

11 February 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Maritime Powers Bill

Purpose

1. We have considered whether the Maritime Powers 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 (PCO 22650/16.0). 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 21 (freedom from unreasonable search and seizure), s 22 (liberty of the person) and s 27(3) (right to litigate against the Crown).

The Bill

4. The Bill creates a new legislative framework to ensure that New Zealand's law enforcement agencies have comprehensive maritime powers to enforce New Zealand's criminal law in international waters in a manner that is consistent with international law.
5. New Zealand has established maritime powers in an ad hoc manner that apply to maritime terrorism and drugs trafficking. The Bill would set up a law enforcement regime that applies irrespective of subject matter, and replace the current, dispersed provisions with powers structured under one Act.
6. The Bill provides powers to "enforcement officers" who are defined as constables, Customs officers, members of the armed forces, Department of Conservation rangers, and trade in endangered species officers. This will enable the powers to be used to address a range of offending, including drug trafficking and wildlife smuggling.
7. The powers in the Bill reflect those available to enforcement officers under existing domestic legislation, notably the Search and Surveillance Act 2012 and the Customs and Excise Act 2018. The intent of the Bill is for the use of these powers to be enabled extraterritorially.
8. While the issue of the extraterritorial application of the Bill of Rights Act is nuanced, we are satisfied that it applies to legislation permitting extraterritorial action taken or directed from New Zealand by New Zealand officials.¹ This will be true in the case of all analysis of the use of powers within this Bill.

¹ See discussion in A Butler and P Butler. *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [15.16.1] – [15.16.7].

Consistency of the Bill with the Bill of Rights Act

Section 21 – Freedom from unreasonable search and seizure

9. 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, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.²
10. Ordinarily a provision found to limit a particular right or freedom may nevertheless 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 logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.³ Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable.
11. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.⁴ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards. In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.

Searches within the Bill

12. The Bill contains significant search and seizure powers. Information obtained from these searches may be retained for law enforcement purposes. Clauses 17 and 18 provide for the stopping and boarding of a ship, while cl 20 of the Bill provides for the search of a ship and of any person on a ship, including internal searches. Clause 22 provides for an enforcement officer to require the production of any document and/or material from electronic devices on a ship.
13. A warranted search power provides prior and independent verification that a search is justified. Nonetheless, warrantless search powers may be justified in circumstances where obtaining a warrant is inappropriate or impractical, for instance, where there is a prospect of evidence being destroyed, including in the context of vehicle searches the risk that the vehicle might move away.⁵ All searches provided for within the Bill may be undertaken without warrant.
14. We consider that, in principle, warrantless searches may be considered proportionate for international law enforcement in respect of serious criminal activity. Law enforcement is a significant objective that may justify reasonable intrusion to a person's privacy. In particular, activities in international waters can be highly volatile and require urgent action and responses. There are many opportunities for those engaging in illegal activity to evade law enforcement activities in open waters and delays in obtaining a warrant could impede law enforcement.

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

³ *Ibid* at [162] per Blanchard J.

⁴ *Hamed v R*, above n3, at [172].

⁵ See, for example, *R v Rao* (1984) 12 CCC (3d) 97.

15. Clause 16 of the Bill sets out the criteria for exercising the powers in the Bill, including the warrantless search powers. Under cl 16(1), the powers may be exercised in circumstances where an enforcement officer:
 - a. has reasonable grounds to suspect a person has committed or will commit an extraterritorial or specified offence, and has reasonable grounds to believe they are on the ship;
 - b. has reasonable grounds to believe there is evidence on the ship of an extraterritorial or specified offence; or
 - c. has reasonable grounds to suspect a ship is involved in an extraterritorial offence.
16. The use of the search powers to investigate an offence under cl 16(1) requires an enforcement officer to have reasonable grounds to suspect the commission of an offence, as well as (for all but one ground) reasonable grounds to believe the relevant person or evidence is on the ship in question. Having “reasonable grounds to believe” is a higher standard to meet than “reasonable grounds to suspect”.⁶ However, even the lesser standard would require the officer to have cause to think that it is likely a vessel contains evidence of relevant offending based on an objective assessment.⁷
17. Searches under the Bill are also constrained by further conditions to ensure that they are exercised in a way which is proportionate and reasonable:
 - a. the principal search powers under cl 20 are subject to Part 4 (except section 121) of the Search and Surveillance Act 2012, which establishes standards of lawfulness and reasonableness for the exercise of powers of search and seizure that accommodate rights and entitlements in the Bill of Rights Act. The Search and Surveillance Act covers equivalent powers in the domestic context, which are regarded as reasonable and proportionate based on the range of safeguards, controls and protocols set in place to manage their use;
 - b. under cl 12 of the Bill, the enforcing agency will be required to make a request for the Secretary of Foreign Affairs to seek flag state authorisation when it wishes to exercise the powers under the Bill against foreign vessels. This provides additional safeguards on the use of powers, as foreign states can impose conditions when giving consent.⁸
18. Finally, we note that the courts have the power to exclude evidence obtained as a result of an unreasonable search in any subsequent criminal trial.⁹
19. The purpose of any search under cl 16(1) would be to board a vessel and undertake investigatory measures to determine if an offence is being or has been committed. We believe the search powers available are reasonable and appropriate in light of the purpose of the searches, the thresholds required for them to be performed, the urgency of the situations in which such searches will be required, and the safeguards contained within the Bill.

⁶ A reasonable belief requires that there must be “an objective and credible” basis for a search rather than “thinking that it is likely that a situation exists”: see *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213].

⁷ See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213], *R v Laugalis* (1993) 1 HRNZ 466, 10 CRNZ 350 (CA) and *R v Pou* [2002] 3 NZLR 637 (CA) at [38].

⁸ This requirement does not apply to stateless vessels or situations qualifying as ‘hot pursuit’ in accordance with article 111 of the United Nations Convention on the Law of the Sea.

⁹ Evidence Act 2006, s 30.

20. In addition, cl 16(2) and (3) permit an enforcement officer to stop, board and search a ship (using the powers set out in cl 17, 18 and 20(2) of the Bill) to verify a ship's nationality, where an enforcement officer suspects on reasonable grounds that a ship is a ship without nationality. Ships without nationality are more likely to be engaged in piracy or other illegal activities, and are subject to being boarded and having their identity verified by official vessels under the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰ The use of these powers is necessary to ensure that New Zealand can carry out its responsibilities concerning the control of ships without nationality on the high seas, in accordance with obligations as a signatory of UNCLOS.

Internal searches and collection of biometric information

21. Clauses 21 and 28 of the Bill specifically permit officers to require internal searches of a person and collection of biometric information, respectively. Internal searches and collection of biometric information involve a much higher degree of intrusion into a person's privacy, therefore they must require a higher level of scrutiny.
22. Internal searches ordered by an enforcement officer under cl 21 of the Bill may only be undertaken by a medical practitioner, where a person is arrested for an offence under the Misuse of Drugs Act 1975 and where the enforcement officer has reasonable grounds to believe that the person has secreted on their person evidence of an offence under the Misuse of Drugs Act. Further, where it is clear to the medical practitioner undertaking the search that the person is not prepared to permit the search, it is not permitted to be undertaken.
23. When collecting biometric information, a higher threshold is also required than for general searches. The Bill only allows for the collection of biometric information from persons detained or arrested, and restricts this collection to when it is necessary to confirm the identity of a person for law enforcement purposes. The search is at a more advanced point in the investigatory process, after reasonable belief of the person having committed an offence has been established. We consider that this ensures that searches are rationally connected and proportionate to law enforcement and are not unreasonable.
24. We consider that in both cases the Bill provides an appropriately higher level of protection of personal privacy in the cases of internal searches and collection of biometric information than is provided for general searches of places, property or documents.
25. We therefore consider that the search powers within the Bill appear to be consistent with the right to be secure against unreasonable search.

Seizure and Forfeiture within the Bill

26. The Bill also contains powers to enable enforcement officers to dispose of unlawful items (cl 32) and to seize a ship for the purpose of forfeiture (cl 43).
27. Seizures under cl 32 clearly operate to support law enforcement objectives. Clause 32 provides for enforcement officers to seize any item found on board a ship that is unlawful to possess, import or export under New Zealand law. The enforcement officer is empowered to either destroy the item, deliver it to a constable or, if the item is a biological specimen, to deliver it to an inspector under the Biosecurity Act 1993.

¹⁰ United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994), art 110(1)(d).

28. Clause 43 allows for the forfeiture of a ship where there is evidence that the ship has been engaged in one of drug smuggling, piracy, trafficking in persons or unlawful importation of goods into New Zealand. The seizure of a ship engaged in these activities is also clearly rationally connected to law enforcement objectives and to deterrence.
29. Clause 43(2) provides that usual due process related to forfeited goods, as set out in the Customs and Excise Act 2018, applies to ships seized under the Bill. This provides the owners of seized ships with the usual options for appeal in cases where owners believe a ship has been wrongfully seized.
30. The approach taken to seizure in the Bill is not unusual, and such legislation is commonly, and necessarily, far-reaching in other comparable jurisdictions.¹¹ It is reasonable for authorities to seize goods that are unlawfully held. This not only supports immediate law enforcement, it also lowers the profitability equation of engaging in unlawful acts. This power may only be exercised with the consent of the flag state of a vessel, which ensures its lawfulness.
31. Accordingly, we consider the powers of seizure authorised under the Bill to be consistent with the right against unreasonable seizure affirmed in Section 21 of the Bill of Rights Act.

Section 22 – Liberty of the person

32. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The purpose of the right not to be arbitrarily detained is the protection of human dignity, autonomy and liberty.¹²
33. Where an enactment is inconsistent with s 22, there can be no role for justification under s 5. The term “arbitrarily” is intended to provide a measure of the reasonableness of statutory powers,¹³ as well as the exercise of those powers. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.
34. Clause 23 of the Bill gives an enforcement officer the power to detain a ship and to direct the ship to proceed to the nearest Customs place or to any other place that the officer considers appropriate, where reasonably necessary to enable the officer to exercise the other powers under the Act. Clause 24(3) allows an enforcement officer to require a person who is or was on a ship detained under cl 23 to remain on the ship, or to regulate their movements between ships, where necessary for prescribed reasons including safety and preservation of evidence. These powers amount to a detention.
35. Clause 25 also allows for an enforcement officer to arrest a person under this Act if they have reasonable grounds to suspect that the person has committed an extraterritorial offence or a specified offence within New Zealand. An enforcement officer may exercise this power without warrant, regardless of their status as a constable within New Zealand.

¹¹ *Williams v Attorney-General* [1990] 1 NZLR 646 (CA) at [677].

¹² *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

¹³ *Butler and Butler*, above n 1, at [19.8.1].

36. We consider that there are sufficient safeguards within the Bill to ensure that any detention authorised by the Bill is not arbitrary. In particular:
- a. in each case the detention power requires the enforcement officer to be satisfied that it is necessary for reasons connected either to law enforcement or to safety;
 - b. the length of detention under cls. 23 and 24 is limited to the period within which the enforcement officer is satisfied that the exercise of the power is reasonably necessary to enable the other powers in the Bill to be exercised, or to bring the person to a place of safety; and
 - c. where a power of arrest is carried out by an enforcement officer who is not a constable, the enforcement officer has the duty to deliver the arrested person to a constable as soon as is reasonably practicable. This ensures that the person is brought into the formal justice system with no unnecessary delay. Judicial oversight of detention has been held to be of high importance in ensuring that detention is not arbitrary.¹⁴
37. For these reasons, we do not consider that any detention authorised within the Bill is arbitrary, or breaches the right to liberty of the person in section 22 of the Bill of Rights Act.

Section 27(3) - Right to bring civil litigation

38. Section 27(3) of the Bill of Rights Act affirms that everyone has the right to bring civil proceedings against the Crown and to have those proceedings heard according to law, in the same way as civil proceedings between individuals. Section 27(3) is concerned with ensuring that the Crown does not benefit from any procedural advantage when engaging in civil proceedings with individuals.
39. Clause 38 of the Bill provides that every person is immune from civil and criminal liability for good faith actions or omissions in pursuance or intended pursuance of the person's duties, functions or powers under this Act if the actions or omissions are reasonable and the person believed on reasonable grounds that the preconditions for the performance or exercise of the duty, function, or power had been satisfied.
40. Clause 39 extrapolates the immunity to provide that the Crown may not have proceedings brought against them based on actions to which the immunity under cl 38 apply.
41. On face value, this immunity may appear to breach the right to bring civil litigation. However, this is not the case. While these provisions do limit the scope for recourse in respect of the exercise of a power under the Bill, they do not preclude recovery against the Crown, or against individuals personally where the conditions in cls. 38 (a) and (b) are not met. The Bill places onus on the enforcement officer to prove the reasonableness and good faith nature of any action or omission against which a claim is made.
42. For this reason, we consider that the Bill does not engage the right to bring civil litigation.

¹⁴ Human Rights Committee. General Comment 35 UN Doc CCPR/C/GC/35 (16 December 2014) at [35].

Conclusion

43. 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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