New Zealand Law Society
Te Kāhui Ture o Aotearoa

Crimes (Countering Foreign Interference) Amendment Bill

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

8 January 2025

Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Crimes (Countering Foreign Interference) Amendment Bill (**Bill**). The Bill proposes amendments to New Zealand's criminal law to respond to incidents of foreign interference — meaning an act by a foreign state, often through a proxy, that is intended to disrupt or subvert New Zealand's national interests by covert, deceptive, corruptive, or coercive means.

1.2 This submission has been prepared by the Law Society's Criminal Law and Public Law Committees.[1]

1.3 The Law Society **wishes to be heard** on this submission.

General comments

1.4 The Law Society recognises the importance of and supports the Bill's purpose to respond to and better prevent foreign interference targeting New Zealand. To do so, the Bill first proposes new offences specifically aimed at foreign-state actors and parties supporting them, who seek to undermine New Zealand's national interests. As the explanatory note to the Bill identifies, this is a gap in the present law. Proposed new Crimes Act offence provisions include section 78AAA (which makes it an offence to engage in improper conduct for or on behalf of a foreign power) and section 78AAB (which makes it an offence to commit an imprisonable offence intending to provide a relevant benefit to a foreign power).

1.5 Further, the Bill sets out circumstances in which a person owes allegiance to the Sovereign in right of New Zealand for the purposes of the Crimes Act 1961, and extends the circumstances in which it is an offence for such a person to aid, abet, incite, counsel, or procure others who do not owe such allegiance. The new section defining allegiance (section 2A of the Crimes Act) is not an exhaustive code. However, it will provide important clarification and greater certainty. The Law Society supports this codification, subject to the need for further clarification of some matters.

1.6 This submission raises three concerns:

(a) The need to clarify several aspects of the proposed new allegiance provision, and consider how allegiance will be dealt with as a matter of trial process.

(b) Issues with the scope of the new offences proposed in the Bill that require further analysis.

(c) Other drafting issues and queries.

Clause 4: allegiance – drafting and trial process

1.7 Clause 4 of the Bill proposes to introduce a new section to the Crimes Act 1961: section 2A, which specifies for the purposes of the Crimes Act who owes allegiance to the Sovereign in right of New Zealand. The proposed new section 2A addresses various

[1] More information about the Law Society's law reform sections and committees is available on the Law Society's website: NZLS | Branches, sections and groups.

matters and provides the basis in turn for attaching liability under section 69 of the Crimes Act (being a party to crimes outside New Zealand) and new section 69A (discussed below).

1.8 The Law Society has several concerns about the drafting and workability of new section 2A:

(a) New section 2A(2), which proposes to preserve the common law, could lead to confusion and complexity. As a minimum, it would be desirable for the new provision to specifically address the effect of renouncing citizenship or otherwise repudiating allegiance, but in the Law Society's view the benefits of preserving the common law may be doubtful if the further matters discussed below were codified.

(b) Subsections (3) and (4) of new section 2A further define the parameters of who owes allegiance to the Sovereign in right of New Zealand. Some potential gaps arise that need clarification.

(c) The provision does not address dual or multiple citizenship, and for the avoidance of doubt could do so.

1.9 There is a further question of how issues of allegiance should be dealt with as a matter of trial process.

Person who owes allegiance — common law preserved

1.10 At clause 4 of the Bill, new section 2A(2)(a) provides that the new section ('meaning of person who owes allegiance to the Sovereign in right of New Zealand') is not an exhaustive code. Subsection (2)(b) preserves the common law, providing that:

> a person is not excluded from owing allegiance to the Sovereign in right of New Zealand under the common law just because they do not owe allegiance under this section.

1.11 It is common for common law concepts to be relevant to determining liability for alleged criminal offending — both in relation to defences under section 20 of the Crimes Act and in determining the meaning of words or phrases in the definition of offences.[2] This is not objectionable where the common law is both reasonably accessible and aligns with common usage.

1.12 However, in the Law Society's view, in the context of subsection (2)(b) neither of these qualifications are true. There are details that would benefit from clarification in new section 2A, rather than relying on the common law as a fallback provision. One particular point that is unclear is the effect of renouncing citizenship or repudiating allegiance in different circumstances, including:

(a) renunciation that has been accepted by the government; or

(b) an unregistered repudiation of allegiance.

1.13 It is unclear whether a person who had New Zealand citizenship, but with assent from the Minister has renounced it as provided for in the Citizenship Act 1977, continues to

[2] For example, the meaning of "representation" in the Crimes Act 1961, s 240.

owe allegiance to New Zealand, whether or not they are living in New Zealand.[3] Proposed section 2A(4)(c)(ii) appears to suggest that allegiance might endure if it would do so at common law. The common law position is discussed below, but we note the risk of absurdity and injustice in holding a person to an allegiance which that person has repudiated, once the government has noted and accepted that repudiation.[4] In the Law Society's view, any prosecution based only on a renounced allegiance risks being an abuse of process. Preferably, this should be excluded from the relevant offence. The Law Society considers that express statutory provision to address this point is both desirable and necessary.

1.14 The issue is more complex where there has been an unregistered repudiation of allegiance. Blackstone's *Commentaries on the Laws of England* published in 1765 suggest that allegiance arising from birth in England was inalienable, comparing it with the temporary allegiance owed to the King by aliens only while resident in England. On that basis repudiation would not be effective. However, Blackstone also stated that the "ligament" of allegiance ran both ways,[5] and if the Crown failed to provide protection and support where deserved, the bond of allegiance could be discharged. It appears that before the Statute of Treasons 1351 (that is, when the common law alone determined status) a person owing allegiance to the King could, on the basis of a failure of the King to provide protection, renounce that allegiance by a formal statement and the display of banners to signify a willingness to use force against the King.[6] That option was, it appears, open to persons in England whose allegiance to the Crown came from birth in England, as well as to the King's subjects in other territories. The Statute of Treasons made waging war against the King in England treason, effectively removing the effect of any such renunciation by a person owing allegiance.

1.15 However, it does not appear that the statute would have had any effect on persons renouncing allegiance on a basis other than birth, and the Bill makes the common law position, not the statutory one, relevant. It is therefore possible, but uncertain, that a New Zealand citizen could effectively renounce citizenship whether or not that renunciation is registered, and — at common law — would have been justified in doing so if the Crown failed to provide support and protection.[7]

1.16 The Law Society recommends amending new section 2A to clarify the matters above, by including a provision expressly declaring the position in relation to renunciation. Doing

3 Citizenship Act 1977, s 15(1) and (2).

4 Note that restoration of citizenship after renunciation also requires Ministerial approval.

5 William Blackstone *Commentaries on the Laws of England* (1765) Book 1 at p 119.

6 Graham McBain "Abolishing the crime of treason" (2007) 81 ALJ 94, at 98–99 and fn 53.

7 The common law is clearer regarding the acquisition of citizenship by those not born in the King's domain. The general rule was persons not born in England were "aliens" even if born in some other part of the King's domains. While this rule is usually ascribed to the majority opinions in C*alvin's Case* 1608 77 ER, (1608)1 Co Rep 1a (also known as *The case of the Post-nati*), it has been convincingly argued by common law that pre-dates the Statute of Treasons. The courts in England had regularly, but perhaps not invariably, held that a person born outside England was an alien and, on that basis could not hold or inherit land in England: Paul Brand "The Origins of 'Alien Status' in the English Common Law" (2018) 39 Journal of Legal History 18–28. There was, Brand tells us, a consensus in the Parliament of 1343 that there were exceptions, both for the children of the King, wherever born, and for persons born overseas to fathers who were in the service of the king (including in the armies in France).

so is particularly important if reference is to be retained to preserving the common law, given the complexity of the common law on this issue.

1.17 There could also be merit in including an "officially induced error" defence in the section, which would apply where a person has formally sought advice from the New Zealand Government as to whether they owed allegiance to the Crown in right of New Zealand and been advised that they did not, but were later charged with an offence alleging allegiance was owed. The normal rule that ignorance of the law is no defence would operate unfairly where, as here, the law is left uncertain.

Other definitional issues: section 2A(3) and (4)

Persons in New Zealand

1.18 New section 2A(3) provides that "a person who is in New Zealand" owes allegiance to the Sovereign in right of New Zealand unless certain factors apply. Three aspects of this subclause require clarification.

Persons in New Zealand and the Ross Dependency

1.19 There are potential difficulties with the reference to "persons in New Zealand", due to the need to reconcile respective Crimes Act 1961 and Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 (**TSCZEEZ Act**) definitions. The interaction of the Crimes Act definition of "in New Zealand" with provisions of the TSCZEEZ Act is unclear.

1.20 Section 2 of the Crimes Act defines "New Zealand" as follows:

> **New Zealand** includes all waters within the outer limits of the territorial sea of New Zealand (as defined by section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977).

1.21 Section 3 of the TSCZEEZ Act defines the territorial sea as encompassing the sea within 12 nautical miles of a baseline being "the low-water mark along the coast of New Zealand, including the coast of all islands".

1.22 However, section 2 of the TSCZEEZ Act has a definition of New Zealand which includes the Ross Dependency.

1.23 The statutes do not fit together well, and there is a good argument that the Bill if enacted in its current form would *not* apply to the Ross Dependency. That may not have been intended and requires clarity if the Bill proceeds.

How, if at all, does the proposed law apply to Niue?

1.24 Niue is stated in section 3 of the Niue Constitution Act 1974 to be "self-governing". However, section 6 provides that "Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of Niue".

1.25 The common law theory preserved by new section 2A(2) in clause 4 of the Bill that allegiance runs both ways, and that providing defence and support creates a duty of

allegiance on those protected, could accordingly result in doubt as to whether Niueans owe allegiance to the Crown in right of New Zealand.

1.26 The Law Society recommends that the Committee take advice on this issue.

Who is an "enemy" alien?

1.27 Section 2A(3)(c) and (4) use the phrase "enemy alien" without defining that term ("a person who is in New Zealand owes allegiance … unless … the person is an enemy alien who …"). This is problematic, because it is unclear when a person is an "enemy".

1.28 Elsewhere, the Crimes Act only uses "enemy" in section 73, where the definition of treason includes "an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country". To illustrate questions which could arise in the context of new section 2A:

(a) If New Zealand forces are involved in hostilities with forces of country A but the hostilities are in country B, are the citizens of country A "enemy aliens" (an issue that might have arisen with Iraqi forces in Kuwait during the first Gulf War)?

(b) If NZ forces are assisting a foreign government to combat an insurgent group in another country, are members of the insurgent group "enemy aliens" (for example NZ troops in Malaya in the 1950s)?

1.29 The Law Society recommends that the Bill should specify the intended meaning of "enemy" in section 2A.

Persons outside New Zealand

1.30 Proposed new section 2A(4)(c)(iii) includes the phrase "family or property in New Zealand that demonstrates an enduring connection to New Zealand". The phrase gives rise to several interpretation issues.

What is meant by "family"?

1.31 The word "family" is not defined in the Legislation Act 2019. Its use raises questions, such as whether "family" requires a blood tie, or formal marital tie. If it requires a blood tie, there is the question of how remote that tie may be. Further, does it vary according to the cultural norms of the persons involved?

1.32 There is also the matter of more informal relationships. The phrase "de facto relationship" is defined in the Legislation Act but the definition does not refer to "family". In likelihood, general usage in New Zealand would include persons linked by a de facto relationship, but that is hardly a guide. A person adopted under the Adoption Act 1955 becomes, in law, the child of the adoptive parents. However, that Act does not recognise whangai (adoptions according to tikanga). It is not clear, then, whether a whangai relationship would qualify as family for the purposes of the Bill.

"… or property"

1.33 The term "Property" similarly lacks clarity. It is not clear whether it is intended to refer to real property only, or whether simply having money on deposit in a New Zealand

bank, or shares in a New Zealand company, would be sufficient. Further, is a legal, rather than an equitable, interest required? Must the person be sole owner, or is joint ownership (or ownership as a tenant in common) sufficient?

"... that demonstrates an enduring connection"

1.34 A further issue arises over what is meant by "demonstrating an enduring connection." For instance, in the not entirely hypothetical case of the New Zealander who goes to the USA or some other foreign country which does not allow dual citizenship; has a successful and lucrative career in that country; takes on local citizenship after renouncing New Zealand citizenship; but purchases a valuable home in New Zealand which the person has publicly stated is a "bolthole" in case of civil tumult or war between the country of normal residence and another: is the ownership of such real estate sufficient to demonstrate an enduring connection? Will repeated visits, such as returning at random intervals for holidays, suffice; or documented statements about an intention to return? Would a stated desire that a person's body be interred in New Zealand, or in a specific place in New Zealand, be sufficient?

1.35 More commonly perhaps, is a property interest shared with others sufficient? Does this include the example of a person who retains a very small share of an asset vested in a Māori incorporation where the costs of disclaiming the interest are greater than its value?

1.36 In the Law Society's view, further guidance is needed for investigators, prosecutors and decision-makers on these questions, not least to ensure clarity and consistency. Regardless of whether section 2A is intended to be comprehensive, more is needed to provide a clear statutory code.

Addressing, for the avoidance of doubt, dual or multiple citizenship

1.37 Clause 4 does not directly address how the amendments relating to allegiance will apply where a person has dual or multiple citizenship. It seems probable that the aim of the Bill is to extend liability to any person who:

(a) owes allegiance to New Zealand and to another country,

(b) prioritises the interests of that other country, in ways that satisfy the elements of relevant criminal offending, over the interests of New Zealand.

1.38 As presently drafted, new section 2A appears to be engaged simply if the elements set out are satisfied, independent of whether a person is also a citizen of any other country. If this is the intention (in other words, that dual or multiple citizenship has no bearing on the question of allegiance), there could be benefit in addressing this in new section 2A, perhaps by drafting an 'avoidance of doubt' clause.

Making "allegiance" an issue of law not fact

1.39 The Law Society is strongly of the view that the question of allegiance is best determined as a matter of law. The effect of such a change would be to ensure that whether a defendant owes allegiance to New Zealand would be for the judge to decide, rather than a jury issue.

1.40 There are some other Crimes Act offences where a particular element is one of law, such as:

(a) sections 45(2) and 47(2) (both provisions dealing with lawfulness of orders);

(b) section 72(2) (proximity in attempts);

(c) section 78C (relating to espionage and disclosure of documents which would endanger the security or defence of New Zealand);

(d) section 124(3) (whether publication serves the public good);

(e) section 220(4) (whether there was a duty to account).

1.41 A clear statutory code, deemed a question of law explicitly, would deliver consistency and appropriately focus this threshold question. The Law Society considers it is likely that making the determination of "allegiance" a question of law would support more consistent decision-making. It would also allow the allegiance issue to be raised and decided pre-trial (with appropriate pre-trial appeal provisions). This would allow the issue — which might often be the only seriously challenged element of liability — to be decided authoritatively before the evidence is entered, rather than on appeal.

1.42 For drafting purposes, section 78C of the Crimes Act may be an appropriate model. Section 78C specifies questions of law in relation to espionage. Section 78C(3) provides:

> Where the decision on any question of law to which this section applies depends on any questions of fact, the prosecutor or the defendant may adduce, and the Judge may hear, in addition to the evidence heard by the jury, any evidence relevant to those questions of fact.

1.43 The Law Society recommends amending the Bill by insertion of an appropriate clause or subclause to provide that allegiance is a question of law.

Scope of new offences

1.44 The Law Society has some concerns with the Bill's approach of creating offences with a very broad scope. Such an approach is concerning from a rule of law perspective. There are some protections in the Bill to target the new offences and ensure that prosecutions are in the public interest, such as consent of the Attorney-General. However — while having protections such as the requirement for the Attorney-General's consent may be a safeguard — the offence provisions remain very broad, and it is not clear that this is necessary. There is a risk, if the new proposed offences are not targeted appropriately, that their use may be unreasonable or excessive.[8]

1.45 The Law Society has the following specific concerns.

Clause 7: section 69 amended (party to any other crime outside New Zealand)

1.46 Currently, section 69 of the principal Act makes it an offence for a person who is in New Zealand to aid, incite, counsel, or procure offending outside New Zealand by a person who does not owe allegiance to New Zealand. Clause 7 extends the scope of section 69 to

8 The Committee may wish to note similar concerns raised by the Privacy Commissioner: Ministry of Justice "Departmental Disclosure Statement" (17 October 2024) at 3.5.1.

also make it an offence for a person who is outside New Zealand to do those things if that person does owe allegiance to New Zealand (as defined in new section 2A).

1.47 The Law Society supports the intent of the proposed amendment but has concerns about two issues with the proposed new section 69(1A) and (2A) offences.

(a) The first question is whether it is intended for the amended offence to capture conduct outside New Zealand which has no impact in or on New Zealand. The Bill is said to be aimed at curbing foreign influence on New Zealand and New Zealanders. However, the broad drafting of the new section 69 offences criminalises conduct or attempted conduct which may have (or was intended to have) consequences in a foreign country. It may be intended that parties to a foreign activity impacting New Zealanders or New Zealand interests overseas are captured in some cases, such as an activity taking place in a foreign country, against New Zealand interests, at the New Zealand embassy. To achieve this without overreach, the Law Society recommends a narrower drafting approach.

(b) The Law Society also suggests considering providing a defence equivalent to the proviso to subs (2). That is, that there is a defence if the conduct counselled, procured (etcetera) is lawful in the jurisdiction where it occurs.[9] It is unlikely that treason would be legal in any country, however the same cannot be said of espionage or incitement to mutiny in any country which requires its government or armed forces to abide by international conventions. For example, where the forces of a country are involved in combat and it is believed that some commanders are ordering troops to commit war crimes. A call to those troops to disobey those orders as being illegal under international law (and quite possibly under domestic law) could easily be characterised as an incitement to mutiny. Placing a person in jeopardy of a criminal penalty for calling for adherence to international law would be concerning.

Clause 8: new section 69A (party to certain acts or omissions in New Zealand)

1.48 Clause 8, inserting new section 69A, would provide that it is an offence for a person who owes allegiance to New Zealand (whether they are in or outside New Zealand) to be party to certain acts or omissions in New Zealand. The proposed new section 69A would supplement section 69, under which it is already an offence to be a party to conduct outside New Zealand by persons not owing allegiance to New Zealand that would (if committed by a person owing allegiance) amount to crimes such as treason, inciting to mutiny, or espionage.

1.49 The proposed section 69A offence is problematic in that it penalises conduct in New Zealand without discriminating between conduct intended to affect New Zealand and conduct directed only at overseas jurisdictions. There can be no argument about extending liability to persons owing allegiance to New Zealand who seek to use or influence persons not owing allegiance to New Zealand to undertake conduct directed at New Zealand interests. That is clearly countering potential threats to New Zealand, consistent with the Bill's purposes.

9 Compare Crimes Act 1961, s 8(2A).

1.50 The problem is that the offence as drafted will, it appears, cover conduct by persons owing allegiance to New Zealand who seek to use or influence persons not owing allegiance to New Zealand to undertake conduct directed towards other countries. Read literally, the new section 69A would make it an offence for a New Zealand citizen living in, say, Canada, to urge troops in the Sudan to disobey orders to commit war crimes. That seems an unjustified extension of the criminal law.

1.51 Another consequence of the provision as presently drafted is that any operative of a New Zealand government agency who sought, outside New Zealand, to recruit a foreign national to commit espionage against that person's own country or any other would be committing an offence. The Law Society questions whether this was intended. New section 69A(1) might also criminalise such recruiting if done within New Zealand.

1.52 To address this, the Law Society recommends a suitably drafted exemption provision.

Clause 10: new section 78AAA (improper conduct for or on behalf of foreign power)

1.53 Clause 10 of the Bill proposes two new Crimes Act offences, in new sections 78AAA and 78AAB. The proposed offences address improper conduct for or on behalf of a foreign power, and commission of an imprisonable offence to provide relevant benefit to a foreign power. The Law Society has concerns about three elements of new section 78AAA:

(a) the phrase "improper conduct" in subsection (1)(a);

(b) the reliance in subsection (6) on section 105C definitions to define "foreign power"; and

(c) the phrase "protected New Zealand interest", also in subsection (6).

1.54 Clarification is also recommended regarding the intended application of this offence to behaviour which overtly advances the interests of another country by means which are lawful (not coercive or corruptive).

Improper conduct

1.55 "Improper conduct" is defined in expansive terms, providing reasonable clarity as to this element of the proposed offence. However, the proposed section does not clearly indicate where the onus of proof lies in relation to the exclusion of conduct carried out in the ordinary course of business. On the normal basis that it is for the prosecution to prove all elements of the offence, the prosecution would have to negative every possible lawful purpose for which the relevant conduct could be undertaken. That could be an onerous obligation.

1.56 The Law Society suggests the Committee take advice on this issue and may wish to consider whether in these circumstances, as a matter of practical necessity, the placing of an evidential (as opposed to legal) onus on the defence to adduce evidence of any lawful purpose might be justified.[10] The possibilities for justification are otherwise too broad to

[10] Placing a legal onus on the defendant for an offence with such a serious penalty is unreasonable.

disprove beyond a reasonable doubt. Existing examples of an evidential burden on the defendant (arising from the same reasons of practical necessity) include sections 45(2) and 46(2) of the Arms Act 1983.

"Foreign power": section 105C definitions

1.57 The Law Society is concerned that reliance on the section 105C definitions of "government" and "government agency" has a risk of inflexibility. The section 105C definitions, reflecting the international convention which gave rise to them, are stated as "means …", not "includes …". This narrows the definition, and means the courts do not have scope for purposive extension of the statutory wording.

1.58 For example, the section 105C definition of a "foreign government" does not provide clarity where two or more regimes are each claiming to be "the" government of a country, or where a de facto government is operating over a substantial part of that country (for example: the Islamic State in Syria recently, the Taliban in Afghanistan prior to it taking over power completely or, closer to home, the conflict in the Solomon Islands). It is unclear whether conduct undertaken in or outside New Zealand at the behest of such a faction or insurgent entity is covered by the proposed offence. It is certainly possible that conflict between rival entities in one state could lead to attempts to influence persons in New Zealand to advance the position of one faction in a way contrary to New Zealand's interests.

1.59 The section would also appear not to cover conduct directed by a single individual or a commercial company *not* connected to the government of a foreign country but seeking to advance that country's interests at the expense of New Zealand's interests. It is not inconceivable that such an entity or person could seek to interfere by stealth or by corrupt means to further some other country's interests. Such a scenario may in fact be more likely than interference through clearly identifiable official channels. The Law Society recommends further consideration is given to the drafting, to ensure the offence can capture any such efforts, rather than risking limiting the offence to only action that can be proven to be official government action.

"Protected New Zealand interest"

1.60 The range of matters encompassed by the phrase "protected New Zealand interest" is extensive and largely self-explanatory. However, there is a significant matter relating to the question of *how* harm or potential harm to a protected New Zealand interest is to be proved. It is likely that in any prosecution the defence would want to argue that — for example — the relevant conduct in fact enhanced New Zealand's international relations with a range of other countries. Leaving that as a question for the jury could be problematic.

1.61 One solution is to insert into the new offence, and also into new section 78AAB, provisions similar to section 78C(1) and (2) of the Crimes Act, to make the issue of harm or potential harm questions of law for the judge. An alternative would be to provide that a certificate by a relevant Minister of the Crown is conclusive proof of the harm or risk of harm. The former is likely to better promote open justice but, in the absence of a power for the judge to hear relevant evidence in camera, more likely to lead to sensitive

information becoming public. The Law Society recommends the Committee seek advice on this point.

Overtly advancing another country's interests

1.62 The intention of new section 78AAA appears to be that conduct which overtly or openly advances the interests of another country by means which are neither coercive or corruptive is not improper and should not be criminalised. The Law Society recommends explicitly clarifying this, rather than leaving it to be deduced; either in the relevant offence provision, or as part of a purpose clause.

Other drafting issues

Clause 5: extra-territoriality

1.63 Clause 5 proposes an amendment to section 7A of the Crimes Act, to insert reference to the new sections 78AAA and 78AAB. That is not in itself problematic; however, there is some uncertainty about the way sections 8 and 8A of the Crimes Act will interact with the jurisdictional provisions of the Bill, particularly for persons who are not New Zealand citizens or permanent residents and are:

(a) travelling on ships or aircraft to and from New Zealand; or

(b) working in New Zealand missions, embassies or consulates in other countries.

1.64 It would be advisable, in the Law Society's view, to explicitly analyse any risk of gaps or overreach in relation to sections 8 and 8A.

1.65 A further matter that should be addressed, affecting extra-territorial application of the new provisions, is section 64 of the Crimes Act (obedience to de facto law). Section 64 provides:

> Every one is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession de facto of the sovereign power in and over the place where the act is done.

1.66 This provision first appears as section 72 of the Criminal Code Act 1893, and is considered to have had no common law equivalent. At that time, New Zealand had no constitutional power to enact legislation with extra-territorial effect, as it now does.

1.67 The Law Society recommends consideration of the effect that section 64 may have on the extra-territorial elements of the Bill, particularly the penalisation of conduct in other countries by persons who are citizens of that country as well as of New Zealand. One remedy may be simply to provide that section 64 does not apply to the new offences; with the proviso, however, that the Committee should seek advice as to whether this has any unintended consequences.

Clause 9: section 78 amended (espionage)

1.68 Clause 9 proposes new section 78(2) which, in addition to clarifying the meaning of "document", would provide that "information includes information about military tactics, techniques, or procedures". The Law Society queries the need to single out one category

of information, especially on a matter that would likely be taken as implicit in the context of the alleged offending. While this is not necessarily problematic, we note the drafting is wide enough to cover providing information about past events — a history of the First NZEF in World War I which discussed the evolution of infantry tactics would come within the wording. The mental elements required for a section 78 offence mean no over-reach arises, however, this provision could be another example where the drafting approach may benefit from revision.

Recommendations

1.69 The Law Society recommends:

(a) Amending proposed clause 4, new section 2A, to include a provision expressly declaring the position in relation to renunciation.

(b) Including an "officially induced error" defence in new section 2A.

(c) Clarifying three aspects of proposed new section 2A(3):

(i) whether the definition of "in New Zealand" includes the Ross Dependency;

(ii) the intended application of the Bill to Niue; and

(iii) the intended meaning of "enemy" in the phrase "enemy alien".

(d) For persons outside New Zealand (new section 2A(4)(c)(iii)), clarifying the meaning of the terms:

(i) "family";

(ii) "property"; and

(iii) "enduring connection".

(e) Addressing, for the avoidance of doubt, whether or how dual or multiple citizenship affects the issue of allegiance.

(f) Providing that allegiance is an issue of law, not fact, so that a judge would determine the issue. Section 78C of the Crimes Act may be an appropriate model.

(g) In clause 7:

(i) reassessing the drafting of new section 69(1A) and (2A) to ensure that it does not inadvertently capture conduct beyond the scope of the Bill; and

(ii) providing a defence if conduct is lawful in the jurisdiction where it occurs.

(h) In clause 8, including an exemption provision in new section 69A to ensure it is not an offence for an operative of a New Zealand government agency to recruit a foreign national for espionage. More generally, the breadth of the drafting of this provision is a concern.

(i) In clause 10, new section 78AAA:

(i) clarifying where the onus of proof lies in relation to the exclusion of any lawful reasons for conduct, perhaps by placing an evidential onus on the defendant;

(ii) reconsidering drafting issues with the definition of "foreign power";

(iii) considering how harm or potential harm to a protected New Zealand interest is to be proved (with suggested options); and

(iv) explicitly excluding the application of the offence to conduct that openly advances another country's interests, provided that it is neither coercive nor corruptive.

(j) Seeking further advice or analysis on the interaction of provisions addressing extra-territorial jurisdiction, particularly sections 8, 8A and 64 of the Crimes Act.

(k) Reviewing the drafting of new section 78 in clause 9.

Nāku noa, nā

David Campbell
Vice President