



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

COUNTERING TERRORIST FIGHTERS LEGISLATION BILL

27/11/2014

SUBMISSION ON THE COUNTERING TERRORIST FIGHTERS LEGISLATION BILL

Introduction

1. The New Zealand Law Society welcomes the opportunity to submit on the Countering Terrorist Fighters Legislation Bill ("**Bill**"). The Bill is an omnibus Bill amending three Acts: the Customs and Excise Act 1996, the New Zealand Security Intelligence Service Act 1969 and the Passports Act 1992. Its purpose is to make "targeted amendments to enhance powers to monitor and investigate, and to restrict and disrupt travel" of foreign terrorist fighters ("**FTFs**"),¹ in accordance with New Zealand's international obligations under United Nations Security Council Resolution 2178 (2014).²

Summary of Law Society's submission

2. The Law Society:
 - (a) acknowledges the generally careful balance demonstrated by the Bill, but
 - (b) notes a number of specific issues of concern that the Select Committee could usefully focus on and address.

3. The Law Society is conscious of the care with which this Bill has been prepared and the efforts that have been made to provide checks and balances to protect against the use of extraordinary powers that the Bill confers on the State. Nevertheless, some provisions in the Bill substantially interfere with and reduce human rights and individual liberty. Thus, the powers taken should be limited strictly to what is required by the threats that have arisen. The Law Society's central point is that the Select Committee should consider the extent to which these powers can be reduced without imperilling the objective at which they are aimed. In that regard the following are suggested:
 - (a) the length of time for passport denial and related issues be reduced to a total of three years;
 - (b) the provisions relating to visual surveillance by the SIS require amendment and the safeguards increased;
 - (c) warrantless emergency surveillance be limited to 24 hours and the test for carrying it out strengthened to make the threshold higher;
 - (d) the sunset provisions be amended so the temporary law expires on 1 October 2016; and

¹ Explanatory Note to the Bill, p 2.

² UNSC R 2178 paragraph 5 requires Member States including New Zealand to "prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities" <http://www.un.org/press/en/2014/sc11580.doc.htm> accessed 25.11.14.

- (e) it is highly undesirable to pass legislation of this character under urgency.

Part 1 – amendments to the Passports Act 1992

*Passport denial*³

4. Under the Passports Act 1992, the Minister has the power to deny passports for a period of 12 months, if he or she believes on reasonable grounds that a person is a danger to the security of New Zealand because they intend to engage in or facilitate certain activities. The Minister can also apply to a Judge for a further denial period not exceeding another 12 months.
5. The Bill proposes that the Minister may specify a longer denial period not exceeding 36 months if the Minister is satisfied that the person would continue to pose a danger to New Zealand or any other country. This extended duration raises a number of issues.

Bill of Rights Act 1990, s 18

6. On their face, these provisions engage the freedom of movement protections provided for by section 18 of the New Zealand Bill of Rights Act 1990 ("**BORA**"), especially sections 18(2) and (3) (rights to enter and exit). These rights are fundamental and are recognised by international treaties (as acknowledged in the Attorney-General's s 7 advice).
7. The Law Society notes that where the Minister denies or cancels the passport of a person outside New Zealand (an action the Bill clarifies will be expressly permitted under the Passports Act 1992), the Minister **must** upon application issue a journey-specific emergency travel document ("**JSETD**") to a person outside New Zealand if their passport or emergency travel document has been refused or cancelled and the JSETD is necessary to enable the person to return or come to New Zealand. This power will ensure that the right to enter New Zealand is preserved and its application to the context of the current Bill is welcomed by the Law Society.
8. The Bill does raise the question of consistency with section 18(3), in that persons inside New Zealand are restricted from leaving the country. Although the right to leave can be overridden by statute, to restrict that right any more than is clearly justified would be unprincipled.

³ "Denial of passports" is used as a catch-all phrase to cover the Bill's provisions concerning the cancellation of passport on grounds of national security, cancellation of certificate of identity on grounds of national security, cancellation of emergency travel documents on grounds of national security, refusal to issue refugee travel document on grounds of national security, and cancellation of refugee travel document on grounds of national security. Schedule 1, clauses 1-6 of the Bill are collectively referred to as "**passport denial provisions**".

9. The advice provided to the Attorney-General by the Ministry of Justice analysing the Bill for consistency with BORA concluded that the passport provisions represent justified limitations on the right to freedom of movement guaranteed under s 18, on the basis that:⁴

the objective of restricting movement of FTFs is proportional to the protection of national security, public order and the rights and freedoms of others. This is especially the case where violent extremists are involved in gross and extensive violations of human rights and international humanitarian law.

However, this describes the objective of the relevant provisions as one of restricting movement of FTFs, which is currently permissible. The issue raised by the Bill is the appropriateness of the length of time for which movement may be restricted (with the Bill introducing a significant increase in the length of the passport denial term). This is not addressed or justified in the Ministry's advice.

Threshold

10. The threshold that must be met by a Minister deciding to deny a passport for a longer period than 12 months is less stringent than the current regime relating to 12 month terms. "Belief on reasonable grounds" is required to deny a passport for 12 months, while any decision to extend the term beyond 12 months depends only on the Minister's "satisfaction that the person would continue to pose a danger". The Minister's "satisfaction" is not constrained by any objective concept of reasonableness, nor any clear requirement of certain evidence.
11. Further, even if stronger requirements were built into the test, it is difficult to imagine what evidence could establish that a person would "*continue*" to pose a threat 12 months in the future. The Regulatory Impact Statement states that:⁵

In [a] small number of cases there is often information at the time of the original cancellation which shows the person's intentions and circumstances are unlikely to change after 12 months. The circumstances could include that the conflict the person is seeking to join as an FTF is assessed as likely to continue for more than 12 months, and the information available demonstrates that the person has a firm intention to join that conflict.

The examples given of information indicating that change is unlikely, are not particularly convincing. Evidence that a conflict is likely to be ongoing is an external factor that should not impact on a person's right to freedom of movement. Whatever the evidence as to the person's present intention, it seems a significant reach to attempt to predict that that intention will remain the same for 3 years.

⁴ Attorney-General legal advice, paragraph 20.

⁵ Regulatory Impact Statement, paragraph 34.

12. The Regulatory Impact Statement appears to justify extended passport denial terms on the basis that the intentions and circumstances of a small number of individuals have not changed after 12 months, and a further application is therefore required.⁶

This involves a new application repeating all the information in the original case.

In the Law Society's submission, it is safer and more rights-conscious to require the increased administrative burden of making a fresh application in the very small number of cases in which this power is envisaged to apply⁷ than to significantly extend the ability to restrict movement in breach of BORA without justification and without clear thresholds.

Limited ability to object

13. There is a limited ability for a person to object to proposed long-term denial of their passport; the Bill only envisages a 30 day window for written submissions to be made once notification of the proposed cancellation has been issued. The Law Society queries why the ability to object should be limited in this way; no harm is identified that would arise if an affected person could object (once) at any time during the period of denial.

Amendment not a good fit with interim legislation

14. Finally, the Law Society submits that the extension of passport denial terms to 3 years does not easily fit within the ambit of legislation which is expressed to be directed at an evolving and **immediate** threat⁸ as an **interim measure** pending completion of a full review.⁹ The review underlying the Bill considered at a high level "what measures could add to the safety and security of New Zealand **in the short term**" (emphasis added).¹⁰ However, the Regulatory Impact Statement justifies the extended passport denial term on the basis that "it recognises the **long term** nature of the FTF issue" (emphasis added).¹¹ In the Law Society's submission, the extension of passport denial duration is a matter to be considered in the context of the full review, with full public consultation and debate.

⁶ Regulatory Impact Statement, paragraph 33.

⁷ Regulatory Impact Statement, paragraphs 33 to 36.

⁸ The Attorney-General's advice describes the Bill as "a response to the continuing and rapidly evolving threat posed by FTFs and other violent extremists" (paragraph 5), and refers to the "acute and growing threat" (paragraph 16, in reference to the UNSC Resolution 2178). Similarly, the Explanatory Note describes the context of the Bill as a "threat posed [that] is continuing to evolve rapidly", and notes that the targeted review was to ensure NZ capacity and legislation "are adequate to respond to the evolving domestic threat". The Regulatory Impact Statement goes into some detail as to the threat posed by FTFs and New Zealand's domestic threat level.

⁹ Terms of reference for the review.

¹⁰ Regulatory Impact Statement, paragraph 6.

¹¹ Regulatory Impact Statement, paragraph 37.

Extension of 12 month window by judge

15. The relevant sections of the Passports Act 1992 currently require a Judge, upon the application of the Minister, to make an order for a further denial period of up to 12 months where the Judge is satisfied that credible information reasonably supports a finding that **paragraphs (a), (b), and (c)** of subsection (1) still apply in relation to the person concerned. In effect, the Judge must be satisfied that the same grounds for passport denial still exist.

16. However, the equivalent provisions under the Bill have been subtly changed, and would require a Judge to make the order sought if satisfied that the information reasonably supports a finding that **subclause (1) or (2)** still apply in relation to the person concerned. Rather than being satisfied that the same criteria are met, a Judge must only be satisfied, at a higher level of abstraction that the Minister believes on reasonable grounds that the criteria are met. Strictly, this operates simply as an endorsement of the Minister's decision rather than an independent assessment of the facts – which would require the Court to make the order on a potentially lower threshold.

Other

17. The Law Society considers that the provisions of the Bill providing for temporary suspension of travel documents for 10 days and limitation of Crown liability are justifiable (Schedule 1, clauses 7 and 9). Deferral of notification of passport denial for up to 30 days where the Minister is satisfied giving notice sooner would prejudice ongoing investigations is also justifiable (subclause (4) of each of the relevant passport denial provisions contained in the Schedule to the Bill).

18. Judicial review in respect to the issues in this Bill is surrounded by difficult issues, particularly in relation to the information concerning security. Security information sources have to be protected and that is appreciated by the Law Society. But the Select Committee needs to appreciate that judicial review in this context is different from other contexts and probably, therefore, less available in a practical sense.

Part 2 – Amendments to Customs and Excise Act

19. The Law Society makes no submissions on the proposed amendments to the Customs and Excise Act (relating to information sharing between Customs and the New Zealand Security Intelligence Service ("NZSIS")).

Part 3 – Amendments to New Zealand Security Intelligence Service Act 1969

20. The Bill proposes introducing increased surveillance powers for the NZSIS.

Visual surveillance

21. Clause 9 provides a new power of visual surveillance to the NZSIS based on similar provisions in the Search and Surveillance Act 2012 ("**SSA**") that apply to the Police.
22. First, the justification for this extension appears to be an "inconsistency" with the powers granted to law enforcement agencies.¹² However, the existing discrepancy is arguably deliberate as the Police and the NZSIS are distinct agencies with different functions and purposes: while visual surveillance is permissible in certain circumstances for law enforcement purposes, it is arguably less appropriate for intelligence gathering purposes. No analysis has been provided, in the RIS or otherwise, as to the justification for an extension of Police powers to the NZSIS.
23. Second, although ostensibly the Explanatory Note to the Bill justifies NZSIS visual surveillance as a necessary tool for the narrow purpose of countering terrorist fighters, as drafted the NZSIS would be statutorily mandated to undertake visual surveillance in a range of much wider contexts. In particular, surveillance would be available:
- (a) for the detection of activities prejudicial to security; or
 - (b) for the purpose of gathering foreign intelligence information that is essential to security.

Security is defined in the NZSIS Act as:¹³

- (a) the protection of New Zealand from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed within New Zealand:
- (b) the identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being:
- (c) the protection of New Zealand from activities within or relating to New Zealand that—
 - (i) are influenced by any foreign organisation or any foreign person; and
 - (ii) are clandestine or deceptive, or threaten the safety of any person; and
 - (iii) impact adversely on New Zealand's international well-being or economic well-being:
- (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

¹² Regulatory Impact Statement, paragraph 15.

¹³ New Zealand Security Intelligence Service Act 1969, s 2.

While this full definition may be appropriate in the context in which an intelligence warrant is issued, arguably at least paragraphs (b) and (c) (particularly insofar as they refer to New Zealand's economic well-being) impose too low a threshold for the authorisation of visual surveillance (a far more intrusive exercise that until now has not been exercisable by the NZSIS).

24. Third, the threshold for visual surveillance is substantially lower than that which applies to the Police under the SSA. Under Part 3 of the SSA, a judge may issue a surveillance device warrant permitting an enforcement officer¹⁴ to undertake certain surveillance activities, provided that the following conditions are met:¹⁵

there are reasonable grounds—

- (i) to suspect that an offence has been committed, or is being committed, or will be committed in respect of which this Act or any enactment specified in [column 2 of the Schedule](#) authorises the enforcement officer to apply for a warrant to enter premises for the purpose of obtaining evidence about the suspected offence; and
- (ii) to believe that the proposed use of the surveillance device will obtain information that is evidential material in respect of the offence

There is no equivalent restriction under the NZSIS Act that a visual surveillance warrant may only be undertaken to obtain evidential material in respect of a suspected offence.

25. Fourth, given the intrusive nature of the proposed powers, there should be enhanced oversight of the issuance and execution of visual surveillance warrants.
26. The oversight by the Inspector-General under the Inspector-General of Intelligence and Security Act 1996 is powerful and useful. However, it has some drawbacks:
- (a) The own motion oversight essentially relies on the Inspector-General being seized of the issuing of a warrant, and its execution, potentially in sufficient detail to enable any concerns to be identified. That may not occur, certainly not in a timely and sufficiently detailed manner.
 - (b) The complaints mechanism available to a New Zealander necessarily relies on that person being seized of the warrant. That also will often not be the case, certainly not in a timely manner. The very purpose of such warrants is to collect evidence without the subject person being aware of that at the time.

¹⁴ Defined in the Search and Surveillance Act 2012, s 2 as a constable or any person authorised by an enactment specified in Schedule 2 (or any other enactment that expressly applies any provision in Part 4) to exercise a power of entry, search, inspection, examination or seizure.

¹⁵ Search and Surveillance Act 2012, ss 46, 51(a) and 53.

27. The Law Society submits that greater scrutiny may be appropriate. One possibility would be to mirror the reporting back provisions contained within ss 60 to 61 of the SSA. They require a report back to the Judge who issued a warrant, containing information regarding whether the warrant resulted in gathering information relevant to its purpose (in that context providing evidence relevant to an offence; preventing offending; averting emergency or facilitating the seizure of arms); and the circumstances surrounding the use of the device or warrant (s 60)). The Judge who receives a report may require the supply of further information and may give directions as to the destruction or retention of obtained material; report the matter to the relevant chief executive if there was a breach of the conditions of the warrant or relevant statutory provision; or order that the subject of the warrant is notified (s 61). In the context of the Bill such a report could be provided to those who issued the warrant and to the Inspector-General. That would allow them to assess properly whether warrants were being appropriately sought and used.

Warrantless emergency surveillance (in the context of both intelligence warrants and visual surveillance warrants)

28. The Bill also proposes the introduction of NZSIS warrantless surveillance powers in situations of urgency or emergency similar to that provided in s 48 of the SSA. The Law Society has the following concerns:
- (a) First, and importantly, the section 48 regime for warrantless emergency surveillance only applies where an enforcement officer is in one of a number of (narrow) situations detailed in subsection (2). These situations generally involve the suspected commission of a specified type of serious offence (relating to arms or drugs, punishable by a term of imprisonment of 14 years or more, or that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property). The only remaining threshold situation, apposite to the terrorist fighting context, is "where there is risk to the life or safety of any person that requires an emergency response". However, neither the commission of an offence, nor a risk to life or safety, feature in the proposed NZSIS emergency surveillance provisions. By contrast, the only element relating to establishing urgency / emergency is that delay must be likely to result in a loss of intelligence. This is a significantly lower standard than in the current Police regime.
 - (b) Second, the Law Society queries whether 48 hours is a justifiable period. The Law Society submits that the Committee should test officials as to the appropriateness of that period. In particular, while the Regulatory Impact Statement suggests an analogy with the equivalent SSA Police power, the Law Society queries whether that analogy is perfect since the Police power is only available for cases of serious offending.

29. Finally, as a general comment, the offence provisions in the Bill may not be adequate (for instance, the failure to destroy records resulting from an authorisation in respect of which no warrant was issued is an offence liable to a fine of up to \$1,000).¹⁶ A firmer safeguard would be to impose an express obligation on the Director and Minister to put in place appropriate policies and procedures to ensure the Bill is complied with. Oversight of compliance with that obligation could fall to an independent party to ensure that offences are picked up and enforced.

General

Urgency and sunset clause

30. The Bill has been introduced with some elements of bi-partisan support under urgency. However, the Law Society is not convinced that the case for urgency to be taken in the House has been made out. The Law Society has raised concerns previously about the use of urgency to introduce new intrusive state powers. The same concern arises here. Despite the raising of the threat level, there is no apparent justification for the legislation to proceed on a fast track that significantly truncates public input and debate.¹⁷ The NZSIS legislation in particular has been problematic and needs an overhaul, and is too complex an area for the appropriateness of reasonable justification and proportionality to be addressed swiftly. The Law Society accepts that the international situation is moving rapidly and that the national response must keep abreast – but that is not synonymous with saying that any legislation should be enacted under urgency.
31. Nevertheless, the Law Society acknowledges and welcomes that the Government has chosen to introduce the changes by way of legislation, rather than implementing the changes administratively by regulations made under the United Nations Act 1946. The Government's decision not to bypass public scrutiny and debate entirely is welcomed.
32. The fact that the whole Bill is the subject of a sunset clause under which the legislation will expire on 1 April 2018 is a welcome protection and is supported.
33. However, the Law Society is concerned about the length of the sunset clause. The temporary law should expire within the life of the current Parliament so as to incentivise the full review and implementation of permanent legislation; which in any event should not take three years. An expiration date of 1 October 2016 would be sufficient. Regardless, it would be better if such

¹⁶ See NZSIS Act 1969, proposed s 4IE(8).

¹⁷ The Bill was introduced and had its first debate under urgency on 25.11.14, and referred to the Foreign Affairs Defence and Trade Select Committee with a report-back deadline of 2.12.14; two working days were allowed for public submissions (by 27.11.14).

intrusive legislation introduced under urgency operates for a shorter period and is extended when necessary, for example if a thorough review has not been completed and new legislation introduced in time.

Comment on UN Security Council Resolution 2178

34. The Explanatory Note to the Bill properly notes the importance of the UNSC Resolution 2178 as a justification for the measures it proposes. The Law Society does note that the Resolution places great weight on the importance of respecting human rights, including the following in the Preamble:

Reaffirming that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, **in particular international human rights law**, international refugee law, and international humanitarian law, **underscoring that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort, and notes the importance of respect for the rule of law so as to effectively prevent and combat terrorism** [...] [Emphasis added]

In addition, paragraph 5 provides that:

[...] Member States shall, **consistent with international human rights law, international refugee law, and international humanitarian law**, prevent and suppress the recruiting, organising, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities. [Emphasis added]

35. Accordingly, the Law Society urges the Select Committee to give full weight to the human rights dimension in its consideration of the Bill. In that regard, the Law Society notes that the United Nations Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, submitted a report to the General Assembly in relation to Resolution 2178 (albeit in the context of mass digital surveillance). In it, he commented that:¹⁸

An assessment of proportionality [in the context of ICCPR, Article 17] involves striking a balance between the societal interest in the protection of online privacy, on the one hand, and the undoubted imperatives of effective counter-terrorism and law enforcement, on the other. Determining where that balance is to be struck requires an informed public debate to take place within and between States

[...]

Measures justified by reference to States' duties to protect against the threat of terrorism should never be used as a Trojan horse to usher in wider powers of surveillance for unrelated governmental functions. There is an ever present danger of "purpose creep", by which measures justified on counter-terrorism grounds are

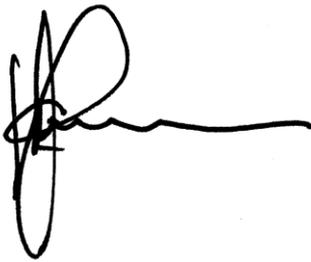
¹⁸ United Nations Special Rapporteur "Promotion and protection of human rights and fundamental freedoms while countering terrorism" A/69/397 (23 September 2014), at [14] and [19].

made available for use by public authorities for much less weighty public interest reasons.

36. As these comments highlight, not only should the introduction of measures breaching human rights be subject to rigorous scrutiny and debate (as a fundamental component of the rule of law), but care must be taken to ensure such measures do not encourage further incremental rights infringements.

Conclusion

37. The Law Society wishes to be heard.

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by a series of loops and a long horizontal tail.

Chris Moore
President
27 November 2014