NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Terrorism Suppression (Control Orders) Bill

13/11/2019

Submission on the Terrorism Suppression (Control Orders) Bill 2019

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Terrorism Suppression (Control Orders) Bill (the Bill).

1.2 The Bill allows the Police to apply for, and the High Court to issue, control orders which impose various restrictions on individuals coming into New Zealand, on the basis that they have engaged in terrorism-related activities overseas.

1.3 If imposed, some proposed conditions would significantly restrict the freedoms of individuals against whom orders are sought. No conviction is necessary to secure a control order; the orders are available where the Police establish to the civil standard of proof that the respondent has engaged in terrorism-related activities.

1.4 The Law Society acknowledges the seriousness of the matters underlying the Bill and the need to deal expeditiously with threats to New Zealand's national security. That said, the Bill in its current form does not reflect the traditional approach of the New Zealand legislature to dealing with the deprivation of individuals' rights.

1.5 The Law Society is fundamentally concerned that the Bill severely restricts a person's rights and freedoms on the basis that they have engaged in criminal activities, without providing for the protections of the criminal justice system in relation to establishing that supposition.

2 Executive Summary

2.1 The Law Society's key submissions are:

2.1.1 The expansive scope of the people to whom control orders could apply under the Bill raise significant human rights concerns.

2.1.2 The control orders should be brought within New Zealand's criminal law, so that the protections of the criminal justice system continue to apply where the state seeks to significantly restrict an individual's liberty.

2.1.3 The potential for control orders to include conditions of electronic monitoring falls within the meaning of 'detention' in section 22 of the New Zealand Bill of Rights Act 1990 (NZBORA), which affirms the right to be free from arbitrary detention.

2.1.4 In practical terms, if the control orders remain civil, there is a real risk that the orders will be applied to unrepresented litigants.

2.1.5 Applications for control orders should be brought by the Solicitor-General, who is (broadly speaking) in charge of all prosecutions, rather than the Commissioner of Police, who is in charge of investigating criminal offending.

2.1.6 Applications without notice should only be made where there is extreme urgency.

2.1.7 The conditions of the control orders should be set out exhaustively in the Act, and not left to the discretion of the courts.

2.1.8 The Bill does not provide sufficient protections to deal with the risk of proceeding against an individual on the basis of non-disclosable information.

2.1.9 The criminal penalty for breach of a control order should be brought into line with the penalties for breach of similar orders in the Sentencing Act 2002.

2.1.10 Given the truncated legislative process, which appears as if it might possibly be in response to a specific (and time-limited) threat, consideration should be given to a sunset clause so that the legislation can be reconsidered at a future date with the necessary scrutiny.

3 Summary of the Bill

3.1 The Bill introduces a scheme for control orders which may impose various restrictions on individuals coming into New Zealand who are suspected of terrorism-related activities overseas.

3.2 Key aspects of the Bill are as follows:

3.2.1 Control orders, which if renewed may last up to six years, may only be made against "*relevant persons*", which are defined as persons coming (or having come) to New Zealand, who before their arrival engaged in "*terrorism-related activities*" in a foreign country.

3.2.2 "*Engages in terrorism-related activities*" is extended through clause 7(2) and (3) beyond the carrying out of terrorism — to planning, making a credible-threat, attempting, facilitating and supporting terrorism-related activities. The clause expressly states that these activities do not require that any terrorism was actually carried out.

3.2.3 Terrorism is defined by reference to section 5(1) of the Terrorism Suppression Act 2002. Section 25 of that Act extends the definition of "*terrorism act*" in similar wording to clause 7(2) and (3) of the Bill. However, unlike the Act, the Bill extends to:

3.2.3.1 people who travel or attempt to travel to another country to engage in such acts (clause 6(1)(b));

3.2.3.2 accessories after the fact (clause 7(1)(a) and the definition in clause (5) of accessory after the fact).

3.2.3.3 an "*other party*", which is defined to include aiding, abetting, inciting, counselling or procuring terrorism (clauses 5, 7(1) and (2)(a)-(c));

3.2.3.4 a person who has been prosecuted, but not convicted, for an "*offence that is or includes those activities*" in another country (clause 6(3));

3.2.3.5 people who have been deported from, had a visa cancelled by, or had any nationality, citizenship or passport revoked for "*reasons that are or include a security risk related to conduct that is or includes*" such activities or have been subject to any control or similar supervisory regime in any other country for such reason (clause 6(1)(d)-(e)); and

3.2.3.6 supporting terrorism-related activities (clause 7(1)(b) and section 25(2)).

3.2.4 The definition of facilitation is also broader in the Bill than in the 2002 Act, which requires that "*the facilitator knows that a terrorist act is facilitated*"

(section 25(2)). The Bill, by contrast, merely requires that "*the facilitator … ought reasonably to know, that terrorism is facilitated*".

3.2.5 Section 6A of the 2002 Act makes a "*terrorism act*" a criminal offence but, in section 14 of the Act, the offences which have extra-territorial effect are more circumscribed. As such, overseas terrorism-related activity only constitutes criminal offending under New Zealand law if the relevant person is a New Zealander (section 15), or the offending is within sections 7 – 13 (bombing, financing, dealing with property, recruitment, participating in a terrorist organisation), or sections 13B – 13E (offences related to plastic explosives and nuclear materials). By contrast, the extra-territorial reach of the Bill is much broader because the Bill captures a person who "*engaged in terrorism-related activities in a foreign country*" and makes that person subject to the control order regime (clause 6(1)).

3.2.6 There is a non-exhaustive list of possible conditions of a control order that the Court may impose. However, the Court:

3.2.6.1 must make a control order only if it is satisfied that the respondent "*poses a risk of engaging in terrorism-related activities in a country*";

3.2.6.2 must only impose conditions that are either "*necessary and appropriate … to protect the public from terrorism [and] to prevent engagement in terrorism-related activities in a country*", or "*necessary and appropriate … to support the relevant person's reintegration into New Zealand or rehabilitation*"; and

3.2.6.3 the Court must consider how the conditions in the control order will affect the respondent's "*financial, health, and other personal circumstances*" and "*any other matters the court thinks relevant (for example, whether requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990)*".

3.3 Below, the Law Society sets out its central concerns in relation to the Bill.

4 The truncated legislative process and the introduction of a sunset clause

4.1 The Law Society is concerned at the truncated legislative process that has been applied to the Bill. The Bill was introduced on 17 October 2019 and had its first reading on 24 October. At that point the Minister of Justice indicated that the Committee would be required to report back early. However, no motion was put to the House and it was not until 5 November that a motion was agreed.

4.2 On 6 November, the deadline for submissions was then made publicly available, with submissions to be filed by 10 November. That has left less than a week for the public to prepare and file submissions. The Law Society has commented on similar recent decisions to truncate the legislative process.[1] The Law Society continues to be concerned that the quality of New Zealand legislation is being compromised through insufficient scrutiny and lack of adequate time for public input.

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[1] See the Law Society's submissions on the Misuse of Drugs Amendment Bill, Racing Reform Bill, Education (Pastoral Care) Amendment Bill found here: https://www.lawsociety.org.nz/news-and-communications/law-reform-submissions/submissions-on-bills

4.3 The control order regime allows for the imposition of sanctions that are equivalent in their effect to criminal penalties — but without any of the protections afforded by the criminal justice system, including the presumption of innocence and the requirement for offending to be established by evidence beyond reasonable doubt.

4.4 In doing so, the Bill trespasses on individual rights protected under both the NZBORA and the International Covenant on Civil and Political Rights. While limitations on those rights may be justified by legitimate national security interests, the adoption of such a regime warrants the most careful, cautious and dispassionate consideration.

4.5 It seems to the Law Society that the very broad and unexplained additions to the scope of the Bill beyond existing counter-terrorism legislation and the proposed open-ended discretion as to the conditions that may be included in control orders reflect a concern to address a problem that has not been properly defined.

4.6 This pattern has occurred in other jurisdictions, notably Australia and Canada, where such legislation has either proved unworkable; has gone unused; or has led in practice to unanticipated and sometimes counterproductive consequences.

4.7 It also appears from the departmental materials supporting the Bill that it has been prepared at short notice in response to a specific (and potentially time-limited) threat. The apparent urgency has left no real opportunity for proper public and Parliamentary scrutiny. Crown Law's advice to the Attorney-General confirming the Bill's compliance with the New Zealand Bill of Rights Act 1990 can be described as cursory at best.[2]

4.8 Under those circumstances, if Parliament decides to proceed with the Bill, the Law Society recommends that the Bill be subject to a 5 year sunset provision, equivalent to that applying to equivalent legislation in Australia,[3] and to a statutory review procedure as with the Intelligence and Security Act 2017, requiring the legislation to come back before the House.

4.9 This would ensure that the control order regime can at least be revisited, and its necessity properly reconsidered by Parliament without the pressure of urgency. The Law Society emphasises, however, that it only recommends a sunset provision as a last resort. These provisions are not a substitute for well-drafted legislation and are not a solution to the Bill's many problems.

5 Substantial broadening of scope beyond already broad provision in counter-terrorism legislation

5.1 The Terrorism Suppression Act 2002 follows and gives effect to the terms of New Zealand's obligations under counter-terrorism agreements and under United Nations Security Council resolutions.

5.2 This Act is framed in broad terms: in particular, section 25(1) provides that a terrorist act is "*carried out*" for the purposes of that Act, even if that act is planned or prepared for but does not occur.

5.3 Similarly, a person may be found to have facilitated a terrorist act even if the particular act is not known, foreseen or planned at that time and, again, does not in fact occur.

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2 Terrorism Suppression (Control Orders) Bill (version 22) – Advice regarding consistency with the New Zealand Bill of Rights Act 1990, 7 October 2019.

3 Paragraph 104.32, Schedule 1, Criminal Code Act 1995.

That broad provision, although problematic, may be thought justifiable to address the risk posed by terrorist acts, even if those acts do not eventuate.

5.4 However, the Bill goes substantially beyond the existing broad provision in the 2002 Act to introduce a new concept of engaging in "*terrorism-related activities*".

5.5 The addition by the Bill of new categories of people potentially subject to counter-terrorism legislation goes beyond New Zealand's counter-terrorism obligations and comparable legislation. This is not addressed in the explanatory note or in the Regulatory Impact Assessment.

5.6 The expansive scope of the Bill gives rise to two particular difficulties:

5.6.1 First, a potentially very broad class of people are subjected to the control order regime without adequate justification, given that the Bill contemplates stringent measures such as prohibition of employment, prohibition against holding a bank account, residential curfews, and restrictions on personal associations, all for up to six years.

5.6.2 Secondly, the application of the existing definitions and thresholds in the Terrorism Suppression Act has, in practice, already been very difficult. The implication for the Bill, if its additional and more expansive provisions are enacted, is to compound that difficulty and, particularly, unpredictability:

a) The Bill will require the Police Commissioner and the courts to interpret and apply more difficult and uncertain terms, likely leading to under- or over-use of these procedures; and

b) They will require the courts to resolve the scope of the provisions over time, causing cost and delay, and uncertainty both for the government and for potentially affected individuals.

5.7 The Committee should seek clarification from officials on the rationale for these additional provisions and also any precedent from other jurisdictions for their workability or otherwise. If sufficient clarification cannot be provided, the Bill should be amended to retain the known definitions from the existing statutory scheme.

6 Reliance on a broad range of procedures and proceedings in other countries

6.1 Clause 6 of the Bill extends jurisdiction based on whether proceedings have been brought in a foreign country against an individual.

6.2 This includes where a person has been "*convicted in a foreign country because of an offence because of conduct that is or includes engaging in terrorism-related activities*".

6.3 However, it also extends to people who been prosecuted, but not convicted, for such conduct; people who have had citizenship, nationality, passports and visas revoked by "*a foreign country for reasons that are or include a security risk related to conduct that is or includes*" such conduct; and people who have been subject to a control or supervisory regime in another country.

6.4 The Bill is proposed to be amended to permit scrutiny of such actions: see Supplementary Order Paper 397, clause 6A(2). However, that does not address the basic difficulty that New Zealand officials, courts and affected individuals will be obliged to address measures taken by another country when:

a) The legal basis for the other country's procedure or proceedings may or may not be robust;

b) The basis for such measures, in the context of counter-terrorism, may well be information that was not disclosed to the affected individual and cannot be disclosed for the purpose of the New Zealand proceeding; and

c) While there is precedent in New Zealand for dealing with overseas convictions, there is not similar experience in dealing with the very widely defined range of measures envisaged by the Bill.

6.5 The Bill does not address these difficulties and it is not explained in the explanatory note or in the Regulatory Impact Assessment how those working with the legislation in New Zealand can robustly engage with the other countries' conduct.

6.6 The much more straightforward alternative is to base the measures taken in the Bill in a factual assessment by the Police Commissioner of the actual risks, which can then be engaged with directly by the court and others.

7 Criminal vs civil procedure

7.1 It follows from the definition of "*engages in terrorism-related activities*" that the jurisdiction to make control orders under the Bill will include the ability of the Police merely establishing to a civil standard what would otherwise be regarded as criminal offending under the Terrorism Suppression Act.

7.2 If jurisdiction is established, the control orders that may follow have the potential to significantly restrict the rights of individuals. It is fundamental under New Zealand law that measures which, in substance, are criminal provisions should only be made through the criminal law, with the protections provided by the criminal justice system.

7.3 Parliament has on other occasions extended through a civil regime what would otherwise be criminal penalties. However, the considerations at play have been different. For example, in the Public Safety (Public Protection Orders) Act 2014, Parliament provided for continued detention after the expiration of a custodial sentence, but only after confirmation that the purpose of the detention was to protect the offender from the consequences of their actions, rather than the deterrence and prevention normally associated with the extension of criminal law penalties.[4]

7.4 In the Returning Offenders (Management and Information) Act 2015, Parliament also accepted that limited orders might be made in relation to those returning with convictions from other jurisdictions to enable them to be better managed within the New Zealand justice system after their return to New Zealand.[5]

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[4] The Law Society made a submission opposing the Bill (in its original form) as infringing on the right against double punishment. See also the Law Society's inclusion of the Public Safety (Public Protection Orders) Act 2014 in its submission on the Universal Periodic Review: https://www.lawsociety.org.nz/__data/assets/pdf_file/0007/124396/I-United-Nations-NZ-Universal-Periodic-Review-2018-12-7-18.pdf.

[5] The Law Society raised further concerns regarding retroactive penalties and double jeopardy in a review of the Returning Offenders (Management and Information) Act 2015: https://www.lawsociety.org.nz/__data/assets/pdf_file/0020/118451/I-SC-Returning-Offenders-Act-review-30-1-18.pdf.

7.5 By contrast, while some effort is made in this Bill to justify some of the powers on the basis of rehabilitation, the "*main purposes*" relate to public safety (clause 3). The conditions of control orders include restrictions more typically ordered as part of a punitive sentence, based on a finding of criminality. The Law Society respectfully disagrees with Crown Law's advice to the Attorney-General that the control orders are primarily civil in nature.[6]

7.6 The Law Society asks the Committee to give further consideration to whether control orders are more appropriately based in the criminal jurisdiction, rather than the civil jurisdiction.

Control order conditions include orders more typically made as part of sentencing

7.7 Most of the conditions in clause 16 are similar or the same as orders that may be made as part of a criminal sentence under the Sentencing Act 2002. While some of these conditions are imposed in the sentencing context primarily to assist with rehabilitation purposes, all of them, to a greater or lesser extent, restrict the "*relevant person's*" freedom. Many of them also serve punitive purposes.

7.8 The following conditions found in clause 16 correspond to orders that may be made as part of sentencing:

7.8.1 clause 16(b): "*prohibit or restrict the relevant person from leaving New Zealand …*" (*cf* the conditions of a community-based sentence in s 69E of the Sentencing Act: "*the offender must not leave or attempt to leave New Zealand without the prior written consent of a probation officer*");

7.8.2 clause 16(c): "*prohibit or restrict the relevant person from communicating or associating with specified individuals*" (*cf* non-association orders in s 112 of the Sentencing Act);

7.8.3 clause 16(j): "*require the relevant person to reside at a specified address agreed between the relevant person and the Police*", to be no more than 12 hours within any 24-hour period – see clause 17 (*cf* community detention in s 69B of the Sentencing Act);

7.8.4 clause 16(k): "*require the relevant person to report to specified constables at specified times and places (for example, meeting a constable twice a week*" (*cf* section 49(1)(b) of the Sentencing Act, which requires as part of the standard conditions of a supervision order, that "*the offender must report to a probation officer as and when required to do so by a probation officer*", and section 54F(1)(b), which requires weekly reporting for the first three months of a sentence of intensive supervision, and at least once each month afterwards or as otherwise directed by the probation officer);

7.8.5 clause 16(n): "*require that the relevant person submits to electronic monitoring of compliance with the requirements of the control order concerned*" (*cf* the conditions of a community based sentence in section 69E of the Sentencing Act: "*the offender must, when required to do so by a probation officer, submit to the electronic monitoring of compliance with the conditions of his or her sentence, which may require the offender to be connected to electronic*

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6 Note 2 above, at [26].

monitoring equipment throughout the sentence term and not just throughout the curfew period");

7.8.6 clause 16(o): "*require that the relevant person undertake alcohol and drug assessments, and rehabilitative or reintegrative needs assessments*" (*cf* section 50 of the Sentencing Act, which permits the Court to impose as a special condition of a supervision order that the defendant attend assessments for counselling, including for alcohol and drug use, and to attend a "*rehabilitative, or reintegrative programme*").

Imposing sentencing orders without the protection of the criminal justice process

7.9 Given how closely the conditions of control orders match the sentences regularly imposed in criminal law, it is concerning that the protections of the criminal law process do not apply.

7.10 If electronic monitoring and a 12-hour curfew is imposed, a control order would effectively become the equivalent of a sentence of community detention. However, the latter can be no more than six months, while a control order if renewed could last for as long as six years.

7.11 While the Bill mandates that the standard of proof is to the civil standard only, it is conceivable that the New Zealand courts may end up extending the protections of section 25 of the NZBORA (minimum standards of criminal procedure) to control orders because they are substantively criminal and punitive.

7.12 The full Court of Appeal has previously taken a similar approach in the context of extended supervision orders. The Court characterised the English authorities as tending to take "*what is perhaps a rather literal approach to what constitutes criminal proceedings and punishment*",[7] and concluded as follows:[8]

> *… in the end, we have concluded that the imposition through the criminal justice system of significant restrictions (including detention) on offenders in response to criminal behaviour amounts to punishment and thus engages ss 25 and 26 of the NZBORA. We see this approach as more properly representative of our legal tradition. If the imposition of such sanctions is truly in the public interest, then justification under s 5 is available and, in any event, there is the ability of the legislature to override ss 25 and 26.*

7.13 In the Law Society's view, section 25 NZBORA protections should apply to control order applications, and that there is a significant risk that if evidence is used from overseas to support an application for a control order, the evidence may not meet the standards required by section 25.

7.14 This is not just a matter of principle. In a practical sense, evidence that does not meet these standards is doubtful in terms of its integrity and reliability. Yet it may well be difficult for counsel to challenge the validity of evidence obtained from overseas. It is noteworthy that difficulties with securing evidence from overseas jurisdictions,

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7 Belcher v Chief Executive, Department of Corrections [2007] 1 NZLR 507 (CA), leave refused by the Supreme Court: [2007] NZSC 54.

8 At [49].

particularly in the context of ongoing armed conflict, is identified in the explanatory note to the Bill as a reason criminal prosecution is not viable.[9]

7.15 Clause 11(3)(b) states that the court must "*consider any other matters the court thinks relevant (for example, whether requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990)*". The effect of the clause suggests, wrongly, that compliance with the NZBORA is at the discretion of the courts.

7.16 The NZBORA applies equally to the judicial branch of the government (section 3) and therefore is mandatory. The Law Society therefore submits that clause 11 should be amended to reflect this, and that the Bill should specify that the onus is on the Crown to demonstrate compliance with the NZBORA. This is particularly important for interim orders, which may be without notice.

The practical consequences of using the civil litigation process

7.17 In practical terms, placing control orders within the civil jurisdiction means that there is a significant risk the respondent will be unrepresented.

7.18 When a party is brought into the criminal justice process, they are able to meet with a duty lawyer at their first appearance. Where necessary, the head duty lawyer may arrange for a senior defence lawyer to attend the High Court as a duty lawyer. Where the matter is unable to be resolved that day, the duty lawyer will complete the party's criminal legal aid application. If the grant is approved, Legal Aid Services will organise for a lawyer to be appointed. In urgent situations (for example, where Police oppose bail), a legal aid lawyer can be appointed on the same day.

7.19 If the matter is civil, the process is quite different. A duty lawyer is unlikely to be available. The respondent would be entirely responsible for organising representation for themselves. This would include finding the list of legal aid lawyers available online and contacting each one until they find a lawyer who has capacity and expertise in the area (this would require the client to have a phone and credit to ring lawyers). That lawyer would then need to meet with the client and complete and sign the application (unlike with a criminal legal aid application, which only needs to be signed by the client), and submit the application with supporting evidence of income. Confirmation of the grant may take several weeks. The conditions of the grant will include that the respondent pay a $50 user charge.

7.20 Where the state is seeking to place significant restraints on an individual's liberty, it is appropriate for the state to have a role in ensuring that the individual is represented. The Law Society remains concerned that reforms to legal aid introduced by the Legal Services Act 2011 have diminished New Zealanders' access to justice over time. A submission on the Triennial Legal Aid Review in 2018 noted that "*the Law Society is now seeing an increase in the inequality of arms between legally-aided and privately-funded litigants, and between legally-aided litigants and the state*".[10]

7.21 If control orders remain civil, then consideration should be given to developing a similar scheme to the Police Detention Legal Assistance service, with a list of providers who are

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9 Explanatory note, p 1.

10 Dated 27 September 2018, https://www.lawsociety.org.nz/__data/assets/pdf_file/0011/126992/l-MoJ-LA-review-NZLS-response-27-9-18.pdf.

available at short notice to act for respondents to a control order application. Such a service would need to be appropriately regulated to ensure the lawyers have the appropriate expertise and capacity.

8 Right not to be arbitrarily detained

8.1 As identified in the Crown Law advice, there is a significant risk that the condition in clause 16(j) will breach the respondent's section 22 NZBORA right: "*[e]veryone has the right not to be arbitrary arrested or detained*".[11] In this regard, clause 16(j) permits the Court to impose as a condition of a control order, that "*the relevant person … remain at [an] address between specified times each day*", and clause 17 limits the period to no more than 12 hours in any 24-hour period.

8.2 The Law Society agrees with the Crown Law advice that a two-stage analysis is necessary: first, identifying whether there has been detention, and secondly, whether such detention is arbitrary. However, the Law Society disagrees with the position taken by Crown Law that clause 16(j) does not involve detention. Given that the Bill lacks the protections provided in other areas of the law where the state may detain individuals (namely criminal and mental health law), there is a significant risk that the detention is arbitrary.

Meaning of detention

8.3 The advice from Crown Law relies on UK jurisprudence, which concluded that equivalent legislation in the UK did not amount to a "*deprivation of liberty*" in breach of the European Convention on Human Rights.[12] In *Secretary of State of the Home Department v E*, Lord Brown observed that "*for a control order with a 16 hour curfew to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controlee might otherwise have been living*".[13]

8.4 However, the Bill needs to be analysed in the context of the New Zealand jurisprudence on detention, which provides that the test for whether someone is detained is whether the individual has a reasonably held belief that he is not free to leave.[14]

8.5 It is very difficult to accept that a control order requiring the respondent to be electronically monitored and not to leave their residence for 12-hour periods could be anything other than detention, when such an order would so closely align with a sentence of community detention,[15] an important part of the sentencing hierarchy in New Zealand's sentencing law.[16]

Meaning of arbitrary

8.6 The Law Society does agree with the advice of Crown Law that, if a control order is 'detention', then it is likely to be arbitrary because "*ordinarily, detention may only be*

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11 Note 2 above, at [6].

12 Ibid.

13 [2008] 1 AC 499 (HL) at [4].

14 *Everitt v A-G* [2002] 1 NZLR 82 (CA) at [7].

15 Sentencing Act 2002, s 69B.

16 Sentencing Act 2002, s 10A.

justified for proven past offending, following due process of law (i.e. pursuant to a charge, trial and conviction) – not for offences that might be committed in future."[17]

8.7 It is notable that where detention is available outside sentencing on a conviction, such as mental health and preventive detention, there are important protections in place to ensure due process. (For example, where a patient is to be detained for a compulsory assessment under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Act has a detailed regime setting out the requirements for continued assessments, reporting, disclosure to patients, and rights of review by a judge.)

8.8 The Bill does not provide for health assessors to provide psychological risk assessment reports to assist the Court in being satisfied that the relevant person poses a present risk of engaging in further terrorism-related activities, and to assist in determining what requirements are necessary and appropriate to protect the public and to support the person's reintegration and rehabilitation. Such reports would also be highly relevant to assessing rehabilitative outcomes and whether renewal, variation or discharge is warranted.

8.9 The Law Society recommends consideration be given to incorporating the Sentencing Act orders for reports that apply in the context of extended supervision orders and public protection orders. If a stand-alone clause is incorporated there will need to be clear rules around whether and how such reports are ordered and provided to the Court.

9 Applications should be brought by the Solicitor-General

9.1 The Law Society considers that the appropriate person to apply for a control order is not the Commissioner of Police, since the Commissioner is logically charged with the investigation and prevention of criminal offending. Rather, the application should be brought by the Solicitor-General, who is normally in charge, broadly speaking, of the prosecution system and is well established as being an independent decision-maker with a range of general law enforcement considerations. (It is notable that the Terrorism Suppression Act makes the Solicitor-General's opinion necessary before charges can be brought under that Act.)

10 Applying without notice

10.1 Clause 14(2) requires a control order application to be made without notice if the respondent has not yet arrived in New Zealand. The Law Society queries why this is mandatory. A without notice order is a breach of natural justice.[18] Ex parte proceedings are usually only used in cases of extreme emergency, where it is not practicable to have the person attend court, such as where proceedings on notice would cause undue hardship or risk of harm.

10.2 These grounds should suffice for applications under the Bill. If a judge determines that the Police Commissioner has not demonstrated urgency or risk of harm justifying a breach of natural justice, the Law Society considers the Court must have the power to require the application to be served before making the orders sought (if necessary

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17 Note 2 above, at [10].

18 *AH v HCH* [2013] NZFC 685 at [9].

truncating the time limit for filing a response). Otherwise the natural justice rights in section 27 of the NZBORA are likely to be breached.

11 The list of control order conditions should be exhaustive

11.1 Clause 16 currently includes a non-exhaustive list of "*examples*" of conditions that a court may choose to include in a control order. Clause 8 makes it clear that the examples are "*only illustrative*" of the kinds of conditions that may be imposed.

11.2 The Law Society considers that this approach is entirely inappropriate. The lack of specification poses three difficulties:

11.2.1 Significant restrictions are to be placed on individuals without specific corresponding consideration by Parliament of what measures may or may not be justifiable;

11.2.2 In place of the necessary policy work and experience, the court and the parties to an application are left to attempt to formulate appropriate measures and predict their likely efficacy; and

11.2.3 It is likely that measures taken will prove excessive, inadequate and/or counter-productive, depending upon the case before the court, and that extensive litigation will likely be required to achieve any clarity.

11.3 The equivalent statutes in the United Kingdom and Australia specifically prescribe the types of requirements that the court can impose.[19] The Law Society considers that it would not be difficult to identify a relatively narrow class of measures – for example, restrictions on access to potentially dangerous materials or places – that would address direct risks to public safety. This, however, has not been done in this case.

11.4 The Law Society recommends the requirements that may be imposed under a control order should be specified and prescribed by statute. The court's discretion should only extend to determining *which* of those specified requirements are necessary and appropriate in a given case.

12 The use of non-disclosable information and the role of special advocates

12.1 The Bill and its supporting information clearly contemplate that an application for a control order may be made on the basis of classified or other sensitive information, which will be provided to the court but not disclosed to the relevant individual to whom the order will apply.

12.2 The Law Society has previously expressed serious concerns about the use of non-disclosable information to make judicial determinations that detrimentally affect the rights of individuals.[20] The right to "*know the case against you*" is an essential element of natural justice, protected by section 27 of the NZBORA. Although the Law Society recognises that right may be limited by legitimate national security interests in some limited circumstances, it remains important that protections are put in place to minimise the inherent unfairness that non-disclosable information inevitably poses.

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19 Australia: paragraph 104.5(3), Schedule 1, Criminal Code Act 1995; UK: section 2(2) and Schedule 1 Terrorism Prevention and Investigation Measures Act 2011.

20 See the Law Society's submission to the Law Commission re IP35 *A New Crown Civil Proceedings Act for New Zealand* (2014), which addressed these issues in some detail.

12.3 Subject to the Supplementary Order Paper, the Bill as it stands fails to address these issues. The decision of the Court of Appeal in *Dotcom v Attorney-General* confirmed that it is the responsibility of Parliament, not the courts, to develop mechanisms to govern the use of non-disclosable information in court.[21] In the absence of any such mechanism in the Bill the Law Society agrees with Crown Law's advice to the Attorney-General that the courts may not consider any non-disclosable information when making decisions to impose, vary, suspend, discharge or renew a control order under the Bill.[22]

12.4 Clause 35 of Supplementary Order Paper 397 proposes a form of special advocate procedure to allow reliance on such information. While that would, if adopted, provide some measure of protection, further work is required to ensure that the procedure is both robust and clear. The special advocate should be given access to all relevant material and be able to make arguments that go beyond the issues of relevancy and reliability. Consideration should also be given to the Law Commission's recommendations regarding the use of special advocates, in its 2015 report.[23]

12.5 The Law Society further notes:

12.5.1 It is not explained why existing special advocate provisions, which provide at least some of the additional and detailed protections necessary, have not been applied or adapted;

12.5.2 Appointment as counsel assisting under rule 10.22 of the High Court Rules (clause 35(2)(b)) is not an advocacy function and is inconsistent with clause 35(2)(c); and

12.5.3 There is no provision for the special advocate to perform the key function of such persons of contesting the non-disclosure of information, which is necessary given the known risk of excessive non-disclosure.

12.6 The Law Society considers the appointment of a special advocate should not be based on rule 10.22 of the High Court Rules. The Law Society recommends that the Committee obtain comprehensive advice on best practice in the formulation of special advocate procedures.

13 The appropriate penalty for breach of a control order

13.1 The penalty for breaching a control order closely follows those for breaching sentences of community detention and supervision in the Sentencing Act. Unlike these sentences, however, a control order does not require a criminal conviction and may be longer in its timeframe. There is no justification as to why a longer penalty for breaching a control order is necessary. The Law Society recommends the maximum penalty for a breach of a control order should be six months, not 1 year, in line with a breach of community detention in section 69G of the Sentencing Act.

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21 [2019] NZCA 412.

22 Note 2 above, at [17].

23 R135 *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings*, 14 December 2015, available at https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R135-The-Crown-In-Court_0.pdf.

14 Recommendations

14.1 For the reasons set out above, the Law Society recommends the following amendments to the Bill:

14.1.1 Control orders should be brought within the criminal justice system.

14.1.2 The existing definitions of terrorism in the 2002 Act should be used rather than the broader definitions in the Bill.

14.1.3 Amend clause 11(3)(b) to read "*be satisfied before making a control order that the order is consistent with the New Zealand Bill of Rights Act* 1990".

14.1.4 Insert a new clause 30A: "*for the purposes of clause 11(3)(b), the onus of demonstrating consistency with the New Zealand Bill of Rights Act 1990 rests on the Crown*".

14.1.5 Consideration should be given to introducing a scheme similar to the Police Detention Legal Assistance scheme so that the persons against whom control orders are sought are represented.

14.1.6 In clauses 13 and 14, replace the word "*Commissioner*" with the words "*Solicitor-General*", and delete the definition of "*Commissioner*" in clause 5.

14.1.7 Amend clause 14 to require urgency to make the application without notice. The onus for this must be on the applicant, and the court must have discretion to place the application on notice.

14.1.8 Amend clause 16 by replacing the heading with the words "*requirements that may be included in a control order*" and replacing the words before paragraph (a) with "*A control order may include any of the following requirements*", and deleting the words immediately before paragraph (j) ("*Examples of other requirements*").

14.1.9 The protective role of the special advocate should be strengthened, to minimise the unfairness inherent in non-disclosable (classified or other sensitive) information being provided to the court but not disclosed to the individuals against whom control orders are sought.

14.1.10 Amend clause 31 by replacing "1 year" with "six months".

14.1.11 If a decision is made to continue with the legislation under the current truncated timeframe, a sunset provision is recommended so that Parliament and the public may consider the legislation with the appropriate level of scrutiny.

Herman Visagie
Vice President

13 November 2019