous monitoring without the agreement of the appropriate agency (which is similar to what happens with electronically monitored bail, or home detention, which require a feasibility assessment).
12. This is particularly concerning with respect to the changes to the Bail Act. It is inherent that bail applies to individuals who have not been proven guilty of any offending.
13. A better approach might be to provide for standard conditions in the Bail Act that could be adopted as needed. A judge could have the option of imposing an abstinence condition, an abstinence condition with a breath testing requirement, or a urine test requirement, or an abstinence condition with the possibility of continuous testing if considered appropriate by Police. This staggered approach would enable a judge to tailor the regime as appropriate to the alleged offender and the alleged offending.
14. The approach is already adopted in practice in respect of curfew conditions. Sometimes a curfew will be imposed that prohibits a bailee being outside between the hours of, say 7pm and 7am. A judge can also impose a requirement for the bailee to present themselves at the door of their home when

requested by Police. This is a more stringent requirement, as it essentially allows Police to wake someone up (sometimes more than once) every night to come to the door, whereas a breach of a bare curfew is only committed if the person is actually found outside their curfew address.

Consistency with current approach to bail

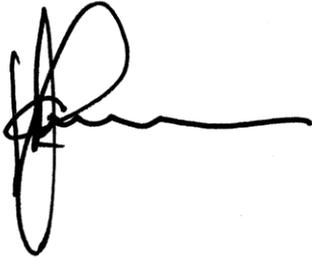
15. The Bill creates offences around refusing to allow authorised persons entry to a residence for various purposes related to continuous monitoring (new sections 36B of the Bail Act, 72A of the Parole Act, and 80ZR of the Sentencing Act). In respect of the parole and sentence conditions, this is consistent with the usual approach. However, with the exception of section 36A of the Bail Act,¹ this is inconsistent with the general approach to bail.
16. While it is an offence to breach parole conditions, and it is an offence to breach sentence conditions, it is not an offence to breach bail conditions. Instead, the consequence of a bail breach is that a person can be arrested, brought to Court and can have bail reconsidered or revoked.
17. In light of this standard approach, the Law Society recommends that new section 36B could be reconsidered. An alternative approach would be to provide that allowing residential access to authorised persons could be a condition of bail and a failure to comply with it could, like a breach of any other bail condition, require bail to be reconsidered or revoked.

Use of evidence in other proceedings

18. In new sections 30W of the Bail Act, 16D(b)(ii) of the Parole Act, and 80ZQ(b)(ii) of the Sentencing Act, the Bill proposes that the evidence derived from the testing regime will only be admissible in cases where the individual is charged with breach of the condition and not “for any other purpose”. This is an appropriate safeguard, consistent with the rules applying in similar areas. However, the Law Society recommends a minor change.
19. While the situation will be uncommon, a person should themselves be permitted to use the evidence or consent to its use in any proceeding to which it is relevant. For example, a person defending a child custody hearing in which they face an allegation of unfitness to parent because they are unable to stop drinking, should be permitted to show evidence from a continuous monitoring device that, in fact, they have stopped drinking. Similarly, a drug test showing a person has ingested a date rape drug should be able to be used in a prosecution against the person who allegedly drugged them.

¹ Section 36A differs from the ordinary approach as it also applies to persons other than a bailee.

20. The Law Society wishes to be heard.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a horizontal line that ends in a small hook.

Chris Moore
President
23 April 2015