

2 August 2021

Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the Autonomous Sanctions Bill ('the Bill'), a Member's Bill in the name of Hon Gerry Brownlee, 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 concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. Our analysis is set out below.

The Bill

3. The Bill's purpose is to enable New Zealand to impose and enforce sanctions autonomously, so as to assist in maintaining or restoring peace and security in response to either a threat to peace and security in the Asia-Pacific region or to breaches of international peace and security to which New Zealand considers United Nations Security Council responses have been insufficient. New Zealand can currently only impose sanctions when acting together with other members of the United Nations under the United Nations Act 1946. This Bill enables New Zealand to impose and enforce sanctions independently of the United Nations.
4. The Bill has the effect of:
 - a. providing a legislative framework for autonomous sanctions;
 - b. enabling autonomous sanctions to be imposed by regulation in relation to certain individuals, entities, and countries, so as to facilitate the conduct of New Zealand's international relations with other countries and with entities and persons outside New Zealand;
 - c. requiring reporting in specified circumstances, and
 - d. providing for the monitoring and enforcement of autonomous sanctions.
5. The Bill also amends the United Nations Act 1946 to update penalty provisions and harmonise it with the provisions governing autonomous sanctions.

Consistency of the Bill with the Bill of Rights Act

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

6. Clause 9 of the Bill enables the Governor-General to make regulations prescribing autonomous sanctions on the recommendation of the Minister of Foreign Affairs. The

range of regulation making powers allowed under cl 9 are very broad in scope and may engage a number of rights protected under the Bill of Rights Act.

7. Under cl 9(1)(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 may prohibit or restrict the designated person from dealing with specified assets, services or persons. 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).
8. The regulations also allow for designated assets or services to be placed under a general prohibition or restriction, to prevent or control the involvement of any person, natural or legal, with these assets or services. This would potentially engage the right to freedom of association of asset holders, service providers and the general public.
9. Clause 10 of the Bill allows for regulations to relate generally, or to a specified country or countries. We consider that regulations aimed at a designated person may only apply to individual legal or natural persons, as the Bill does not provide for these regulations to be applied to a class of persons. On this basis, only regulations aimed at classes of assets or services could be targeted by country. Targeting of assets and services in this way would engage the right to freedom from discrimination on the basis of national origins, affirmed in s 19 of the Bill of Rights Act.
10. For completeness, we note that cl 9(1)(c)(i)(A), which allows for regulations to restrict persons who are not New Zealand citizens or residence class visa holders from travelling to, entering or remaining in New Zealand, also *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. We consider that this provision is consistent with the Bill of the Rights Act.
11. 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. To be justifiable under s 5, the regulation or measure would have to be rationally connected to a sufficiently important objective, and engage rights in ways that are minimally limiting and proportionate to the importance of the objective.

Important objectives and rational connection

12. Clause 8 of the Bill sets a high threshold for the making of regulations and requires the Minister to be satisfied that the regulations will assist in maintaining or restoring peace and security in response to:
 - a. a threat to peace and security in the Asia-Pacific region; or
 - b. a breach of international peace and security to which New Zealand considers United Nations Security Council responses have been insufficient.

13. The maintenance or restoration of peace and security are significant objectives, which may justify limits on rights and freedoms which would be considered disproportionate in other circumstances.
14. Placing limits on persons entering and remaining in New Zealand or dealing with specific assets and services (for example weapons trading or communications technology), or a more generalised prohibition or restriction on engaging with a specific group or entity dealing with designated assets and services, is rationally connected to the objective of addressing the kinds of security threats the Bill is targeting. Targeting sanctions on the basis of national origins may have rational connection to addressing the behaviour of a state actor or to providing defence against threats from a particular country.
15. Clause 9(a) of the Bill requires regulations made under the Bill to state the purpose of the regulations and to include a description of the particular threat or breach of peace and security to which the autonomous sanction responds. The threat needs to be identified and considered on a case-by-case basis. This acts as a safeguard to ensure that sanctions are not overly broad and retain their rational connection to the threat they are designed to address.
16. For the reasons discussed above, we consider that the trigger provision for making regulations under the Bill is framed in a reasonable way, and is rationally connected to the objective of maintaining or restoring peace and security.

Proportionality

17. 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.
18. Clause 12 of the Bill provides that sanctions are to have a fixed term of no more than 3 years, unless extended in cases where the Minister is satisfied that the sanctions are still required for the purpose set out in the regulation.
19. Sanctions may be challenged in Court, and, under cl 13 of the Bill, may also be amended or revoked administratively where a designated person, asset holder or service provider feels that they have been unfairly targeted. Where a designated person or actor makes an application to the Minister for amendment, revocation or an exemption from a sanction, the Minister is required to respond to this application as soon as reasonably practicable and in a way that is consistent with the purpose of the regulations setting up the sanction. Both these measures overcome a problem experienced with overseas sanction schemes, which have often been criticised because of a lack of review mechanisms.¹
20. Clause 26(a) 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 autonomous sanctions. This provides a means of redress where a person's interests suffer due to their involvement

¹ 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.

with a designated person, asset class or service provider despite their not being relevant to the purpose of a 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.

21. Additionally, cl 9(1)(c)(i)(A) of the Bill limits the scope of any limit on the right to freedom of movement by requiring that sanctions do not bar a New Zealand citizen or residence-class visa holder from entering or remaining in New Zealand. This ensures that regulations made under the Bill do not render any person stateless, or prevent a New Zealand citizen or resident from returning to their normal place of abode or family.
22. The discretionary power that the Bill gives the Minister to make regulations must be exercised consistently with the Bill of Rights Act. Therefore, for the regulation to be lawful, every regulation enabled by the Bill must be proportionate to the level of risk to peace and security that has been identified in the regulation.
23. We are of the view that, for these reasons, the limits that the regulations may place on the rights to freedom of movement and freedom of association, are justified under s 5 of the Bill of Rights Act.

Section 14 – Freedom of Expression

24. 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.²
25. Clause 15 of the Bill creates a duty on registered banks to report to the Police Commissioner if they have a reasonable suspicion that they are involved with:
 - a. assets or services which are designated under a sanction;
 - b. assets owned or controlled by a designated person; and
 - c. services provided to a designated person.
26. Regulations may also be made extending this reporting duty to other persons for the purposes of the Bill. This duty *prima facie* engages the right to freedom of expression.
27. 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.
28. Requiring banks or regulated persons to proactively report their involvement with sanctioned persons, assets or services rationally supports the enforcement of sanctions. This ensures that sanctions have their intended effect in preventing public involvement with designated persons, assets or services.

² See, for example, *Slight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

29. 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.
30. 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 for an individual, or a \$200,000 fine for a commercial 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.
31. 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.

Conclusion

32. 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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