10 June 2016

Attorney-General

Enhancing Identity Verification and Border Processes Legislation Bill (PCO 19557/14.0)
Our Ref: ATT395/252

1. We have reviewed this Bill for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We conclude it is consistent.

Introduction

2. The Bill provides for improved information sharing between law enforcement agencies and Customs, reflecting recommendations of the Government Inquiry into Matters concerning the escape of Phillip John Smith/Traynor ("the Inquiry"). The Inquiry found that "justice sector management systems and practices did not facilitate interoperability sufficiently to support administration of justice and protect the public against risks, particularly those arising from confusion about criminal identities."[1]

3. When Parliament gives an agency authority to demand, from another agency or person, information in which the subject of the information has a reasonable expectation of privacy, it creates a search power. The enactment creating that power will be consistent with s 21 of the Bill of Rights Act if the intrusion into privacy it authorises is justified by a sufficiently compelling public interest[2] and the search power is accompanied by adequate safeguards to ensure it will not be exercised unreasonably.

4. We have analysed each of the provisions containing search powers in light of these principles.

---

1 Inquiry at p 15, recommendation 1.

2 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, Lexis Nexis, Wellington 2015): p 936 at [18.9.2] "In *Hamed v R,* Blanchard J, supported by the majority of the Supreme Court, clarified the steps undertaken in determining whether there has been a "search" in terms of s 21. First, search has its ordinary meaning but is informed by the underlying expectation of privacy protected by s 21. The person complaining of the breach must have subjectively had such an expectation, and that expectation must be one "that society is prepared to recognise as reasonable"" (footnotes omitted).

Part 1 – Privacy Act Amendments

5. Clause 6 introduces a new Part 10A to the Privacy Act governing access to identity information. Identity information means any information that identifies an individual and includes biographical details, biometric information, a photograph, details of an individual's travel document or certificate of identity and details of any distinguishing features.

6. The term "biometric information" is used throughout the Bill and means[3]:

   (a) 1 or more of the following kinds of personal information:

      (i) A photograph or all or any part of the person's head and shoulders:

      (ii) Impressions of the person's fingerprints:

      (iii) A scan of the person's irises; and

   (b) An electronic record of the personal information[4] that is capable of being used for biometric matching.

7. Proposed s 109D authorises the nominated agencies to access an individual's identity information held by a holder agency for specified purposes set out in Schedule 4A. The specified purposes are to verify identity when the agency is exercising specified law enforcement or border control functions. Proposed s 109F enables Schedule 4A to be amended by Order in Council by adding, omitting or amending any item in Schedule 4A.

8. The amendments give effect to the recommendations of the Inquiry that there be a "step change" in justice sector information sharing with full inter-operability within and across sectors[5] and a strategic focus among all government agencies on biometric identity information.[6]

Freedom from unreasonable search or seizure

9. An individual does have a reasonable expectation of privacy in biometric information[7], but given the access arrangements to this information go no further than verifying identity, the expectation would be easily displaced where the state has a legitimate purpose in verifying identity, as it would when making a decision to arrest a person or prevent their entry into or departure from New Zealand.

---

3 Proposed s 109C Privacy Act - amendment to s 2(1).

4 Privacy Act, s 2: "Personal information means information about an identifiable individual; and includes information relating to a death that is maintained by the Registrar-General pursuant to the Births, Deaths, Marriages and Relationships Registration Act, or any former Act (as defined by the Births, Deaths, Marriages, and Relationships Registration Act 1995)." Under proposed s 2(1) of the Customs Act "personal information" is defined as meaning "information about an identifiable person (including without limitation, biometric information)."

5 Inquiry, pp 15 and 134.

6 Inquiry at pp 16 and 134.

7 Fn 2 at 943 at [18.11.3]: Butler and Butler note that taking fingerprints (which are biometric information) is covered by a search: "Searches and seizure are, equally, subject to [Bill of Rights Act] unreasonableness scrutiny. A "physical" search or seizure in this context means … the compulsory taking of impressions such as fingerprints, palm print, footprints; …"

10. Schedule 4A limits access to identity information (which includes biometric information) by confining access to those occasions where its purpose is to confirm identity for specified law enforcement and border control purposes. The access arrangements limit a person's ability to avoid law enforcement or border control by adopting a different identity document, using an alias or pretending to be someone else. They also eliminate the risk of a person with the same name and date of birth as a person of interest to the authorities from being wrongly apprehended. In these circumstances we consider that the access arrangements authorised by schedule 4A do not infringe the right to be free from unreasonable search or seizure.

11. The potential amendment or replacement of Schedule 4A by Order in Council does not alter our assessment. The recommendation of the Minister is made after consultation with the Privacy Commissioner. The Order-in-Council itself must be consistent with the Bill of Rights Act.[8]

Part 2 - Subpart 1 - Births Deaths, Marriages and Relationships Registration Act 1995 amendments

12. Clause 12 adds a new information sharing provision to the Births, Deaths, Marriages and Relationships Registration Act. The Registrar-General is already authorised to disclose birth, death, marriage, civil union and name change information as follows:

    (a) Under s 78A and Schedule 1A to specified agencies for specified purposes; and

    (b) Under s 78AA pursuant to an approved information sharing agreement[9] to facilitate the provision of public services.

13. The proposed amendment adds s 78AB which authorises the Registrar-General to share births, deaths, marriages, civil union and name change information with specified agencies where the specified agency has reasonable cause to suspect an individual: is, or is liable to be, detained under an enactment; arrested under a warrant; is or is about to contravene a court order; is, or is liable, to be prosecuted for an offence punishable by imprisonment; is endangering or threatening to endanger the life, health, or safety of a person or group of persons; is injured or dead. The specified agencies are Corrections, Department of Internal Affairs, Immigration New Zealand, Ministry of Justice, Ministry of Transport, New Zealand Customs Service, New Zealand Police, and New Zealand Transport Agency.

Freedom from unreasonable search or seizure

14. We consider the proposed new disclosure power to be consistent with s 21. The relevant documents held by the Registrar-General contain only basic biographical information held in a public register[10] so expectations of privacy are less than in

---

8 Section 6 Bill of Rights Act and *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

9 Approved information sharing agreements are approved by Order in Council and can be entered into between public sector and private sector agencies. At least one of the agencies entering an approved information sharing agreement must be a public sector agency that is a department or part of a public sector agency that is a department (ss 96C and 96F Privacy Act).

10 Section 74 (1) provides "Any person may request a Registrar to – (a) cause a search of information to be made; (b) permit the inspection of a source document; and (c) provide a print-out or certificate of the information requested or a copy of a source document."

other contexts.[11] Second, the agency must have reasonable grounds to believe one of the specified circumstances exist in order to be given access to the information.

Part 2 - Subpart 2 - Amendments to the Customs and Excise Act 1996

Customs and Excise Act - ss 32D - 32F

15. Clause 15 adds new sections 32D - 32F into the Customs and Excise Act.

16. Section 32D authorises Customs, for the purpose of monitoring movement of craft, people, passenger and crew processing and border security, to collect and use personal information about persons arriving and departing New Zealand. This includes biometric information.

17. Section 32E authorises a Customs Officer to ask a person to verify their identity by providing biometric information for the purpose of biometric identity matching.

18. If a person fails to comply with such a request, the Customs Officer may direct them to remain in a designated place to enable the Officer to either or both:

    (a) make the necessary inquiries to establish the person's identity;

    (b) obtain the attendance of, or make inquires of, another officer who is authorised for public health or law enforcement purposes, to question the person, ascertain their status, detain or arrest them.

19. If a person fails to comply with a direction to remain in the designated place proposed s 32F authorises a Customs Officer to detain a person for up to 4 hours and to use reasonable force, if necessary.

20. These provisions raise issues of compliance with s 21 (right to be free from unreasonable search or seizure) and s 22 (right to be free from arbitrary arrest or detention).

Freedom from unreasonable search or seizure

21. We consider the ability to require those arriving or departing to provide biometric information for identity verification purposes to be reasonable. When assessing the protection of reasonable expectations of privacy underpinning s 21 the context of border security involving the processing of large numbers of people quickly is relevant. The Inquiry refers to the ability to flag offenders for the purpose of a border alert. Border alerts have the potential to trigger a false match with a traveller with a similar name or similar biographic data.[12] Further personal information would be needed to ascertain/confirm identity.

22. United States and Canadian jurisprudence has held there are significantly diminished expectations of privacy for persons crossing international frontiers. That

---

11 Fn 2 p 916 at [18.5.2]: Butler and Butler consider the "touchstone" of s 21 is the "protection of reasonable expectations of privacy" now a first step in assessing whether a "search" in terms of s 21 has been undertaken."

12 Inquiry at pp123-124.

jurisprudence has been cited with approval in New Zealand case law, albeit in the context of the right to consult a lawyer.[13]

23. The requirement to disclose personal information, including biometric information, is limited to the purpose of identity verification. Once obtained, the information is subject to the Privacy Act information privacy principles, principle 9 of which provides that information must not be kept for longer than required for the purposes for which the information was obtained. We consider the authorisation provided by proposed s 32D to be reasonable.

Right not to be arbitrarily detained

24. Section 22 of the Bill of Rights Act provides that "everyone has the right not to be arbitrarily arrested or detained." Detention is arbitrary if it is "capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures."[14]

25. The ability to detain arises in the context of a refusal to provide biometric information and in which the contextual factors discussed above apply. A refusal gives rise to the risk that the person is travelling under a false identity. The time for which the person may be detained is limited to a maximum of four hours and enables inquiries to establish identity or arrange further inquiries for law enforcement or health related purposes. We consider the power does not infringe s 22 of the Bill of Rights Act.

Section 280M Customs and Excise Act - Access by other agencies to Customs Information

26. The Bill replaces s 280M of the Customs and Excise Act. Under the existing s 280M Police and the New Zealand Security Intelligence Service (SIS) have access to the Customs' database for conducting counter-terrorism investigations. The access occurs pursuant to a written agreement on which the Privacy Commissioner has been consulted. Existing s 280M expires on 1 April 2017.

27. The current s 280M was assessed for consistency with the Bill of Rights Act prior to the introduction of the Countering Foreign Fighters and Other Violent Extremists Bill. That assessment found the provision to be consistent with the Bill of Rights Act but observed:

> The data that Customs holds includes passenger movement, trade data and intelligence holdings.
>
> The Customs Act contains significant search and surveillance powers. As an example of one such power, a High Court decision has held that s 151 provides that a Customs officer may examine or analyse any goods that are subject to the control of Customs or the officer has reasonable cause to suspect are subject to the control of Customs. Section 151 is designed to provide Customs with the widest possible powers to deal with persons who arrive in New Zealand from overseas. Customs officers are entitled to examine and analyse such articles as

---

13 Fn 2 p 1054 at [18.30.10]: Butler and Butler consider the endorsement of the North American approach by New Zealand Courts in the context of the right to a lawyer would be transferrable to assessing compliance with s 21 of the Bill of Rights Act.

14 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) at [34].

> may be of interest to them by any means whatsoever. Section 151 does not provide a requirement of reasonable cause or suspicion of criminal activity, and the information may be retained for law enforcement purposes. An example of the information obtained includes data downloaded from a cell phone.[15]
>
> It is entirely appropriate for Customs to have wide latitude to search and seize goods at the borders without a warrant for the purposes of border protection. What is of issue is NZSIS and Police having access to data taken by Customs without a warrant for border protection and then using it for other purposes such as the investigation of suspected criminal offending. We consider that comprehensive examination of data, either from cell phones, laptops or other storage data, for general law enforcement purposes would require at least reasonable suspicion.[16]

28. The proposed s 280M facilitates wider access. It authorises access by the Chief Executive of an agency (which covers Public Service Departments[17], Police, Security Intelligence Service and Defence Force) to one or more Customs databases to search for information, including personal information, for the purpose of assisting the agency to perform its functions relating to or involving the following:

    (a) The prevention, detection, investigation, prosecution, or punishment of offences:

    (b) The prevention, detection, or investigation of any potential, suspected, or actual-

        (i) terrorist act; or

        (ii) facilitation of a terrorist act;

    (c) National security.

29. The access must be pursuant to a written agreement between the Chief Executive of the agency and the Chief Executive of Customs (who must first consult with the Privacy Commissioner). The written agreement must specify and address certain listed matters including the particular purpose for which the information is accessed, how it will be used to achieve those purposes and the safeguards to be applied for protecting personal information disclosed.

30. As observed in relation to the current s 280M of the Customs Act, the search power is a warrantless power. Section 280M(1)(a) widens it to offence detection and law enforcement purposes.

31. Notwithstanding this we consider the search authorised by the s280M is consistent with s 21 of the Bill of Rights Act because the access can only be authorised by a written agreement entered into between the Chief Executive of Customs and the Chief Executive of the agency.[18] The Chief Executives are public actors to whom the Bill of Rights Act applies. Section 280M has to be read consistently with the Bill

---

15 *R v Steven Baird* HC AK CRI-2009-004-13439 [27 May 2011].

16 *United States of America v Howard Wesley Cotterman,* No. 09-10139, 9th Cir.; 2013 U.S. App. LEXIS 4731.

17 Departments specified in Schedule 1 to the State Sector Act 1988.

18 Proposed s 280M(3). We note s 281 of the existing Act adopts a similar approach in respect of disclosure of information by Customs to overseas agencies and thus similar analysis applies to the Bill of Rights consistency of this provision s 281(1)(j) of which is amended to replace "personal identification details" with the term "personal information".

of Rights Act and cannot be interpreted as authorising the Chief Executives to enter an agreement inconsistent with s 21. The preferred method of preventing an unreasonable search is prior judicial authorisation by means of a warrant. In the absence of a warrant, the Act itself ought to curtail the use of the power with appropriate qualifiers. Here it does so by requiring an agreement between Government agencies for provision of access to information. Because those agencies are covered by s 3 of the Bill of Rights Act, they must act consistently with it. The agreement will need to prescribe sufficient restrictions on the sharing of information so that information is not able to be accessed in circumstances where doing so would result in s 21 being contravened. Further, the agreement must be published and any person or body sufficiently interested in doing so could seek a declaration from the High Court as to its lawfulness.

Part 2 - Subparts 4, 6, 7 and 8 – requirement for parolees, those on community based sentences or detained under the mental health provisions to provide biometric information if requested and obtain permission before leaving New Zealand

Amendments to the Parole and Sentencing Acts

32. Subpart 7 amends the Parole Act 2002 to impose further standard conditions on convicted offenders released on parole or subject to court ordered extended supervision following completion of a determinate sentence. Amendments to the Sentencing Act 2002 in subpart 8 add these conditions to the standard conditions applying to community based sentences of supervision, intensive supervision, community detention, home detention, and for the period post-home detention in which standard conditions apply.

33. The further conditions are:

(a) the offender must not leave or attempt to leave New Zealand without the prior written consent of a probation officer; and

(b) must, if the probation officer directs, submit to the collection of biometric information.

34. These conditions were recommended by the Inquiry.[19] The condition in (a) above engages the Bill of Rights Act s 18 right to freedom of movement. Section 18(3) and (4) provide:

> (3) Everyone has the right to leave New Zealand.
>
> (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

35. The condition at paragraph 33(b) engages the s 21 right to freedom from unreasonable search or seizure.

Freedom of movement

36. The condition at paragraph 33(a) will limit the offender's freedom of movement by interfering with his or her ability to leave New Zealand. The right will be subject to

[19] Inquiry at p 135, recommendations 5, 6 and 8.

obtaining the prior written approval of a probation officer. Section 5 of the Bill of Rights Act applies to this guaranteed freedom so it is subject to such limits are demonstrably justified in a free and democratic society. In order to be so justified, the measures limiting the right must be rationally connected to a pressing social objective and involve minimal impairment of the right.

37. Standard release conditions are intended to reduce the risk of re-offending in the period following release from prison. They serve an important social purpose of reducing crime and assisting the reintegration of convicted offenders into society.

38. We are satisfied that the imposition of the restriction on freedom of movement is a justified limitation on the offender's freedom of movement. It is prescribed by law and logically connected to the purposes it serves. An offender who leaves New Zealand and fails to return is unable to be supervised.

39. The impairment of the right is the minimum necessary to achieve its purpose. It is not an absolute limitation - the offender may leave if a probation officer grants written permission. When deciding whether or not to do so, the probation officer, as a person exercising a public function, must act in a manner that is consistent with the Bill of Rights Act.

Freedom from unreasonable search or seizure

40. The search power is logically connected with the purpose for which it is imposed. The ability to require an offender to provide biometric information facilitates enforcement of the prohibition against him or her leaving New Zealand without permission. The biometric information so collected may only be used for the purpose of helping identify offenders before they leave New Zealand and enforcing the condition that they not do so without permission. The context of parole and community based sentencing provide for a lower expectation of privacy than that held by others in the community.[20]

41. We consider the search authorised by the power to be consistent with the Bill of Rights Act.

Special patients, restricted patients and special care recipients

42. Restrictions will also apply to:

    (a) Special patients - persons charged with offences who the Court has ordered are to be held in a hospital or secure care facility under the Criminal Procedure (Mentally Impaired Persons) Act 2003;[21] and

    (b) Special care recipients - persons charged with an offence who the Court has ordered are to be held in a hospital or secure care facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; and

---

[20] Fn 2 p 1054 at [18.30.11]: Butler and Butler note that the prison context "is a field in which limits on the usual warrant plus reasonable grounds to believe standard [for a search] can readily be contemplated." While the direction for an offender to provide biometric information is not made inside a prison, contextual factors associated with expectation of privacy for a person being supervised under a court imposed sentence apply.

[21] Such orders may be for detention because a person has been found unfit to stand trial or acquitted on grounds of insanity; or a charged person may be detained for the purposes of assessment or detained following an assessment and pending trial (see Inquiry at p 21).

(c) Those who are designated by court order as restricted patients because of the danger the person poses to themselves or others.

43. When on authorised leave, such persons are prohibited from leaving New Zealand unless permitted to do so by the Minister of Health who may impose terms and conditions on any permission granted.

44. The inquiry supported such restrictions on special patients leaving New Zealand without permission.[22] Special care recipients are in a similar position.

Freedom of movement for special patients, restricted patients and special care recipients

45. We consider the restriction on freedom of movement for special patients, restricted patients and special care recipients is a justified limitation on freedom of movement. Their detention is prescribed by law and subject to statutory time limits.[23] There are regular assessments of the basis on which a person is detained.[24] For example, whether a person remains unfit to stand trial, or, if they remain unfit to stand trial, whether their continued detention is necessary. While legislation authorises the granting of leave by the Director of Mental Health or the Minister, such leave is not a right. The person remains subject to the hospital or special care facility oversight. In such circumstances a prohibition on the person leaving New Zealand without permission is a justified limitation on freedom of movement.

46. The position of restricted patients differs in that they have not been detained through the criminal justice system. However, they are detained due to their being a danger to themselves or others. In such circumstances a restriction on their leaving New Zealand without permission is also a justified limitation on freedom of movement.

Freedom from unreasonable search or seizure for special patients, restricted patients and special care recipients

47. The assessment of the requirement to provide biometric information made in relation to parolees also applies to special patients, special care recipients and restricted patients.

Part 2 - Subpart 5 - Amendments to s 200 of the Land Transport Act 1998

48. Currently, s 200 of the Land Transport Act 1998 prohibits New Zealand Transport Authority (NZTA) from releasing the photograph it holds of a licence holder. Photographs are only released to an enforcement officer pursuant to a warrant issued under s 198 of the Summary Proceedings Act 1957, such warrant being limited to the purpose of traffic law enforcement.

49. In addition to access via the access arrangements provided by the proposed s 10A of the Privacy Act for identity verification purposes[25], the proposed s 200 authorises

---

22 Inquiry at 133.

23 Section 30 Criminal Procedure (Mentally Impaired Persons) Act 2003.

24 Mental Health (Compulsory Assessment and Treatment) Act 1992 - see s77 regarding special patients and s 78 regarding restricted patients; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 – see ss 77, 79 and 89 regarding special care recipients.

25 Proposed s 200(1) Land Transport Act and the Privacy Act amendments discussed earlier.

access by specified agencies (Corrections, Immigration New Zealand, Ministry of Justice, Customs and Police) for general law enforcement purposes.[26] The Bill implements the Inquiry's recommendation that the provision should be amended to permit photographs of drivers held by NZTA to be shared with law enforcement agencies for law enforcement purposes.[27]

50. The Inquiry noted that when legislation changed the format of driver licences to include a photo there was a degree of disquiet that the photo identification driver licence might become a form of national identity card or that the photograph might be used for improper purposes. Hence the restrictive nature of s 200.[28]

Freedom from unreasonable search or seizure

51. Obtaining a photograph for law enforcement purposes would enable a law enforcement agency to compare the photograph with information that agency already holds about a person who comes to their attention in the course of law enforcement. This would enable the agency to ascertain, for example, whether a person is using an alternative name.[29]

52. While the move to photo identification on driver licences was an issue of public significance, from a Bill of Rights Act perspective the databank of driver licence photographs is indistinguishable from the other forms of biographic and biometric information described earlier in this advice. It is information in which there is a lower expectation of privacy. That expectation would be displaced by the use of this information for the purpose of verifying the identity of a person of interest to law enforcement agencies.

53. This advice has been peer reviewed by Paul Rishworth, Senior Crown Counsel.

Helen Carrad
Crown Counsel

Noted

Hon Christopher Finlayson
Attorney-General
13 / 06 /2016

---

26 This implements the Inquiry's recommendation for the driver licence photographs to be shared with law enforcement agencies for law enforcement purposes – Inquiry Report at p 135, recommendation 9 and discussion at p132.

27 Inquiry at p 135, recommendation 9.

28 Inquiry at p 132.

29 Inquiry at p 132.