

Public Issues Committee

ADLS

Discussion Paper

HAS THE NEED TO COUNTER TERRORISM RESULTED IN DISTORTIONS TO THE DOMESTIC CRIMINAL JUSTICE SYSTEM?

1. New Zealand relies very heavily on foreign intelligence sources in its own efforts to combat terrorism. While this may be necessary for reasons of national security, it has implications for the judicial process in New Zealand, particularly with respect to evidence. This is highlighted in the Terrorism Suppression Act 2002. It may be questioned whether it is sufficient to rely upon government certificates, which are based upon this foreign intelligence, to avoid testing such information during a trial. The balance of the requirements of national security, and fair and impartial trial processes, may have been skewed too far in favour of the former. This balancing process is rendered particularly difficult by the need to comply with international conventions of which New Zealand is a party.

2. **Background to Terrorism Suppression Act 2002**

This Act was designed to comply with the provisions of two international conventions,¹ as well as the United Nations Security Council (Anti-Terrorism) Resolution 1373 (2001), adopted on 28 September 2001.²

The particular conventions covered by the Act require:

- (a) That the participating state make these acts an offence in their domestic law, and
- (b) Give themselves extra-territorial jurisdiction as to place and persons, and
- (c) Provide mutual assistance to other states who have an interest in investigating and extraditing for these offences.

3. The Act defines a terrorist act (s 5) as either:

- (a) Intending to cause outcomes of either death, injury, or serious risk to a population, destruction of property of value or importance or major economic

¹ The International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997; No 37517, UN Doc. A/RES/52/164, Terrorism Suppression Act 2002, Schedule 1); The International Convention for the Suppression of the Financing of Terrorism (New York, 15 December 1997; No 38349, UN GA Resn A/RES/54/109; Terrorism Suppression Act 2002, Schedule 2).

² Reproduced in the Terrorism Suppression Act 2002, Schedule 4.

loss/environmental damage/serious interference with infrastructure facilities likely to endanger human life or introducing/releasing disease bearing organisms which is likely to devastate the economy, and

(b) To induce terror or compel governments/international organisations.

In addition, the definition includes an act against a specified terrorism convention or a terrorist act in armed conflict outside the rules of international law.

4. The Act also provides for the Prime Minister to designate an entity as a terrorist entity or an associated entity of a terrorist and there are procedures for such determination to be notified in the *New Zealand Gazette*.
5. There are duties to report suspicion about such entities and immunity for the same.
6. Under s 38 a marked departure occurs to our open justice and adversarial process in procedures relating to such applications to challenge or to appeal such designation. The Chief Justice or nominee, on request by the Attorney-General, if satisfied that it is desirable to do so for the protection of the classified information received or hear the classified security information in the absence of the designated entity, and all barristers and solicitors representing that entity, and all members of the public. A summary of the information, excluding any summary of information that will itself likely to prejudice the interests set out in s 32(3), is then approved by the Court. A copy of that would then be given to the entity concerned.
7. Section 32(3) is denied if the disclosure would be likely:
 - (a) To prejudice the security or defence of New Zealand, or the international relations of the Government of New Zealand; or
 - (b) To prejudice the entrusting of information to the Government ... by the Government of another country or international organization; or
 - (c) Prejudice making of law including the prevention, investigation and detection of offences and the right to a fair trial; or
 - (d) To endanger the safety of any person.
8. While the specific offences of terrorist bombing and financing of terrorism offences do not rely on the designation of entities, the other prohibition offences do, unless the prosecution can rely upon knowledge/recklessness of the group carrying out a terrorist act. The other offence (relating to dealings with terrorists) is also affected by extra-territorial jurisdiction either as to the Actus Reus or to some aspect of connection with the offence or offenders.
9. An entity designated as a terrorist entity or as an associated entity of a terrorist would be unable to effectively challenge the designation, if it were deemed that disclosure of

evidence would prejudice the international relations of New Zealand. It may be questioned whether this is sufficient to outweigh the presumption that every accused person is entitled to know the evidence on which they are charged.

10. **Terrorism Suppression Amendment Act 2003**

The principal Act now includes two new offences, namely the use and movement of unmarked plastic explosives, and an offence relating to the physical protection of nuclear material. It places those within the “other offences” category with the extra-territorial jurisdiction applying. There is a further offence of harbouring or concealing terrorists added to the Act for harbouring persons known or being reckless as to whether such persons intend to or has carried out a terrorist act. This latter offence does not involve extra-territorial jurisdiction but carries a maximum penalty of 7 years imprisonment.

11. The offence of using and movement of unmarked plastic explosives has a maximum penalty of 10 years and \$500,000 fine, as does the possession of nuclear material.
12. Further rules in relation to the retention of goods suspected to be terrorist property by Customs and consequential amendments to the deemed offences for which orders may be under the Extradition Act, fulfil the conditions of the Convention.
13. There are amendments to the Summary Proceedings Act to:
 - (a) give power to a constable to require a person who owns or works a particular computer, to provide assistance in obtaining information from the computer,
 - (b) a general authority given to any public officer of any government agency that has a duty to enforce any law, to apply to a court for a warrant to use a tracking device to follow people or goods, and
 - (c) an amendment to s 23 of the Misuse of Drugs Amendment Act 1978 allowing for evidence from interception warrants to be admissible where the warrant has been obtained under one Act and evidence has been obtained of an offence under the Crimes Act. This effectively reverse the Court of Appeal’s decision in *R v Aranui* (1999) 16 CRNZ 304, that only evidence of offending pursuant to the Authorising Act, are admissible

This also raises important questions with respect to the New Zealand Bill of Rights Act 1990. In particular, the computer provision raises the prospect of an individual being compelled to assist a constable to obtain information from a computer, although in so doing they may be incriminating themselves. This could be in breach of ss 25(c) and (d), the right to be presumed innocent until proved guilty according to law, and the right not to be compelled to be a witness or to confess guilt.

14. The Act also adds to the Sentencing Act subsection 9(1) as to the aggravating and mitigating factors, the aggravating factor “that the offence was committed as part of or involves a terrorist act”.
15. Section 104 of the Act is amended by adding a further criteria for a minimum period of imprisonment of 17 years or more for murder if it was committed as part of a terrorist act.
16. The Amending Act introduced changes to the Crimes Act 1961 by adding three new offences:
 - (a) Infecting animals with disease or sickness,
 - (b) Contaminating food, crops, water or other products intended for human consumption,
 - (c) Threatening to do harm to persons or property.

These attract maximum penalties 10 years imprisonment for the first two and seven years for the last. As these are inserted on the premise they are likely to be committed as part of acts of terrorism, it is difficult to see why they are added to the Crimes Act

17. The offence of infecting animals is created where any person either directly or indirectly causes or produces in animals any disease or sickness that either:
 - (a) Intended that cause or was reckless as to the outcome, and

the outcome is a serious risk to health or safety of an animal population or anything likely to result in major damage to the national economy.

This will include the rabbit virus *colesi*.

18. The offence of contaminating products is created when contamination occurs, knowing or being reckless as to whether they are intended for human consumption, and intended or was reckless as to harm or major economic loss to a person or to the national economy of New Zealand.
19. This has an interesting affect on the genetic engineering (GE) debate. Protests against the genetic manipulation of animals and crops – admittedly principally destructive protests – could be caught by this provision.
20. The Crimes Act offence of threatening to do harm would be committed if there was an intention to cause significant destruction to commercial or government interests by threatening to do an act to cause harm to personal property or communicating information about harm to personal property. There is no explicit link to terrorism for this offence.

21. In addition to the provision of offences involving the use and movement of unmarked plastic explosives, and the physical protection of nuclear material – and the other specific offences – the Amending Act 2003 provides for extra-territorial jurisdiction, extradition, and mutual assistance requirements in respect of those offences. This is provided for by amendments to s 7 of the Crimes Act. Section 7A lists certain provisions under which prosecution may occur irrespective of the commission occurring overseas. Currently these relate largely to corruption. The amendment greatly extended the extra-territorial application of the Crimes Act, for it will allow proceedings to be brought for any offence against the Crimes Act committed in the course of carrying out a terrorist act anywhere in the world, provided there is some connection with New Zealand
22. Section 14 of the Terrorism Suppression Act 2002 was amended to insert a reference to new offences relating to nuclear material. New Zealand courts have jurisdiction over offences in the Terrorism Suppression Act 2002 which occur wholly outside New Zealand if committed by New Zealanders, or against New Zealand property, against New Zealand facilities or citizens, or “in an attempt to compel the Government of New Zealand to do or abstain from doing any act” (ss 16(a), s 17(d)), or by individuals present in New Zealand and not extradited. The New Zealand courts have jurisdiction if the acts occurred in New Zealand, but by the convention so does any other member state have jurisdiction over Acts in New Zealand
23. Section 18 was also amended to provide that the principal offences (bombing, financing, or nuclear materials offences) also apply to acts outside New Zealand if the alleged offender is in New Zealand and not extradited.
24. It is conceivable that individuals might face prosecution for activities which might not popularly be regarded as terrorism, but which were caught by the wide definition of terrorism in the Terrorism Suppression Act. This was a risk under the original Act; with the additional offences added to the Crimes Act this becomes more serious.
25. Prosecutorial discretion might be expected to prevent unjustified prosecutions within New Zealand. But there is a risk that New Zealand might find itself under pressure to either extradite or prosecute individuals for alleged “terrorist” offences, when local authorities would not normally seek to do so.
26. A hypothetical situation could be where a policeman or protestor was injured during a protest against a visiting foreign dignitary. Terrorism is defined by the Terrorism Suppression Act 2002 as, inter alia, in order to advance a ideological, political, or religious cause, “the death of, or other serious injury to, 1 or more persons” (s 5). There is, however, an additional requirement that the act was accompanied by an intention to unduly compel or to force a government of an international organisation to do or abstain from doing any act, or to induce terror in a civilian population in New Zealand. Engaging in protests is expressly provided for, as not of itself sufficient basis to infer specific intent and purpose required for a terrorist act, but it might be

doubted whether other countries would have this unique proviso and whether “unduly compel” would be interpreted as strictly in some countries as it would be in New Zealand. The provisions provide ample scope for diplomatic if not legal argument, if the foreign government concerned sought extradition or to persuade New Zealand to prosecute the alleged offender.

27. The expectation implicit in the Terrorism Suppression Act 2002 is that New Zealand will prosecute any and every terrorist offence within its jurisdiction, or allow the extradition of the alleged offenders to face trial overseas. Other signatories to the conventions, which that Act – and the Amending Act – implement, will have similar domestic laws as the definitions are mainly contained in the conventions. It might be expected that they would have equivalent provisions to s 7A and s 7B of the Crimes Act, and ss 14-19 of the Terrorism Suppression Act. This will allow foreign countries to claim jurisdiction over events which occurred solely within this country. In the example of the protestor, such an individual would be subject to the jurisdiction of the courts of the visiting dignitary, and would be tried for a terrorist offence.
28. Historically, there has been a legislative presumption against the extra-territorial application of public law statutes, as a matter of statutory interpretation. This is based on a historical concern not to infringe on the sovereignty of other states (or jurisdictions) by purporting to regulate conduct that occurs wholly within the boundaries of another jurisdiction. Customary international law however permits a nation to apply its law to extraterritorial behaviour with substantial local effect, as well as the extraterritorial conduct of its citizens or domiciliary. The terrorism conventions, as adopted by New Zealand, seriously undermine this presumption.
29. A fundamental difficulty with both the Terrorism Suppression Act 2002 and the Amending Act 2003 is their provision for the use of evidence. The fairness of a trial could be severely affected if the evidence upon which the prosecution was relying was from a security agency, and was not subject to full cross-examination. Neither the trial judge nor the prosecution or defence would be in a position to fully evaluate the evidence. The decision to bring the prosecution would also be based on an assessment of evidence of which the Crown prosecutor and police would only see selected portions. The selection process might well occur in overseas intelligence agencies, who are not accountable to New Zealand authorities. This use of evidence may infringe s 27 of the New Zealand Bill of Rights Act 1990, which guarantees a general right to natural justice. However demonstrating the breach would be extremely difficult, usually impossible, as even the courts would not have jurisdiction over ordering discovery process against a third party resident outside New Zealand.
30. Terrorist offences are not confined to the specific offences of the Terrorism Suppression Act, but now include all offences in the Crimes Act if committed as part of a terrorist act. This may have significant and unforeseen consequences for criminal justice in this country.

31. If we are prepared to accept prosecutions based on intelligence reports provided by the New Zealand Security Intelligence Service (NZSIS), to what extent should they be relied upon if they cannot be fully tested in an adversarial process. In an article by Paul Buchanan, a former US Defence Department analyst (NZ Herald 2 December 2003), the degree of reliability is so diluted it is clear it would not normally be admissible in a court of law. Mr Buchanan points out that not only is the source of intelligence not first hand by our own agents, but it also is compiled by governments who have their own agenda. Noting the track record of the FBI and the CIA to draw on lists of persons and organisations made up by countries such as Algeria, Egypt and Morocco and much of the Middle East intelligence comes from, Israel's Mossad had distributed to US allies such as New Zealand, he further notes the third hand information is often used without vetting or independent confirmation of authenticity. New Zealand compounds that problem with the very small number of people dedicated to full time analysis of foreign derived intelligence often without expertise in that area of the world as we have virtually no operatives working outside New Zealand.

32. An article in the NZ Herald (2 March 2004) carried the comments of Helen Clark relating to an alleged bugged conversation between the UN Weapons Inspectors in Iraq and the UN Secretary General Kofi Annan in which the Prime Minister is quoted:

“I do not comment on intelligence matters”

but went on to advise that she had embarked on her own independent intelligence gathering efforts stating that she did not want to comment on any other government:

“... but I have an acute awareness of what intelligence is. It often cannot be corroborated, therefore it must be used with particular care.”

This demonstrates the difficulty the Government presents to the Crown as a prosecutor. On the one hand the receipt of raw data or analysed intelligence depends upon maintaining secrecy of its source, but on the other hand secretly use that information to deprive persons of their liberty or their reputation, it must guarantee a fair trial. A fair trial depends upon testing the source material for credibility.

33. With what we know of the current intelligence coming into New Zealand, we cannot rely upon a certificate from NZSIS as they neither source the material directly, or in many cases, are able to independently analyse it with sufficient expertise to render it safe without question for the purposes of a prosecution. The checks and balances for classification of a certificate to designate an entity as a terrorist entity does not apply to the prosecuting of an individual although it may be part of the prosecution case. If you combine the requirements of a government to keep the source, and therefore often the detail of material relied upon for a prosecution secret from the defendant, our adversarial system as a process of seeking truth and justice becomes ineffective. The government clearly has a duty to ensure it is not at the mercy of other states with

separate, sometimes unknown, agendas in accepting intelligence as the basis of a case against a New Zealand citizen or even a foreigner in New Zealand being judged by our courts.

34. Terrorism is an emotive adjective and any jury would recognise the weight upon them in contributing to the safety of ordinary citizens of New Zealand on the one hand and a fair trial on the other. The moral strength of our legal system will depend upon the rules that we put in place to ensure a just verdict arising after a fair trial. At present, we recognise the difference between the basis upon which a government acts in the security of the country on the one hand and the duty to provide firm but fair prosecution on the other. Until we can be sure that information gathered by our intelligence service is sufficient and appropriate, it should not be used as the basis for prosecutions.

35. Public issues are:

- (a) Classified security information has not always been accurate and inter-government mutual assistance has been used for political purposes, care need to be taken that untested assumptions do not flow into the domestic jurisdiction, especially in prosecution of criminal offences.
- (b) The Crimes Act and the Evidence Act already allow for secret witnesses. The Chief justice or nominees will be privy to such material as it relates to designation of terrorist entities.
- (c) The GE debate, the *colesi* virus introduction debate cut short by unauthorised introduction and spreading are two examples of areas where the spectre of terrorism can enlarge fertile imagination unless the definitions of these offences are carefully prescribed.
- (d) The effect upon the domestic criminal procedures of New Zealand of the extensive extra-territorial jurisdiction established by the Act, and the implications for New Zealand of similar provisions being enacted abroad, especially given specific extradition rights of foreign states and their influence over New Zealand prosecutorial discretion.