



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Conservation (Infringement System) Bill

05/04/2018

CONSERVATION (INFRINGEMENT SYSTEM) BILL

1. INTRODUCTION

- 1.1. The New Zealand Law Society welcomes the opportunity to comment on the Conservation (Infringement System) Bill (Bill).
- 1.2. The Bill seeks to improve the effectiveness of conservation compliance and law enforcement by introducing an infringement system into conservation related legislation. Infringement notices are to be added to the current enforcement options of a warning/caution and prosecution, for criminal offending under eight principal Acts: the Conservation Act 1987, Marine Mammals Protection Act 1978, Marine Reserves Act 1971, National Parks Act 1980, Reserves Act 1977, Trade in Endangered Species Act 1989, Wild Animal Control Act 1977, and Wildlife Act 1953.
- 1.3. Infringement offence provisions play an important part of our justice system. They relieve the burden on the court system in respect of lower level repetitive offending while enabling a proportionate response to relatively minor breaches of the law.
- 1.4. This submission comments on:
 - 1.4.1. An important matter of principle arising under the Bill in its current form. Specifically, the Bill does not limit the consequences of infringement offending to a modest infringement fee. Rather the Bill provides for a combination of infringement fee and potential forfeiture of property, depending on whether a charging document is laid in relation to an infringement offence. The Society considers that it is inappropriate to provide for forfeiture of property to be a potential consequence of the commission of an infringement offence.
 - 1.4.2. Drafting issues relating to consistency of approach across the statute book in relation to the definitions of "infringement offence" and "infringement fee" and whether leave is required before commencing a proceeding in respect of an infringement offence by way of filing a charging document.
 - 1.4.3. Technical drafting suggestions to improve the clarity and workability of the amendments introduced by the Bill.
- 1.5. The Law Society does not seek to be heard in relation to its submission.

2. FORFEITURE OF PROPERTY AS A CONSEQUENCE OF INFRINGEMENT OFFENDING

- 2.1. The Law Society does not consider that forfeiture of property is an appropriate legal consequence of committing an infringement offence.
- 2.2. The Law Society recommends that the consequence of committing an infringement offence under the proposed amendments in the Bill should be limited to payment of an infringement fee of no more than \$1,000. It considers the forfeiture of property provisions are inconsistent with the fundamental principles underpinning infringement offence regimes and recommends they are removed from the Bill.

- 2.3. The proposed forfeiture of property arising out of infringement offences affects the proposed amendments to the Conservation Act 1987,¹ Marine Mammals Protection Act 1978,² Marine Reserves Act 1971,³ National Parks Act 1980,⁴ Reserves Act 1977,⁵ Trade in Endangered Species Act 1989,⁶ Wild Animal Control Act 1977⁷ and Wildlife Act 1953.⁸
- 2.4. Determining appropriate consequences for the commission of an infringement offence requires an understanding of the role of infringement offences in the criminal justice system.
- 2.5. Infringement offence schemes can provide an administratively efficient means of ensuring compliance with the law, relieving the burden on the courts, and ensuring accountability for low level offending. There are however important trade-offs inherent in the infringement concept.
- 2.6. The Ministry of Justice's Policy Framework for New Infringement Regimes⁹ sets out Cabinet's expectations for the design and operation of new infringement schemes. It states that an infringement system "involves both benefits and trade-offs for the prosecuting agency, the defendant and the justice system." The Policy Framework describes the benefits for the defendant, as "a discounted penalty, no possibility of conviction and, despite the diminution of their legal rights, avoids the time and cost involved in a court hearing."
- 2.7. The Policy Framework further provides:
- "The Government seeks to ensure that infringement schemes are fair, equitable, consistent and a proportionate means of ensuring compliance with the law. By imposing **a monetary penalty**, an infringement offence scheme can be a proportionate response for a relatively minor breach of the law.*
- ...
- An infringement scheme provides an administratively efficient method of encouraging compliance with the law by imposing **a set financial penalty** following relatively minor breaches of the law." (emphasis added).*
- 2.8. It is in this context that the orthodox approach is for the relevant primary legislation to set a maximum, but low level, infringement fee. This is often set at \$1,000 (being the value adopted in the Bill). It is not unusual for legislation to provide for regulations that can specify the relevant infringement fee for specified offences, for up to or less than the maximum fee specified in the primary legislation. This model is adopted in the Bill. In this regard, the Bill is

¹ Clause 7 of the Bill inserting new section 46A into the Conservation Act 1987.

² Clause 14 of the Bill. Inserting new section 27G(2) into the Marine Mammals Protection Act 1978.

³ Clause 20 of the Bill, inserting new section 18GA(2) of the Marine Reserves Act 1971.

⁴ Clause 26 of the Bill, inserting new section 61(4)(A) and 61(8) into the National Parks Act 1980.

⁵ Clause 35 of the Bill, inserting new section 95(3)(A) and 95(6AA) into the Reserves Act 1977.

⁶ Clause 47 of the Bill, inserting new section 51(1AA) into the Trade and Endangered Species Act 1989.

⁷ Clause 58 of the Bill, inserting new sections 39C and 39D into the Wild Animal Control Act 1977.

⁸ Clause 63 of the Bill, inserting new section 70(3)(a) into the Wildlife Act 1953.

⁹ Refer <https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>.

consistent with the Legislation Advisory Committee Guidelines on Creating Infringement Offences, which provide:¹⁰

"In general the penalty should not exceed \$1,000, although, in cases with significant financial incentives to non-compliance, a higher level of penalty may be justified to achieve the deterrent effect. Penalties of more than \$1,000 should be stated in primary legislation. In some cases infringement fees of less than \$1,000 may be set by delegated legislation."

- 2.9. The forfeiture provisions in the Bill provide that where proceedings in respect of specified infringement offences are commenced by way of a charging document under the Criminal Procedure Act, certain property may be forfeit.¹¹ This creates the unfortunate possibility of differing financial consequences applying to the *same level of infringement offending* based on whether an infringement notice is issued on the spot or whether the proceeding for an infringement offence is commenced by way of charging document.¹² Such an approach is not justified. The Law Society recommends the removal of the provisions in the Bill which enable forfeiture of property in certain circumstances where an infringement offence is committed.
- 2.10. If that recommendation is accepted and property forfeiture was removed as a sanction for the infringement offence regimes in the Bill, forfeiture would still be available under the principal Acts as a sanction for more serious offending. For example, for the offence of disturbing or damaging freshwater fish spawning grounds, the discretion whether a charge should be brought under the existing section 26ZJ *or* the (new) section 51F of the Conservation Act would determine whether forfeiture of property would be an available sanction (it would in the former, but not in the latter). In other words, the level of seriousness of the offending would determine which route was taken and therefore whether property may be forfeited.
- 2.11. The guidelines that are to be developed in relation to the exercise of the prosecutorial discretion for the new infringement regimes can be expected to take this consideration into account to guide decision-making on when infringement offence provisions should be used (or not).

3. Drafting issues relating to consistency of approach across the statute book.

- 3.1. This part of the submission addresses two issues of drafting consistency across the statute book.
- 3.2. The first relates to consistency in the definitions of infringement offence and infringement fee.
- 3.3. The second relates to whether the leave of a Judge or Registrar should be required before an infringement offence created by the Bill can be prosecuted by filing a charging document (there being a conflict of approach regarding leave between the Summary Proceedings Act 1957 and the Criminal Procedure Act 2011).

¹⁰ <http://www.ldac.org.nz/guidelines/lac-revised-guidelines/chapter-22/>.

¹¹ Refer footnotes 1-8.

¹² This statement applies to most of the new provisions in the Bill except clause 47 which amends the Trade and Endangered Species Act. The forfeiture provisions in clause 47 apply regardless of whether an infringement notice is issued or a charging document is laid.

Definitions of "infringement offence" and "Infringement fee"

- 3.4. Consistency of definitions across different but related pieces of legislation is desirable.
- 3.5. The Bill includes definitions of "infringement offence" and "infringement fee" in each of the principal Acts.¹³ The Law Society suggests below an approach to those definitions that is consistent with existing legislation and which avoids any interpretation issues that may otherwise arise from the slight difference in language.
- 3.6. Section 2 of the Summary Proceedings Act defines "infringement offence" as follows:
- "infringement offence** means any offence under any Act in respect of which a person may be issued with an infringement notice".
- 3.7. The definition in section 2 of the Summary Proceedings Act is also incorporated into the Criminal Procedure Act 2011.¹⁴
- 3.8. Section 2 of the Summary Proceedings Act defines an "infringement fee" as follows:
- "infringement fee**, in relation to an infringement offence, means the amount fixed as the infringement fee for the offence by or under the Act under which the offence is created".
- 3.9. The definitions of "infringement offence" and "infringement fee" in the Bill are phrased slightly differently to the Summary Proceedings Act definitions. The Summary Proceedings Act definitions are however broad enough to encompass the new definitions proposed in the Bill.
- 3.10. The Law Society recommends the clauses are amended so that the definitions of "infringement offence" and "infringement fee" reflect section 2 of the Summary Proceedings Act. The relevant clauses of the Bill would then read:
- infringement fee** has the meaning given to it in section 2 of the Summary Proceedings Act 1957;
- infringement offence** has the meaning given to it in section 2 of the Summary Proceedings Act 1957.

Consistency regarding commencement of infringement offences by charging document

- 3.11. There is an existing inconsistency between the provisions of the Summary Proceedings Act 1957 and the Criminal Procedure Act 2011 about how proceedings in respect of infringement offences may be commenced.
- 3.12. Under the Summary Proceedings Act, leave of a Judge or Registrar is required before a charging document can be filed in relation to an infringement offence. In contrast, no leave is required before a charging document for an infringement offence can be filed under the Criminal Procedure Act 2011. There is no principled reason for the difference in the regimes.

¹³ Refer clauses 4, 11, 17, 25, 33, 40, 51 and 61 of the Bill. These definitions are respectively "an offence in subpart [x] of Part [x] or an offence against regulations made under this Act that is declared by regulations to be an infringement offence" and "the infringement fee for the offence prescribed in regulations made under this Act."

¹⁴ Criminal Procedure Act 2011, s 5.

- 3.13. The Bill perpetuates the existing inconsistency in procedural requirements, by providing that in relation to the infringement offences created by the Bill, proceedings in respect of those offences can be commenced using the Criminal Procedure Act process (in other words, no leave would be required before a charging document could be filed).
- 3.14. While potentially outside the scope of the Bill, the Law Society's preference would be for the inconsistency in procedural requirements for filing a charging document relating to an infringement offence to be resolved. There is a potential opportunity to do so with this Bill.
- 3.15. The requirement for leave is a traditional one, no longer required by the Criminal Procedure Act and inconsistent with proceedings aimed at the lowest level of offending, for which there is no jeopardy of conviction for defendants.¹⁵ Leave of the District Court involves additional work for court staff, and therefore carries an added cost to the court system. Removing the requirement for leave to file charging documents for infringement offences serves the Bill's objective by removing unnecessary costs to the court system.
- 3.16. Should the Committee decide that the Bill provides an opportunity to remedy an existing inconsistency on the statute book, the Law Society recommends including a provision in the Bill amending section 21 of the Summary Proceedings Act, so that it is consistent with the provisions of section 14 of the Criminal Proceedings Act.

4. TECHNICAL DRAFTING SUGGESTIONS

- 4.1. This part of the Law Society's submission comments on provisions in the Bill relating to:
 - 4.1.1. providing evidence of name, address and date of birth;
 - 4.1.2. the postal service provisions;
 - 4.1.3. clause 31 of the Bill, and the proposed section 71D(2) of the National Parks Act, which prohibits possession of "any chainsaw or any firearm, trap, net, or other similar object in a park."

Evidence of name, residential address and date of birth

- 4.2. The Bill¹⁶ proposes enhanced powers for relevant officers to require people to state their full name, residential address and date of birth, where the officer believes on reasonable grounds that a person has committed or is committing an offence against the relevant Act or Regulations. If required to state their full name, residential address and date of birth, the person is also required to provide evidence of the same. These new powers extend beyond the new infringement offences created by the Bill, to all offences under the relevant principal Acts.
- 4.3. There are limited means of proving identity, address and date of birth. For example, a person may produce an official letter, bank statement or similar document to prove their address. If

¹⁵ Criminal Procedure Act 2011, s 375.

¹⁶ Clause 5, proposing new s40A(2)(b) CA; clause 29, proposing new s64A NPA; clause 34, proposing new s93 RA; clause 41, proposing new s38AA(2)(b) TESA; and clause 55, proposing s34AA WACA.

they have one, a driver's license or other photographic identification card may be used to prove name and/or date of birth.

- 4.4. The Committee may wish to seek further information from officials as to whether the requirement to provide evidence of name, address and date of birth is workable in the context of activities in remote outdoor locations, such as those contemplated under the Bill.

Service of Infringement Notices by Post

- 4.5. The Bill proposes an option of postal "service" of infringement notices. For example, clause 9 (section 51X of the Conservation Act) authorising an officer to issue an infringement notice, and section 51X(2) – (3) state that:

*"The warranted officer may deliver the infringement notice (or a copy of it) in person to the person alleged to have committed an infringement offence **or send the notice by post addressed to that person's last known place of residence or business.***

*An infringement notice (or a copy of it) sent by post to a person under subsection (2) **is to be treated as having been served on that person when it was posted.**" [emphasis added]*

- 4.6. There are two practical considerations that arise in relation to the provisions in the Bill that infringement notices are deemed to have been served upon being sent to a person's "last known place of residence or business".
 - 4.6.1. The first is that postal delivery in New Zealand is now restricted to only a few days a week, so there will likely be a delay in the person receiving the notice.
 - 4.6.2. The second is that some people are transient and may never receive an infringement notice posted to their last-known residential or business address.
- 4.7. This brings into question both the workability and fairness of permitting service by post. This appears a particular concern with the Trade in Endangered Species Act and clause 45 (new section 50G), which proposes a truncated procedure for "border infringement offences". For Trade in Endangered Species Act border offending, where tourists or visitors are likely to be involved, the Law Society recommends that consideration be given to restricting service to personal service only (i.e., no postal or quasi-postal option).
- 4.8. The Committee may wish to obtain advice from officials on other practical means of achieving prompt and reliable service (such as "signature required" courier to the last known residential address), rather than the deemed postal service proposed in the Bill which apply broadly to offences created under the Bill.

National Parks Act 1980

- 4.9. Clause 31 of the Bill (proposed new section 71D(2) of the National Parks Act) prohibits possession of "*any chainsaw or any firearm, trap, net, or other similar object in a park.*"
- 4.10. The phrase "or other similar object" is too broad. On its face, it is not clear whether proposed section 71D(2) means:
 - 4.10.1. similar objects to those specified individually, or

4.10.2. objects “similar to” some envisaged *class or category* of objects that includes chainsaws, firearms, traps and nets.

4.11. The intention is presumably the former. It is difficult to envisage any single class or category of objects that would cover chainsaws, firearms, traps and nets.

4.12. For clarity, the Law Society recommends that proposed section 71D(2) be amended to read:

A person must not, without being authorised by the Minister, be in possession of any of the following in a park:

- (a) a chainsaw or similar object, or
- (b) a firearm or similar object, or
- (c) a trap or similar object, or
- (d) a net or similar object.

A handwritten signature in black ink, appearing to read 'Tiana Epati', with a horizontal line at the end.

Tiana Epati
Vice President
5 April 2018