Counter-Terrorism Bill 2002

EXPLANATORY NOTE: COUNTER-TERRORISM BILL 2002

The following advice on the Counter-Terrorism Bill 2002 is published with the permission of the Attorney-General following a request from the Foreign Affairs, Defence and Trade Select Committee. The Bill was introduced on 17 December 2002. The Crown Law Office had previously advised the Attorney-General on 10 December 2002 that no provision in the Bill appeared to be inconsistent with the New Zealand Bill of Rights Act 1990. However, due to late receipt of the Bill, the Crown Law Office was unable to provide detailed advice at the time on provisions in the Bill which raised prima facie Bill of Rights consistency issues. This detailed advice was subsequently provided on 11 February 2003 and is set out below.

11 February 2003

Attorney-General

Counter-Terrorism Bill PCO4663/14
Our Ref: ATT114/1124(15)

1. Further to my letter to you of 10 December 2002, indicating that no provision in the above Bill appeared to be inconsistent with the New Zealand Bill of Rights Act 1990, I now provide detailed advice on a number of the Bill's provisions which raised a prima facie Bill of Rights-consistency issue. As mentioned in the letter of 10 December, the late receipt of the Bill meant that I was not in a position to provide detailed advice to you on those matters at that time and unfortunately the pressure of current litigation, together with consideration of the companion measure the Border Security Bill, has prevented me attending to this matter until now. I apologise for any inconvenience.

Tracking device regime - s 21 BORA

2. The only BORA-consistency issue of note raised by the Bill concerned cl 34, which proposes to introduce new ss 200A-200I into the Summary Proceedings Act 1957.

The tracking device scheme

3. In broad outline the purpose of these sections is to create a regime authorising the installation, monitoring and removal of tracking devices (defined in s 200A) for the purposes of law enforcement (widely defined also in s 200A). The scheme created by the Act has two aspects: a warrant procedure and a warrantless procedure.

3.1 Under s 200B application may be made by an authorised public officer for a tracking device warrant ("TDW"), to authorise the installation of a tracking device in or on a specified thing and the maintenance, monitoring and removal of that device (s 200B(1)). Application may not be made unless the officer believes (1) that there are reasonable grounds to suspect that an offence has been, is being or will be committed; and (2) that information relevant to the commission of the offence can be obtained through the use of the device; and (3) that it is in the public interest to issue such a warrant taking into account the seriousness of the offence, the degree to which privacy or property rights are likely to be intruded upon, etc (s 200B(2)). The application for a warrant must be in writing on oath and be sufficiently particularised (s 200B(3)). The warrant may be issued by a High Court Judge or a District Court Judge; not, note, by a Court Registrar (as is the case in respect of ordinary search warrants) (s 200C). A TDW authorises a number of things, including inter alia, where necessary forcible entry and forcible interference with anything (s 200D(2)). A TDW has effect for a maximum period of 60 days, although that period can be renewed (see ss 200E-200F).

3.2 Under s 200G an authorised public officer may place a tracking device in or on anything and monitor that device where, in all the circumstances, it is not reasonably practicable to obtain a TDW and the officer believes on reasonable grounds that a Judge would have issued a warrant under the warrant procedure if time had permitted. Where this warrantless process is used, application must be made within 72 hours for a warrant authorising continued monitoring of the device. If the application is declined then the officer must apply for a warrant to remove the device.

BORA assessment

4. The placing of a tracking device on any thing or vehicle constitutes an intrusion on reasonable expectations of privacy that a citizen would have in being able to go about his or her business without electronic observation being made of those movements through the installation and monitoring of a tracking device. Accordingly, in my view, s 21 BORA (right to be free from unreasonable search and seizure) is engaged and prima facie infringed. The issue which arises is whether the warrant regime and the warrantless regime constitute a justified limit on that right in the circumstances.

5. In my view the warrant regime is clearly a reasonable limit on s 21 BORA. In particular, the regime requires (1) written application to be made on oath (2) to a Judge (3) only where there is reasonable ground to believe that an offence has occurred and that information in relation to commission of that offence would be gleaned and that installation of a device is sufficiently in the public interest, (4) particulars must be provided, (5) once issued the warrant has a limited life (unless renewed upon application) (6) the acts which the warrant empowers and authorises a public officer to undertake are explicitly provided for (see in particular s 200D). Moreover, the Judge is not obliged to issue a warrant (see s 200C(1) "may") and may impose any terms or conditions appropriate in the circumstances (s 200C(1)). Finally I note that a tracking device that remains in place after the expiry of a warrant must not be monitored (s 200H(3)).

6. As regards the warrantless search procedure, the circumstances and limitations placed upon its deployment meet, in my opinion, the requirements of s 5 BORA. In particular, (1) s 200G can only be resorted to where an authorised public officer reasonably believes in all the circumstances that obtaining a warrant is not reasonably practicable and that had time permitted a Judge would issue a warrant, (2) application for a warrant must be made within 72 hours of the installation of the device, (3) if a warrant authorising continued monitoring is not issued, then application must be made for a warrant to remove the device, (4) where a warrant is not issued then the authorised public officer must lodge a written report on the exercise of the warrantless power to install on the circumstances in which it came to be exercised with the High Court or District Court (s 200G(4)).

7. The scheme created by new ss 200A-200I establishes a reasonable accommodation of law enforcement needs and reasonable expectations of privacy. The warrant regime is tightly circumscribed and while s 200G creates a warrantless tracking device power, that too is limited in scope and clearly available only in exigent-type situations.

Yours sincerely
Andrew Butler
Crown Counsel