

29 October 2015

Attorney General

Maritime Crimes Amendment Bill (PCO 14020/3.0) - Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/233

1. We have examined the Maritime Crimes Amendment Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). We have concluded that whilst the Bill raises some issues under the Bill of Rights Act, it is not inconsistent with that Act.

Outline of the Bill

2. The purpose of this Bill is to amend the Maritime Crimes Act 1999 (“MCA”) so as to implement obligations under the 2005 Protocol to the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the 2005 Protocol to the Rome Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (“the 2005 Protocols”). The 2005 Protocols are maritime counter-terrorism treaties. Enactment of this Bill will enable New Zealand to ratify the 2005 Protocols.
3. The Bill introduces a number of new offences which relate to maritime terrorism and introduces a maritime boarding regime. In summary, the Bill proposes new offences relating to:
 - 3.1 terrorism and ships (cl 10);
 - 3.2 transportation of weapons and nuclear material and equipment (cl 10);
 - 3.3 transportation of fugitives by ship (cl 10);
 - 3.4 fixed platforms and terrorism (cl 12);
 - 3.5 intentionally causing death or injury to any person in connection with the commission or attempted commission of named offences (cl 13);
 - 3.6 failing to comply with a lawful direction of an enforcement officer exercising powers under the MCA or obstructing him/her in exercising those powers (cl 15).

4. The Bill provides for extra-territorial jurisdiction in respect of offences if the act or omission occurs against or on board a New Zealand ship or fixed platform located on New Zealand's continental shelf, or if the defendant is a New Zealand citizen, ordinarily resident in New Zealand (but not the citizen of any State) or present in New Zealand (cl 13).
5. The Bill also sets out enforcement officers' powers when taking action to suppress offences in the MCA (cl 15). Those powers can be summarised as follows:
 - 5.1 Powers to board a ship and search the ship, cargo and persons on board if the enforcement officer has reasonable grounds to suspect the person on board the ship has committed, is committing, or is about to commit an offence against the MCA; or the ship has been, is, or is about to be involved in the commission of an offence against the MCA. These powers can be exercised without warrant;
 - 5.2 In relation to a ship that fails to stop when signalled or required to do so, power to chase the ship, fire a warning shot and, as a last resort, fire at or onto the ship to compel it to stop.

The powers described at 5.1 and 5.2 can be exercised in relation to New Zealand ships wherever they may be (unless in another state's territorial or internal waters). They can only be exercised in relation to foreign ships if (a) the foreign ship is in New Zealand internal or territorial waters and there are reasonable grounds to suspect the offence has been, is, or is about to be committed in NZ internal or territorial waters; or (b) in every other case, the flag State of the foreign ship has consented.
 - 5.3 Powers to enter and search a fixed platform and a person on board a fixed platform if the enforcement officer has reasonable grounds to suspect that a person on board the fixed platform has committed, is committing, or is about to commit an offence against the MCA, or the fixed platform itself has been, is, or is about to be involved in the commission of an offence against the MCA. These powers can be exercised without warrant.
 - 5.4 Power to arrest any person without warrant if the enforcement officer has reasonable grounds to believe the person has committed an offence against the MCA. The person must be delivered into the custody of a constable as soon as practicable.
6. Enforcement officers are designated as every constable and every officer in command of a ship or an aircraft of the Defence Force (who may direct a person under his/her command to exercise the powers of an enforcement officer). Reasonable force may be used by an enforcement officer for the purpose of exercising his/her powers.

Extraterritorial application of Bill of Rights Act protections

7. The Bill expressly provides for extraterritorial jurisdiction in respect of offences, and expressly anticipates the use of the boarding regime powers in relation to foreign ships which are outside of New Zealand internal or territorial waters (if the flag state consents). The Bill thus raises the question of the extraterritorial application of Bill

of Rights Act protections. The issue is not straightforward and it is possible that some conduct under the Bill might be found to fall outside the scope of the Bill of Rights Act,¹ but New Zealand authority raises the possibility that jurisdiction would be found on the basis that extraterritorial actions could be subject to the Bill of Rights Act where taken or directed from New Zealand.²

8. For that reason, we have presumed for the purpose of considering the Bill that the Bill of Rights Act would apply to the extraterritorial exercise of the powers that it confers. However, and in light of the qualified approach taken by other jurisdictions and, particularly, decisions of the Supreme Court of Canada on the effect of context upon the right against unreasonable search,³ we proceed on the basis that there is a more limited, if any, expectation of privacy and/or protection for that privacy under the Bill of Rights Act in respect of searches undertaken outside New Zealand.
9. Having said that, we note the s 18 right to freedom of movement is specifically limited to those in New Zealand and to the right to move within New Zealand. Accordingly we consider this right will only be engaged if the powers are exercised within New Zealand internal or territorial waters. We discuss this further below at paragraphs 19 and 21.

New offences

10. The proposed new offences raise no issues of consistency with the Bill of Rights Act.
11. The powers conferred on enforcement officers under the boarding regime raise issues relating to consistency with s 18 (right to freedom of movement), s 21 (freedom to be secure against unreasonable search and seizure) and s 22 (right to be free from arbitrary arrest and detention).

Consistency with s 21 (freedom to be secure against unreasonable search and seizure)

12. Assessing the reasonableness of search powers involves striking a balance between the interest of the public and of the particular individual or entity concerned to be 'left alone', and the public interest in the objective of the search. See, for example, *R v Grayson and Taylor*:⁴

“Any search is a significant invasion of personal freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.”

13. Whether a search is unreasonable will depend on many factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale for the search.⁵ The greater the degree of intrusiveness, the

¹ See, among others, *Al-Skeini and Others v the United Kingdom* (2011) 53 EHRR 18, [137] (European Convention rights may apply extraterritorially, but contingent on factors such as control and authority over individual affected); *Prime Minister v Khadr* [2010] 1 SCR 44, [16] (extraterritorial application exceptional); but see *X (Re)* [2010] 1 FCR 640 at [46]-[48], [59] & [64] (application where actions originating in Canadian territory).

² See, particularly, *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289, [79].

³ See, particularly, *Schreiber v Canada (Attorney-General)* [1998] 1 SCR 841, [19]-[25] (expectation of privacy in overseas records) and *R v Simmons* [1988] 2 SCR 495, 528 (expectation of privacy in border searches).

⁴ [1997] 1 NZLR 399 (CA), 407.

⁵ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172].

greater the justification required (and the greater the attendant safeguards required to ensure that the justification is present).

14. A warranted search power allows for prior and independent verification that the search is justified. Whilst warrantless search powers lack prior judicial oversight, such searches may be reasonable where the delay inherent in obtaining a warrant would have a disproportionate adverse effect. Warrantless search powers have been accepted where there is a serious threat to safety or property;⁶ the search is undertaken as an incident to a lawful arrest or other detention where, for example, it was necessary to obtain evidence or ensure safety of the detainee;⁷ the search is undertaken in the context of a regulated activity;⁸ or where there is a prospect of evidence being lost or destroyed, including in the particular context of vehicle searches, the risk that a vehicle may move away.⁹
15. Similarly, factors that can diminish the seriousness of a breach of s 21 include where the breach takes place in situations of urgency, particularly where a person's safety might be in jeopardy, or in order to prevent the possible destruction of evidence.¹⁰
16. We consider that the proposed powers to carry out warrantless searches as described above are not per se unreasonable because:
 - 16.1 The powers are conditional on an enforcement officer having reasonable grounds to suspect the commission of offences against the MCA;
 - 16.2 The powers can only be exercised by enforcement officers (defined as constables and officers-in-command) who are either trained in investigative analysis or are senior, experienced officers (who may also have experience in investigating service offences);
 - 16.3 The powers may only be exercised where there is a serious threat to safety or property, i.e. if an offence has, is, or will be committed against the MCA.¹¹ There is a strong public interest in the investigation of serious offences and, given the unique logistical circumstances that may pertain when enforcing the MCA, the requirement to obtain a warrant could well impede effective law enforcement;
 - 16.4 Given the searches will be conducted on ships or fixed platforms:
 - 16.4.1 there is a real risk of evidence being lost or destroyed if the powers are not exercised promptly upon establishment of the reasonable grounds;
 - 16.4.2 it may be impracticable to obtain a warrant in the circumstances.

⁶ For example, *R v Godoy* [1999] 1 SCR 311.

⁷ See, for example, *Cloutier v Langlois* [1990] 1 SCR 158.

⁸ Such as a commercial activity carried out under conditional licence: see, eg, *British Columbia Securities Commission v Branch* [1995] 2 SCR 3; *Simmons v R* [1988] 2 SCR 495.

⁹ See, for example, *R v Rao* (1984) 12 CCC (3d) 97.

¹⁰ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207, (2007) 23 CRNZ 1 at [123].

¹¹ Offences punishable by 7 years, 14 years or life imprisonment (s 7 of the MCA).

- 16.5 Other than searches of the person, the searches will be of ships or fixed platforms which are less invasive of personal freedom and where there is a lesser expectation of privacy;¹²
- 16.6 Insofar as searches are conducted outside of New Zealand, there is a more limited expectation of privacy and/or protection for that privacy.
17. The capacity of courts to exclude evidence obtained as a result of an unreasonable search from a subsequent criminal trial provides an additional safeguard.¹³
18. For these reasons, we consider that no issue of inconsistency arises under s 21 in respect of these powers.

Consistency with s 18 (freedom of movement)

19. Section 18(1) of the Bill of Rights Act provides that everyone lawfully in New Zealand has the right to freedom of movement in New Zealand. The rights of each of the individuals on board a ship would be affected if the power to chase a ship were to be exercised within New Zealand internal or territorial waters. Further, the right would be seriously curtailed given that shots can be fired at the ship in order to halt its movement (if it has failed to stop when required). The power to chase and fire upon the ship is thus prima facie inconsistent with the s 18 right.
20. However, the need to enforce and uphold the criminal law and, in particular, prevent or investigate the commission of very serious maritime offences, is a legitimate objective. The power to chase the ship, and fire upon it, will be exercised only if the ship fails to bring to when requested. We therefore consider that the provision is a reasonable limit on the right that can be demonstrably justified in a free and democratic society (s 5 Bill of Rights Act).
21. The power to stop the ship is also prima facie inconsistent with the s 18 right (if the power is exercised within New Zealand internal or territorial waters). For the same reasons as set out in paragraph 20, we consider the limitation is demonstrably justified in terms of s 5 of the Bill of Rights Act.

Consistency with s 22 (right to be free from arbitrary arrest and detention)

22. Section 22 of the Bill of Rights Act guarantees the right not to be arbitrarily arrested or detained. Both limbs of this right are engaged by the proposed power for an enforcement officer to arrest a person whom s/he has reasonable grounds to believe has committed an offence against the MCA. However, there is a legitimate purpose for the arrest and subsequent detention, namely to ensure the detention of an individual who is believed to have committed a very serious offence and, correspondingly, ensure the safety of others. This is an important objective and the power is rationally and proportionately connected to it. Further, the power may only be exercised if the reasonable grounds exist.

¹² *Williams* at [113].

¹³ Evidence Act 2006, s 30. This includes where, notwithstanding that the conditions for exercise of the warrantless power have been satisfied, it would have been reasonably possible to obtain a warrant: see, eg, *R v Langalis* (1993) 10 CRNZ 350 (CA); *R v Dobson* [2008] NZCA 359 at [30] ff.

23. Although there are no particular safeguards to limit the period of detention, the individual must be delivered as soon as practicable into the custody of a constable. This appears to serve a number of purposes. It places the individual within the standard law enforcement processes/machinery. It enables, at a practical level, a place for detention to continue. It also enables facilitation of the individual's s 23 rights.
24. In light of these factors, we conclude that the proposed power to arrest (and detain) does not authorise an arbitrary arrest or detention and it is thus consistent with s 22 of the Bill of Rights Act.
25. A large-scale limitation on the right to freedom of movement may also involve an infringement of the right to be free from arbitrary detention. Thus the power to stop the ship may engage s 22 (in addition to s 18). However, even if s 22 is engaged by the enforcement officer's power to stop the ship, there is a legitimate purpose for detention namely to ensure that a search of the ship and/or individuals may be conducted in circumstances where there are reasonable grounds for suspecting that the ship or person has committed, is committing, or is about to commit a serious offence against the MCA. Any detention will necessarily be limited to the period of time that is required to stop the ship and conduct the necessary searches. As such we consider that the proposed power to stop the ship does not enable arbitrary detention and is consistent with s 22.
26. This advice has been reviewed by Austin Powell, Senior Crown Counsel.

Yours faithfully
Crown Law



Alison Todd
Crown Counsel