

Policing (Police Vetting) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui
Ture o Aotearoa

16 December 2024

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Policing (Police Vetting) Amendment Bill (**Bill**), which seeks to amend the Policing Act 2008 in order to provide a statutory framework for the Police Vetting Service (**PVS**).
- 1.2 This submission has been prepared with input from the Law Society's Public Law Committee.¹
- 1.3 The Law Society does not wish to be heard in relation to this submission.

2 General comments

- 2.1 The Law Society supports the creation of a statutory framework for the PVS, as well as the provisions in the Bill which expressly identify the types of information which could be included in a Police vet.² We believe these will help improve transparency of the PVS, and enable a more consistent approach to be taken when considering and responding to vetting requests.

3 Requirement to notify vetting subject

- 3.1 It would be preferable to include a provision in the Bill which requires the PVS to notify the vetting subject³ about:
 - (a) Information which will be disclosed to the requestor; and
 - (b) The relevant statutory provisions which empower the PVS to provide that information to the requestor.
- 3.2 We acknowledge the PVS' *Vetting Service Request & Consent Form*,⁴ which is currently used to obtain the vetting subject's consent to disclose information, already contains this information. However, it would be preferable to include a notification requirement in the legislation itself, so this remains a statutory requirement even if this information is removed from the consent form.

4 Provision of non-conviction information

- 4.1 New sections 54J(7)(b) and (k) in clause 5 of the Bill expressly provide that a Police vet may include a summary of 'any charges ever filed against the vetting subject that did not result in conviction', and 'any investigations conducted by the Police in which the vetting

¹ More information about this committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-law-committee/>.

² In new section 54J in clause 5 of the Bill.

³ New section 54A in clause 5 of the Bill defines 'vetting subject' as an individual in respect of whom a vetting request is made.

⁴ At page 4. A copy of this form is available here: <https://www.police.govt.nz/sites/default/files/publications/pvs-vetting-request-and-consent-form.pdf>.

subject was suspected of committing an offence but which did not result in any charges filed against the vetting subject' (**non-conviction information**).⁵

- 4.2 Use of or reliance on non-conviction information may, in some circumstances, engage section 25(c) of the New Zealand Bill of Rights Act 1990 (for example, where a hiring employer forms an adverse view about an individual because of non-conviction information relating to that individual, and decides against recruiting them). The Law Society therefore supports codifying the processes for requesting and providing such information in legislation (even though the existing vetting process already allows for the provision of such non-conviction information).⁶
- 4.3 However, in the case of information about an individual having been a suspect, where no charges were laid, the risk of unwarranted prejudice is even greater. The fact that an individual was a suspect, where there is no test other than 'relevance' under new section 54J(1)(b), means that an individual long discounted as a suspect, risks having such information included in a Police vet. In such cases, it is likely there is insufficient evidence to suggest they committed the offence, and there are a wide range of reasons to why a person may have been identified as a suspect at some point in time.
- 4.4 Further, it is not clear whether Police records are held in such a way as to readily identify if a crime for which an individual was noted as a suspect, has subsequently resulted in the identification and/or conviction of the actual offender.
- 4.5 Accordingly, for the type of information captured by new section 54J(7)(k), the Select Committee may wish to consider:
- (a) Applying a higher threshold of 'substantially relevant', as is the case for subsections (3) and (4); and
 - (b) Requiring, in the legislation, that Police take all necessary steps to ensure that information is not included where another individual has since been charged or identified as a primary suspect, whether or not a conviction has been secured.
- 4.6 We also note the term 'substantially relevant' is not defined in the Bill, the Policing Act, or in any other legislation. The Select Committee could consider replacing this term with 'directly relevant', which has been used in various other enactments.⁷

⁵ The Departmental Disclosure Statement for the Bill states, at page 7, that non-conviction information can include 'any information Police holds about the vetting subject, such as active or past charges, warrants, infringement offences, demerits, overseas conviction, any family violence incidents the person may have been involved in, investigations that did not result in charges, interactions the vetting subject has had with Police, or information about the home environment of the vetting subject'.

⁶ See: <https://www.police.govt.nz/advice-services/businesses-and-organisations/nz-police-vetting-service>. The High Court has also referred to the scope of a police vet as including non-conviction information: see *Parker v Police* [2016] NZHC 2524 at [22], and *Dorn v Police* [2024] NZHC 2305 at [47].

⁷ For example, ss 44AA and 106H of the Evidence Act 2006, s 112Q of the Health Act 1956, and s 49(2)(c) of the Disputes Tribunal Act 1988.

5 Immunity from liability

The scope of immunity

- 5.1 New section 54N in clause 5 of the Bill grants the Commissioner of Police and Police employees immunity from liability in civil or criminal proceedings for good-faith actions or omissions. This wide immunity is significant in light of the breadth of information that may be disclosed under this proposed statutory regime – arguably, immunity from suit could potentially encourage a culture of over-inclusion, and result in more fulsome disclosure than necessary in each case. However, the Bill maintains Court oversight of the PVS through judicial review, and strikes an appropriate balance between efficiency in the PVS, the ability to disclose relevant information, and judicial oversight.

Meaning of ‘civil proceeding’

- 5.2 The Crown Proceedings Act 1950, which applies to actions against the Police, defines ‘civil proceedings’ as ‘any proceedings in any court other than criminal proceedings; but does not include proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for review under the Judicial Review Procedure Act 2016 to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari’.⁸
- 5.3 The select committee could consider amending the Bill to provide that this definition of ‘civil proceedings’ applies to new section 54N. While such an amendment is not required to preserve the Court’s ambit of judicial review, it would help improve the clarity and certainty of the Bill by acknowledging that it is possible to apply for judicial review of a decision to disclose information under this legislation.

6 Complaints relating to Police vets

- 6.1 The Bill does not provide for a separate mechanism for considering and responding to complaints relating to Police vets, and the Departmental Disclosure Statement (**DDS**) for the Bill states that vetting subjects will ‘continue to have access to the right to make a complaint to Police, the Privacy Commissioner, or the Independent Police Conduct Authority, if they consider Police’s actions in releasing a Police vet were not appropriate’.⁹
- 6.2 Given the breadth of information which can be included in a Police vet, the potential risks of unwarranted prejudice to the vetting subject arising from the disclosure of information (as discussed at [4.3] and [4.4] above), and the risks of over-disclosure arising from the indemnity provisions in the Bill (as discussed at [5.1] above), it would be useful to include a provision in the Bill which expressly refers to the vetting subject’s right to make a complaint about the information included in a Police vet. Such a provision could:

⁸ Section 2(1).

⁹ At page 10.

- (a) Identify the relevant agencies which can receive and investigate complaints (i.e., the Police, the Privacy Commissioner, and the Independent Police Conduct Authority, as noted in the DDS); and
- (b) Include cross-references to relevant provisions in other enactments which provide for those complaints mechanisms.

A handwritten signature in black ink, appearing to read 'Jesse Savage', is positioned above the typed name. The signature is fluid and cursive.

Jesse Savage
Vice-President