9 May 2007

Chair
Foreign Affairs Defence and Trade Select Committee
Parliament

Terrorism Suppression Amendment Bill 2007

Introduction

1. This submission is from the Legislation Advisory Committee (LAC), which was established to provide advice to Government on good legislative practice, legislative proposals and public law issues. The Committee produces and updates the LAC Guidelines adopted by Cabinet as appropriate benchmarks for legislation.

2. The following members of LAC wish to appear before the committee to speak to the submission.

- Dr Warren Young – Law Commission
- Professor John Burrows – Law Commission

Issues

3. Our remit does not extend to policy issues, and our comment here is restricted to an aspect concerning good legislative practice.

4. Clause 10 of the Bill inserts a new s10A into the principal act. It provides:

> "**10A No dealing with property of designated terrorist entity**
>
> "(1) While an entity is a designated terrorist entity, a person must not, without reasonable excuse, deal with any property –
>
> "(a) owned or controlled, directly or indirectly, by the entity; or
>
> (b) derived or generated from any property of the kind specified in **paragraph (a).**
>
> (2) **Subsection (1)** applies to the entity itself, as well as any other person.

The explanatory note says that the effect of this provision will be to freeze the assets of a designated terrorist entity.

5. The difficulty with s10A is that it creates a duty but provides no sanction for the breach of it. It will appear in a part of the principal Act where the sections which surround it all create criminal offences punishable by imprisonment.

6. Sanctionless duties are uncommon in our statute law. Where they occur they tend to be in relation to matters of procedure; for example s47 of the Local Government Official Information and Meetings Act 1987 which obliges local authorities to hold meetings in public unless one of the statutory exceptions applies. Section 10A is different in that it imposes a substantive duty – not to deal with a terrorist entity's property – where one would normally expect to find a sanction for disobedience. The rather similar s9 does carry a criminal penalty.

7. In the absence of an express statutory penalty, there is a risk that a court might treat infringement of s10A as a criminal offence nonetheless, by virtue of s107 Crimes Act 1961. That section provides:

> **107. Contravention of statute** – Every one is liable to imprisonment for a term not exceeding one year who, without lawful excuse, contravenes any enactment by wilfully doing any act which it forbids, or by wilfully omitting to do any act which it requires to be done, unless –
>
> (a) Some penalty or punishment is expressly provided by law in respect of such contravention as aforesaid; or
>
> (b) In the case of any such contravention in respect of which no penalty or punishment is so provided, the act forbidden or required to be done is solely of an administrative or a ministerial or procedural nature, or it is otherwise inconsistent with the intent and object of the enactment, or with its context, that the contravention should be regarded as an offence.

8. If section 107 were to be invoked in this way it would lead to unfortunate results, in that s10A lays down a strict duty not dependent on actual knowledge. Furthermore the defence of 'reasonable excuse' is very narrowly confined by the new section 9(2) of the principal act, substituted by clause 8 of the Bill.

9. There is of course no certainty that a court would hold that s107 applies. It might well be argued that the context of s10A shows an intent that breach of it should not constitute an offence (see s107(b)). The fact that the sections surrounding s10A expressly provide that they create offences, whereas s10A does not, might be taken to indicate a parliamentary intention not to visit criminal liability on an infringer of s10A.

10. In that case the question would arise of what sanction, if any, could be visited on someone who infringed s10A. It may be that in a particular case an injunction could be applied for by the Attorney-General to prevent a breach of the duty. However the law on the availability of injunction in these circumstances is far from simple, as the discussion in Meagher Gummow and Lehame *Equity,*

Doctrines and Remedies (4th ed 2002) 21-180 shows. Moreover injunctions are only useful before the event: if a prohibited dealing has already taken place it is too late to prevent it by injunction.

11. There must, then, be a possibility that breach of s10A would incur no sanction at all. While no doubt reputable institutions like banks would wish to comply regardless of sanction there may be others who would not. It is true that a person who infringed the letter of s10A might also infringe s9 of the principal Act which does create an offence. But that does not alter the fact that s10A, in its terms, creates a duty which is separate from, and stricter than, that in s9, and that that duty may well carry no sanction at all. A duty which cannot be enforced would seem to have no point. It is little more than a pious aspiration, and is not a good precedent.

Recommendation

12. The uncertain status of s10A is not good legislative practice. It is not satisfactory to have a provision which is unclear as to whether or not it creates a criminal offence. The LAC recommends that, if s10A is to be retained, it should be amended. If it is to create an offence it should say so expressly. Equally, if it is not to create an offence, that should be made clear, and the consequences of non-compliance should be made express. If there are to be no consequences of non-compliance consideration should be given to omitting the provision altogether.