

7 March 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Russia Sanctions Bill

Purpose

1. We have considered whether the Russia Sanctions Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO24635/1.11). This advice has been prepared in an extremely short timeframe due to late receipt of the Bill that was not in compliance with Cabinet Office Guidance. We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 9 (right not to be subjected to disproportionately severe treatment or punishment), s 14 (freedom of expression) s 17 (freedom of association), s 18 (freedom of movement), s 19 (freedom from discrimination), s 21 (right to be secure against unreasonable search and seizure), and s 27 (natural justice). Our analysis is set out below.

The Bill

4. The Bill sets up a bespoke framework to enable New Zealand to impose and enforce sanctions in response to Russia's military actions in relation to Ukraine. Sanctions may also respond to countries or persons who may be assisting Russia.
5. Sanctions are defined in cl 6 of the Bill to mean a prohibition or restriction imposed by regulations under cl 9 in relation to:
 - a. persons travelling to, entering, or remaining in New Zealand;
 - b. dealing with assets; or
 - c. dealing with services.
6. The Bill:
 - a. enables sanctions to be imposed by regulation in relation to designated persons, assets or services, or designated classes of persons, assets or services, and setting out rules in relation to those regulations;
 - b. provides that individuals, entities, assets and services that are subject to sanctions will be identified by a designation notice in the *Gazette*;

- c. requires a register of sanctions to be maintained and imposes duties to report certain dealings to the Commissioner of Police;
 - d. provides civil and criminal enforcement mechanisms for sanctions.
7. Clause 10(5) also allows regulations creating sanctions to modify specified provisions in other legislation. We do not consider that this clause would apply to allow the making of regulations inconsistent with rights and freedoms affirmed in the Bill of Rights Act.

Consistency of the Bill with the Bill of Rights Act

Section 17 – freedom of association, section 18 – freedom of movement and section 19 – freedom from discrimination

8. Clause 9 of the Bill enables the Governor-General to make regulations prescribing sanctions on the recommendation of the Minister of Foreign Affairs. The range of regulation making powers allowed under cl 9 is broad in scope and may engage a number of rights protected under the Bill of Rights Act.
9. Under cl 9(2)(c) the regulations may prohibit a designated person who is not a New Zealand citizen or residence class visa holder from traveling to, entering or remaining in New Zealand. Or they may prohibit or restrict the designated person from dealing with specified assets or services. These prohibitions and restrictions would engage the designated person's rights to freedom of association (s 17 of the Bill of Rights Act) and freedom of movement (s 18 of the Bill of Rights Act).
10. Regulations may also provide for sanctions including prohibitions or restrictions on specified dealing with designated assets or services. This could potentially engage the right to freedom of association of asset holders, service providers and the general public.
11. Clause 10 of the Bill allows for regulations to apply generally, or only to a specified country or countries. The Bill also allows regulations to target classes of persons, assets or service. Regulations aimed at classes of assets, services or persons could be targeted by country. Targeting sanctions in this way could amount to discrimination based on national origin and would engage the right to freedom from discrimination affirmed in s 19 of the Bill of Rights Act.¹
12. The level of engagement that any specific sanction would have on rights protected under the Bill of Rights Act would be contingent on the particulars of the sanction applied. However, where a sanction is imposed that limits a right affirmed by the Bill of Rights Act, this may be justifiable under s 5 of that Act if the regulation or measure is rationally connected to a sufficiently important objective, and engages rights in ways that are minimally limiting and proportionate to the importance of the objective.²

¹ Section 19 of the Bill of Rights Act affirms the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993. Section 21 of the Human Rights Act lists the prohibited grounds of discrimination. These include "ethnic or national origin, which includes nationality or citizenship" (see s 21(g) Human Rights Act).

² *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

Important objectives and rational connection

13. The purpose of the Bill is set out in cl 3 and is to enable New Zealand to impose and enforce sanctions in response to Russia's military actions in relation to Ukraine, which began on 24 February 2022. Sanctions may be imposed in relation to countries or persons who may be assisting Russia. Clause 8 of the Bill sets a high threshold for the making of regulations and requires the Minister to be satisfied that the regulations are appropriate to respond to threats to the sovereignty or territorial integrity of Ukraine. The Minister must also be satisfied that the United Nations Security Council:
 - a. is unlikely to act in response to the threat under Chapter 7 of the Charter of the United Nations (whether because of the exercise of a veto by a permanent member of the Security Council or otherwise); or
 - b. has acted (or is likely to act) in response to the threat under Chapter 7, but the action is (or will be) insufficient.
14. Responding to threats to sovereignty or territorial integrity are significant objectives, which may justify limits on rights and freedoms that may be considered disproportionate in other circumstances.
15. Placing limits on persons entering and remaining in New Zealand, or on dealing with specific assets or services with, for or from designation persons, or prohibitions on dealing with designated assets or services is rationally connected to the objective of addressing the kinds of threats the Bill is targeting. Targeting sanctions on the basis of national origins also has a rational connection to addressing the behaviour of a state actor.

Proportionality

16. The proportionality of any sanctions imposed under the Bill will be contingent on their nature, specificity and scope. However, the Bill contains several safeguards which ensure that the regulations are reasonable, go no further than necessary in the circumstances, and support the requirement for any regulations made under the Bill to be consistent with the Bill of Rights Act.
17. Clause 12 of the Bill requires sanctions to have a fixed term of no more than 3 years, unless extended where the Minister is satisfied that the sanctions are still required for the purpose set out in the regulation.
18. Clause 13 of the Bill also provides that a person may apply to the Minister on the basis of humanitarian need or any other reason for amendment to or revocation of a regulation or designation notice, or for an exemption for a particular specified situation. The Minister must decide an application as soon as reasonably practicable, and provide reasons for their decision. Both these measures overcome a problem experienced with overseas sanction schemes, which have often been criticised because of a lack of review mechanisms.³ We also note that sanctions could be

³ The absence of any review mechanism from some sanctions schemes has been the focus of considerable concern and criticism, including in the decision of the United Kingdom Supreme Court in *Ahmed & Others v HM Treasury* [2010] 2 AC 534 and the European Court of Justice in *Kadi v Council of the European Union* [2009] AC 1225.

challenged by way of judicial review, as could the Minister's decision on an application under cl 13.

19. Clause 32(1)(b) provides that regulations may be made prescribing the circumstances in which compensation may be payable to persons or entities in relation to assets or services that are adversely affected by the imposition of sanctions. This provides a mechanism for redress where a person's interests suffer due to their involvement with designated persons, assets or services, despite their interests not being relevant to the purpose of the sanction. This should protect the public from undue negative effects of sanctions and lessen any potential chilling effect of sanctions on the public right to freedom of association. This also provides a form of redress for asset holders or service providers who face sanctions targeted at a particular country, limiting the negative effects of potential discrimination within the Bill.
20. In addition, cl 9(2)(c)(i)(A), limits the scope of any limit on the right to freedom of movement, by requiring sanctions do not bar a New Zealand citizen or resident from entering New Zealand. For completeness, we note that this clause prima facie limits the right to freedom from discrimination on the ground of national origins. However, in this instance the discrimination is not against any particular class of person entering New Zealand, it is discrimination in favour of New Zealand citizens and residence class visa holders, to ensure they are not excluded from New Zealand on the basis of the sanctions regime. This ensures New Zealand complies with its international legal obligations not to render a person stateless.
21. We note that for the regulations to be lawful, they must be consistent with the Bill of Rights Act. Every regulation made under the Bill must be proportionate to the level of risk to peace and security that has been identified in the regulation.
22. We are of the view that, for these reasons, the limits that the regulations may place on the rights to freedom of movement, freedom of association, and freedom from discrimination are justified under s 5 of the Bill of Rights Act.

Section 27 – natural justice

23. Section 27(1) of the Bill of Rights Act provides that every person has the right to the observance of the principles of natural justice by any public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. Section 27(2) provides that every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any public authority has the right to apply, in accordance with law, for judicial review of that determination.
24. Under cl 9(2)(c) of the Bill, the regulations may prohibit a designated person who is not a New Zealand citizen or residence class visa holder from remaining in New Zealand. Clause 10(3)(d) provides that s 157(2) of the Immigration Act 2009 – which provides that the person has 14 days from the date of service of a deportation liability notice to give good reason why deportation should not proceed – does not apply in respect of a regulation of this nature.
25. Section 18(4) of Bill of Rights Act provides that “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.” This reflects New

Zealand's international obligations under Article 13 of ICCPR, which also requires that the person "except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

26. The Bill prima facie engages ss 18(4) and 27 because it provides for the expulsion of people in New Zealand then appears to limit rights of review under the Immigration Act. However, we do not consider that these rights are limited because there is an alternative path under the Bill. A person may apply for an exemption from, amendment to or revocation of the sanction under cl 13. The Minister must decide the application as soon as reasonably practicable. There is also the ability to apply for judicial review of the decision to impose a sanction on the person and any decision under cl 13. We note that the Bill does not address the status of the person while those steps are taken, but any steps taken in regard to the person would have to be consistent with the Bill of Rights Act, including ss 18(4) and 27.

Section 14 – freedom of expression

27. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.⁴
28. Cl 15 of the Bill creates a duty on reporting entities within the meaning in s 5 Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (or persons declared by regulation under the Bill to be duty holders) to report to the Police Commissioner if they have a reasonable suspicion that they are involved with:
- a. assets which are designated under a sanction; or,
 - b. assets owned or controlled, directly or indirectly, by a designated person

This duty prima facie engages the right to freedom of expression.

29. A limit on a right may nevertheless be justified in accordance with s 5 of the Bill of Rights Act if the limit is in service of an important objective, is rationally connected with that objective, limits the right no more than necessary and is proportionate.
30. Requiring banks or regulated persons to proactively report their involvement with sanctioned assets or assets connected to a designated person rationally supports the enforcement of sanctions, which in turn serve the important objectives of responding to threats to sovereignty or territorial integrity. This ensures that sanctions have their intended effect in preventing public involvement with designated persons and assets.
31. The information that may be required under cl 15 is targeted at information relating to designated assets or services for the purpose of the sanctions regime. This limits the scope of the information that is required under this provision to only that information necessary to enforce the sanctions.

⁴ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

32. We also consider that offences for failing to meet the duty are proportionate to the seriousness of the objective and to the conduct they cover. It is an offence to knowingly fail to provide information under cl 15, or to provide information which a person knows is false or misleading. A person who commits an offence will be liable on conviction to up to 1 year's imprisonment or a \$20,000 fine, or both, for an individual, or a \$200,000 fine for an entity. However, the person must have intentionally failed to provide a report, provided false or misleading information, or omitted to provide information that they knew would make the report false or misleading in a material way. Clause 17 also provides that a person charged with a breach of their cl 15 duties is immune from liability where they acted in good faith, or if their act or omission was reasonable in the circumstances.
33. For these reasons, we consider that any limit on the freedom of expression in the Bill is justifiable in terms of s 5 of the Bill of Rights Act.

Section 21 – freedom from unreasonable search and seizure

34. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.⁵
35. Clause 25 of the Bill provides the Commissioner of Police the power to order production of or access to all records, documents, or information from any duty holder that is relevant to analysing and investigating information received under the Bill, with or without a court order. This is a search and, depending on the particular circumstances, may also involve seizure.
36. More generally, regulations made under cl 9(2)(c) may prohibit or restrict designated persons from dealing with specified assets or services. Clause 10(4) provides that regulations prohibiting or restricting certain assets may set out how assets may be preserved, managed, or disposed of during the time they are prohibited or restricted. Depending on the circumstances, preservation, management or disposal of assets could be considered seizure. In *Hamed v R* [2011] NZSC 101, Blanchard J noted at [150] that the essence of a seizure was removing something from the possession of someone else.
37. Ordinarily, a provision found to limit a particular right or freedom may be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held that an unreasonable search and / or seizure logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁶ Rather, s 21 is self-limiting in that the assessment to be undertaken is whether the search power is reasonable.
38. Whether a search or seizure will be reasonable turns on a number of factors, including the nature of the place or object being searched or seized, the degree of intrusiveness

⁵ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

⁶ *Hamed v R*, above n 5, at [162] per Blanchard J

into personal privacy and the rationale for the search or seizure.⁷ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

39. We consider that the search and seizure powers in the Bill are reasonable, and therefore consistent with s 21 of the Bill of Rights Act. This is because:
- a. the search and seizure powers contribute to the enforcement of sanctions, which in turn serve the important objective of responding to threats to sovereignty or territorial integrity;
 - b. the search power in cl 25
 - i. relates to ordering the production of or access to records, documents or information, rather than physical entry onto premises, which is less of an intrusion into a person's reasonable expectation of privacy; and
 - ii. the power is exercisable against duty holders, being AML reporting entities, or other persons declared by regulation to be under a duty. These persons will have less of an expectation of privacy than an ordinary citizen. They will also not be required to disclose any privileged communication; and
 - c. regulations made under cl 9(2)(c) prohibiting or restricting a designated person from dealing with specified assets or services must be consistent with the Bill of Rights Act (because the Bill does not specifically provide for them not to be). Regulations providing for preservation, management, or disposal of assets as permitted by cl 10(4) would also need to be consistent with the Bill of Rights Act.
40. For completeness, we note that compelling information may also limit freedom of expression. However, we consider any limit on freedom of expression to be justified for the reasons set out at paragraph 39(a) and (b) above.

Section 9 – right not to be subjected to disproportionately severe treatment or punishment

41. Section 9 of the Bill of Rights Act affirms that everyone has the right not to be subjected to disproportionately severe treatment or punishment.
42. The Bill contains offences in cl 24. Each offence carries with it a potential maximum penalty ranging from a fine not exceeding \$10,000 for knowingly breaching clause 16(4) (relating to not disclosing certain information in judicial proceedings), to up to 7 years imprisonment or a fine not exceeding \$100,000 for an individual, or \$1 million for an entity (for knowingly or recklessly breaching a sanction, or for knowingly providing false or misleading information in an application for amendment, revocation or exemption under cl 13).
43. Clause 25 provides for an additional penalty where an offence under cl 24 involves commercial gain. Upon conviction the court may order the person convicted to pay an amount not exceeding 3 times the value of any commercial gain resulting from the commission of the offence. This is recoverable in the same manner as a fine. The imposition of an additional penalty on top of an already potentially high penalty for an

⁷ *Hamed v R*, above n 5, at [172]

offence could arguably amount to disproportionately severe treatment or punishment in some cases.

44. Whether s 9 applies to a fine, rather than interference with bodily integrity alone, is not entirely clear. Section 9 appears in the subpart of the Bill of Rights Act entitled “life and security of the person”, and the other sections in that subpart all deal with interferences with bodily integrity.⁸ While it has not received detailed judicial consideration, the Court of Appeal in *Lyall v Solicitor-General* appears to have proceeded on the assumption that s 9 was applicable to property for forfeiture.⁹ On this basis, s 9 could arguably apply to financial penalties.
45. In the event that a fine can fall within s 9, we consider that cl 25 does not amount to disproportionately severe treatment or punishment. The existence of a mechanism to impose an additional penalty does not mean that an additional penalty will always be imposed, or that the maximum penalty under either cl 24 or 25 would be imposed. The court would retain its discretion to set the appropriate penalty, and must do so consistently with the rights in the Bill of Rights Act, including s 9.

Conclusion

46. For the reasons outlined above, we have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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⁸ See ss 8-11 Bill of Rights Act.

⁹ *Lyall v Solicitor-General* (1997) 15 CRNZ 1 (CA), 6-7 and 9.