Te Tari Ture o te Karauna
Crown Law

3 March 2017

Attorney-General

Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill
Our Ref: ATT395/264

1. We have reviewed the Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill (Bill). We advise it appears to be consistent with the rights and freedoms in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

2. We understand that the version of the Bill we have reviewed (copy **attached**) is intended to be close to the final form in which it will be introduced to Parliament. We will advise you if any significant changes are made which might impact on this advice.

3. The Bill amends the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (Act) to extend the reporting and supervisory regime under the Act to a wider range of entities, namely real estate agents, conveyancers, many lawyers, accountants, more gambling operators than are covered at present and some businesses that trade in high value goods. The Bill aims to protect businesses at risk of being targeted by criminals to launder money and to make it harder for criminals to profit from and fund illegal activity.

4. You have previously accepted our advice that the Act as it is at present is not inconsistent with the Bill of Rights Act. A copy of that advice is **attached.** We have reviewed the Bill for any additional issues that might arise by virtue of extending the ambit of the legislation to more entities and the other changes made by the Bill.

5. By altering the definition of "reporting entity" to include a wider range of entities, the Bill will have the effect of broadening the ambit of the mandatory reporting, production and inspection powers and the corresponding civil and criminal consequences for failure to comply with the requirements of the Act. These changes raise issues with the right to be free from unreasonable search and seizure affirmed by s 21 of the Bill of Rights Act and the protections in ss 24-26 of the Bill of Rights Act.

6. The information sharing powers in the Act are also to be expanded by the Bill, a change which also raises issues with the right to be free from unreasonable search and seizure affirmed by s 21.

7. We conclude, however, that none of these issues give rise to an inconsistency with the Bill of Rights Act.

Search and seizure powers

8. Lawyers, conveyancing practitioners and firms, accounting practices, real estate agents and trust and company service providers are now to be defined as a designated non-financial business or profession if they carry out certain activities set out in cl 5. These activities include acting as an agent for the formation of legal persons, managing client funds and conveyancing ("certain activities"). Reporting entities under the Act are now defined to include designated non-financial businesses and professions (cl 5). High value dealers and the New Zealand Racing Board will now also be covered by the definition of reporting entity. We have considered whether the extension of the regime in this way might give rise to inconsistencies with the Bill of Rights Act. We note that in Canada, some provisions of legislation setting out anti-money laundering and anti-terrorist financing legislation have been found to breach the Charter[1] but as explained further below, we consider the protections in this Bill go further than the Canadian equivalent and are sufficient to ensure the search provisions do not infringe s 21.

9. The alteration to the definition of reporting entities extends the group of entities now required to report suspicious activities under s 40 of the Act. There is an express exclusion such that lawyers are not required to disclose any privileged communication.[2] These powers could arguably amount to a search or seizure but we remain of the view as expressed in our earlier advice on the Act that they would not be unreasonable even in this expanded form given the important law enforcement function, the minimal nature of the intrusion and the protection for privilege.

10. The Bill has the effect of extending the powers of an "anti-money laundering and countering the financing of terrorism supervisor" (AML/CFT supervisor) to require records relevant to the supervision of reporting entities for compliance with the Act to be provided by a wider group of reporting entities (s 132). There is nothing in s 132 that excludes privileged material but given the focus on establishing compliance rather than disclosing suspicious activities as in s 40, that is an explicable omission. As noted in our earlier advice, requiring the production of information is less intrusive than on-site inspection. We do not consider that amending the power to include designated non-financial businesses and professions is inconsistent with s 21 of the Bill of Rights Act, for the same reasons as with suspicious activity reports.

11. The Bill also extends the power of an AML/CFT supervisor to conduct on-site inspections to include inspections of the expanded group of reporting entities, namely designated non-financial businesses and professions, high value dealers and the New Zealand Racing Board (s 133). However, these powers reserve the right to refuse to answer incriminating questions and also provide that lawyers need not provide privileged material. Although these powers will extend to additional entities, we remain of the view that protections in s 133 remain sufficient to ensure they are not unreasonable in terms of s 21 of the Bill of Rights Act.

---

1 *Canada (Attorney-General) v Federation of Law Societies of Canada* [2015] 1 SCR 401.

2 The definition of privileged communication in s 42 will be amended by the Bill to ensure that communications that are subject to the general law governing legal professional privilege or the definitions in the Evidence Act are also privileged under the provisions of the Bill.

12. The Police Commissioner's powers under s 143 of the Act will now extend to designated non-financial businesses and professions, high value dealers and the New Zealand Racing Board. These powers allow the Commissioner to order production of records, documents and information from any reporting entity that are relevant to analysing the financial information and intelligence received by the Commissioner. This also allows for the compulsion of a broader class of information than in the Act at present (previously it was material relevant to analysing a suspicious transaction report). Despite the expansion, we remain of the view that as the power is specifically for law enforcement purposes, is limited in scope and the search or seizure is minimally intrusive, it is not unreasonable in terms of s 21.

13. The current powers in the Act to apply for a search warrant are amended to provide that subpart 4 of the Search and Surveillance Act applies, allowing for warrantless searches when an offence is being committed that would be likely to cause injury to any person or serious damage of loss of property or there is a risk to life and safety. Given the restriction to serious and urgent circumstances and the protections in the Search and Surveillance Act, we do not consider a warrantless search to be unreasonable.

Pecuniary penalty for civil liability act

14. The civil liability regime in subpart 2 of Part 3 of the Act will also now apply to a broader range of entities because of the Bill's amendment to the definition of reporting entity. However, as the regime remains directed at a limited group who voluntarily engage in a regulated activity, we continue to consider that proceedings under this subpart are properly characterised as civil not criminal and the protections in ss 24 to 26 of the Bill of Rights Act need not apply.

Power to disclose

15. The information disclosure regime in s 139 of the Act will also be broadened by the Bill as agencies gain the power to disclose personal information (which is presently expressly excluded). The disclosure of information must be for law enforcement purposes or regulatory purposes and the disclosing agency must be satisfied the recipient has a proper interest in receiving the information (proposed new s 139(1) and (2)). The amendments to s 139 also establish a power to make regulations or written agreements for the disclosure of information that does not fall within s 139(1) and (2) but is being disclosed for law enforcement or regulatory purposes.

16. The disclosure of information in this way could amount to a "search" in terms of s 21.[3] However, even if information disclosure of this type does amount to a search, the Bill only authorises agreements for the disclosure of information to the extent that it is consistent with s 21.[4]

---

[3] The Courts have accepted that a request for information about an individual from a third party can be a search for the purposes of s 21, at least where a search is authorised by statute or warrant. In *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 at 6, the Privy Council was "content to assume" that the Commissioner of Inland Revenue was conducting a search, for the purposes of s 21, when requesting information from the New Zealand Stock Exchange under statutory authority. In *R v Javid* [2007] NZCA 232 at [45(a)], the Court of Appeal accepted that the obtaining of confidential information from a telecommunications company (text messages) by the police was properly seen as a search and seizure.

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

17. A search is consistent with s 21 of the Bill of Rights Act if it is reasonable.[5] We consider that the new information disclosure regime does not authorise an unreasonable search for the purposes of s 21. The information disclosure powers are exercised in the public interest, namely for law enforcement and regulatory purposes. The exercise of the power is restricted by the need for the disclosing agency to be satisfied that the recipient of the information has a proper interest in receiving it. The new provision is also generally consistent with the information privacy principles in the Privacy Act 1993.[6] Regulations and written agreements for information sharing can only be made after consultation with the Privacy Commissioner. Therefore, the power to disclose is not unreasonable in terms of s 21.

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

Kim Laurenson
Crown Counsel

5 *Cropp v Judicial Committee* [2008] 3 NZLR 774 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

6 In particular, we note that information Privacy Principles 10 and 11 allow for the use and disclosure of personal information where necessary to prevent or lessen a serious threat to the life or health of an individual or to prevent the commission of offences.