LEGISLATION ADVISORY COMMITTEE

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15 May 2007

Chair
Law and Order Committee
Parliament Buildings
WELLINGTON

CRIMINAL PROCEEDS (RECOVERY) BILL

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
    - Professor John Burrows

3. Arrangements for the hearing should be made with Dr Young at the Law Commission, 04 914 4838.

Summary

4. Our remit does not extend to policy issues and our comment here is restricted to three issues concerning good legislative practice:

    - Whether a criminal or civil standard of proof should apply in respect of proceedings brought by the Crown under the Bill;
    - Retrospective application of the Bill (Clause 5 "relevant period of criminal activity" and Clause 55);
    - The availability of coercive enforcement powers without prior judicial scrutiny (Clauses 111 and 114).

Issues

A Civil standard of proof

5. The Committee recognises that the Government's decision to move to a non-conviction based regime, instead of the current conviction based scheme under the Proceeds of Crime Act 1991, is a policy matter upon which it would be inappropriate for us to comment. That said, the Committee has concerns about the standard of proof to be applied in proceedings under the proposed legislation.

6. The Crown Law Office advice provided to the Attorney-General on this Bill (18 August 2006, affirming its advice of 10 June 2005 on the Criminal Proceeds and Instruments Bill) is, in part, that the New Zealand Bill of Rights Act 1990 (BORA) rights do not apply to civil proceedings of the type proposed in this Bill.

7. We accept the Crown Law Office advice that overseas jurisdictions have held that certain minimum procedural requirements do not apply to civil proceedings. However, in our view a further enquiry is necessary to determine whether the nature of the proposed regime is criminal or civil in substance, irrespective of the label given to it.

8. To conclude that attaching the label "civil" to the procedures in this Bill effectively removes the regime from the ambit of BORA is to permit form to triumph over substance. The Committee considers that in essence the proposed regime is criminal in nature, especially since the forfeiture of property undeniably constitutes a punishment.

9. If our opinion on that issue is accepted it has a number of important consequences, including bringing into play:

    - Section 21 of BORA relating to unreasonable search and seizure (we will discuss this further below);
    - Section 25 of BORA relating to minimum standards of criminal procedure;
    - The issue as to whether the Crown should be required to prove its case beyond reasonable doubt, rather than on the balance of probabilities as proposed by the Bill.

10. If it is accepted that the nature of the proceedings proposed in the Bill is criminal in substance and carry penal consequences, it follows that the Crown should be required to prove its case beyond reasonable doubt.

11. That is not to suggest that the fundamental principle of the Bill (relating to the respondent benefiting from "significant criminal activity" rather than the Crown having to obtain a criminal conviction) need be revisited. As we have acknowledged, that is a policy decision outside our remit.

12. It is our submission that given the nature of the proceedings, the serious consequences arising from forfeiture of property and the potential for injustice, it is neither unreasonable nor unworkable to require the Crown when bringing proceedings under the Bill to prove its case to the ordinary criminal standard: beyond reasonable doubt.

B Retrospective application of the Bill

13. The LAC Guidelines (at [3.3.2]) note the general principle that legislation should operate prospectively and that the principle is strongest in the case of criminal liability. In our view the loss of property under the regime in the Bill is equivalent to a penalty for criminal offending, and is therefore in the nature of a criminal sanction. The fact that it does not follow a "conviction" does not alter its basic character in that respect.

14. Under clause 55 the Court need only be satisfied that the beneficiary has derived benefits from significant criminal activity in the "relevant period of criminal activity." That term is defined in clause 5 to mean the period that begins 7 years prior to the date of the application for a restraining order or a profit forfeiture order. Thus no significant criminal activity, and indeed no criminal activity at all, needs to have occurred after the Bill comes into force.

15. As currently drafted, the only event that need occur after the commencement date of the legislation is the application for an order, meaning that a person who has not benefited from serious criminal activity for 6 years and 11 months prior to the Bill's commencement could nonetheless be caught by its provisions.

16. We accept that it would defeat the purpose of the Bill to make its provisions wholly prospective, since up to 7 years would elapse before the full impact of the legislation would be felt. However, an alternative and arguably more principled approach to that proposed in the Bill would be to require that some serious criminal activity occur after the commencement of the Bill. That would mean that any person engaged in serious criminal activity after the commencement of the Bill would be on notice that profits derived from such activity in the last 7 years would be liable to confiscation.

C Enforcement powers of entry and search

17. We have concerns about clauses 111 and 114 which give the Director the power to issue a production notice or an examination notice. These are significant enforcement powers and one would expect such powers to be balanced by a requirement of prior judicial authorisation as provided for in the LAC Guidelines at [14.2.3].

18. The requirement to obtain prior judicial authorisation is designed to ensure that the decision to undertake a search or seizure or other such coercive enforcement powers is not left in the hands of the party who conducts it. There are a number of compelling reasons for this including the following:

    - It is an essential component of the checks and balances that should exist in a system operating according to the rule of law. While the State through its agents may be expected to act in good faith when exercising coercive powers against individual citizens, that cannot be guaranteed and should not be assumed. It is fundamental to the protection of individual liberty that the need for the exercise of the power should be demonstrated to the satisfaction of an independent judicial officer and authorised by that officer before the exercise of the power.

    - The requirement of judicial authorisation introduces its own disciplines and constraints into the routine procedures and activities of law enforcement agencies. Even if applications for warrants and orders are almost always approved, the fact that they have to be justified to an independent person is likely to mitigate any risk of abuses or excesses of power.

    - It acts as some protection for the agencies themselves against claims of civil or criminal liability. It gives their actions the imprimatur of a judicial order and may to some degree pre-empt the filing of court proceedings for damages or injunction by those under investigation. In other words, the requirement for a court order acts as a protection not only to the suspect, but also to the agency.

19. We doubt whether administrative efficiency can justify the granting of such expansive and invasive powers in the absence of prior judicial authorisation. Such powers should in principle generally only be granted in times of exigency or emergency. This is the intended recommendation of the Law Commission in its forthcoming report on search and seizure powers and also the import of recent comments by the Court of Appeal in *R v Williams and Ors* [2007] NZCA 52 at [265] - [270]).

20. The use of these production and examination powers will almost by definition be at times other than exigency or emergency, since they require the cooperation of the person subject to the notice. Accordingly it is suggested that production and examination powers should be able to be exercised only following the making of a judicial order, rather than by way of a notice from the Director.

Recommendations

21. The Committee therefore recommends that:

- The Crown be required to prove benefit from significant criminal activity under the Bill to the ordinary criminal standard of beyond reasonable doubt;
- Before a profit forfeiture order is made against a respondent the Crown must prove that some relevant criminal activity occurred *after* the commencement of the Bill;
- Production and examination powers under the Bill should be able to be exercised under the Bill only following the making of a judicial order.