

17 October 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Asia-Pacific Cooperation (APEC 2021) Bill

Purpose

1. We have considered whether the Asia-Pacific Economic Cooperation (APEC 2021) 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 concluded that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.
3. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 21839/4.0). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
4. In reaching that conclusion, we have considered the consistency of the Bill with the following sections of the Bill of Rights Act:
 - a. s 14 (freedom of expression);
 - b. s 16 (right of peaceful assembly);
 - c. s 17 (freedom of association);
 - d. s 18 (freedom of movement); and
 - e. s 21 (unreasonable search and seizure).
5. Our analysis is set out below.

Summary

6. The Bill grants wide discretionary powers during the three-week period in November 2021. APEC 2021 is a major international event of significant scale and complexity. Leaders from up to 21 APEC economies will be in New Zealand.
7. The exercise of the discretionary powers granted under the Bill are likely to result in significant limitations on some protected rights and freedoms, particularly freedom of movement. However, we consider these limits can be justified in a free and democratic society. This is largely on the basis that:
 - a. there is a clear and pressing need for security at an event of such international significance; and
 - b. there is nothing to suggest that Parliament is authorising the powers be used in a way that is inconsistent with the Bill of Rights Act. While the powers appear to be

granted in wide-terms, s 6 of the Bill of Rights Act requires that these powers be interpreted consistently with the Bill of Rights Act where possible. Rights-consistent interpretations of these powers are available.

The Bill

General overview

8. The Bill provides a legislative framework enabling New Zealand to host the Asia-Pacific Economic Cooperation forum in November 2021 (“APEC 2021”). APEC 2021 will be attended by world leaders, officials, and media from an expected 21 countries. This event is of significant scale and complexity, and it creates a unique security challenge for the New Zealand Police (“the Police”).
9. The purposes of the Bill at cl 4 are to:
 - a. ensure the security of all involved in APEC 2021 (including the media and members of the public); and
 - b. facilitate the efficient operation of APEC 2021.
10. The Bill achieves these objectives by:
 - a. enabling the Commissioner of Police (“the Commissioner”) to authorise members of the New Zealand Armed Forces to assist the Police during the leaders’ event period (1 – 21 November 2021). Those members of the Armed Forces will be integrated into the Police’s security operations, be put under Police control, and be given constabulary powers and training;
 - b. providing for the Commissioner to designate certain groups of people as APEC security staff with limited statutory powers;
 - c. providing for foreign protection officers to import and possess, if approved by the Commissioner, weapons and ammunition that would otherwise be illegal to import or possess;
 - d. creating temporary powers and offences to enable the securing of APEC venues, sites, and surroundings, as well as to enable road closures for motorcades and security purposes (discussed in detail below); and
 - e. providing for the Police and foreign protection agencies, with approval by the Commissioner, to import and use wireless electronic countermeasure technology during APEC 2021 events.
11. The Bill also makes a number of related consequential amendments to several Acts.
12. The Bill (including its consequential amendments) is repealed on 21 November 2021 at the closure of APEC.

Powers to close places, transport routes, and airspace

Closure of places

13. The Bill provides for the planned closure of public and private places. The Commissioner may close a public place (cl 47) or a private place (cl 48) on any day during the three-week long leaders' event period in November 2021. To do so, the Commissioner must reasonably believe that the closure is required to prevent a security risk at, or near, a leaders' event or near a protected person. Clause 52 also empowers a constable to reactively close any place on any day during the leaders' event period if the constable reasonably believes the closure is required to prevent or respond to a security risk at or near a leaders' event or near a protected person.
14. The effect of closing a place (including homes and marae) is that the owner or occupier of the public or private place (cl 49):
 - a. is prohibited from excluding or ejecting people who are permitted by a constable to enter or remain that place;
 - b. is prohibited from permitting other people to enter or remain at the place; and
 - c. may themselves be excluded or removed from the place.
15. Clause 49 of the Bill does not include any explicit matters that the decision-maker must consider in deciding whether to exclude an owner or occupier from a public or private place that is closed. The Bill is also not explicit as to who is empowered to exercise that discretion, whether it is the Commissioner (in designating a place to be closed), or a constable on the day of an event.
16. A place may not be closed under cls 47 or 48 unless the requisite consultation has been completed. The Commissioner must consult with the owners of the place (or if there is no owner of a public place, the local authority), and may consult with any person the Commissioner considers is directly affected more than the public generally. There is no obligation to consult anyone else. No consultation is required for a constable to close a place at cl 52. This is because cl 52 is designed to only be used reactively, in response to security situations that develop during the leaders' event period.

Closure of roads, marine areas, and the creation of secure transport routes

17. Roads and marine areas—cls 50 and 51 respectively—may be closed in whole or in part by the Commissioner on any day during the leaders' event period. To do so, the Commissioner must reasonably believe that the closure is required to prevent a risk to security at, or near, a leaders' event or a protected person.
18. Before closing a road or marine area, the Commissioner must consult the road controlling authority in the case of a road, and the harbourmaster and the local authority in the case of a marine area. The Commissioner may also consult with any person the Commissioner considers is directly affected more than the public generally, but need not consult anyone else.
19. Roads and marine areas —cls 57 and 58 respectively—may also be closed temporarily by a constable in order to create a secure transport route, if that route leads to or from an aerodrome, a leaders' event, or a protected person's accommodation. To do so, a constable must reasonably believe the closure is required to ensure the security of

protected persons while travelling. In addition to the road or marine area that forms the actual transport route itself, a constable may also close roads and marine areas in the vicinity of the transport route, along with places adjacent to, or in the vicinity of, the route.

20. An owner or occupier of any place that is closed by a constable for the purpose of creating a secure transport route is subject to the restrictions set out at cl 49, and could potentially be excluded from their homes, or disallowed from permitting others to enter.

Closed places and secure transport routes are security areas

21. The Bill provides that closed places and secure transport routes are security areas (cl 44). A person can only enter or remain in a security area with the permission of a constable (cl 60) and may be prevented from entering or be removed (cl 62). The Bill does not include any explicit matters that a constable must consider in deciding whether to grant permission to enter or remain in a secure area.
22. A person may be asked to produce accreditation or evidence of permission to enter or remain in a secure area, and must provide satisfactory evidence of their permission to enter, their reason for doing so, and their personal details (cl 63). A person in a security area may be directed to stop any activity that may cause a risk to security (cl 64). A constable may require vehicles in a security area to stop and remain stopped for as long as is reasonably necessary (cl 65).
23. Constables, and others permitted by constables, may enter, remain in, and use a security area that is not a home or marae (cl 61). The Bill does not include any explicit matters that a constable must consider in deciding whether to enter, remain in, or use a closed private place (which may potentially be against the owner's or occupier's wishes).
24. The Bill is not completely clear as to how the power to enter security areas at cl 61 (which explicitly excludes homes and marae) relates to the restriction at cl 49(b) preventing owners and occupiers of closed places from excluding or ejecting people who are permitted by a constable to enter or remain in that place. We consider that cl 49(2)(b) implies that there can be no entry to a home or marae without a warrant; however, the Bill clearly envisages that homes and marae can be closed by the Commissioner at cl 48, and it appears that they are intended to be subject to the restrictions at cls 49(3) and (4).
25. Security areas, except homes or marae, may be entered and searched for security risks without warrant (cl 66). Homes and marae may be searched with the owner's or occupier's consent, or with a warrant. Warrants may be issued by an issuing officer if the issuing officer is satisfied that there are reasonable grounds to believe that it is necessary to search the home or marae, for a security risk because:
 - a. the home or marae's particular location in a security area poses a risk to security if it has not been searched; and
 - b. it would be a risk to security if there were a security risk at the home or marae.
26. Searches under cl 66 do not require reasonable suspicion that a security risk is present in the home or marae, merely that there would be a security risk if the home or marae was not searched. Because of the very wide definitions of "risk item or substances" and the associated "risk to security" at cl 6 of the Bill, it is unlikely that any home or marae in a security area would not satisfy this requirement. The search power therefore is functionally identical to a general inspection power for all homes and marae that are within

security areas. Items found during a search may be seized if the item is reasonably believed to be a “risk item or substance” (cl 72).

27. People and things in a security area or at an entrance to a security area (cl 70(4)) may be screened or searched with the consent of the person, or in the case of an unattended thing, without consent (cl 68). The power to screen and search may be exercised without consent if the constable has reasonable grounds to suspect that there is a risk to security and it requires an immediate response (cl 68(4)). A person who does not consent may be prevented from entering, or be removed from, the secure area (cl 69).
28. In exercising all of these powers, reasonable force may be used against people or things if required (cl 106). Nobody is entitled to compensation for any actions or omissions made in accordance with the Bill (e.g. a person deprived of the use of their home for three weeks because it happens to be in a security area and they refuse consent to be searched), except that, within specified limitations, reasonable compensation must be paid for property that is damaged or destroyed when closing a security area (cls 114 and 115).

It is an offence not to comply with requirements while in a closed place or transport route

29. It is an offence to intentionally and without reasonable excuse enter, attempt to enter or remain in a security area, knowing that it is a security area, and knowing that a constable has not permitted entry (cl 74). It is an offence to intentionally and without reasonable excuse, while knowing it is a security area, to breach or fail to comply with any requirement, condition, direction, or prohibition made in respect of the statutory requirements as outlined above, except the requirement to provide information at cl 63 (cl 75). It is an offence to intentionally and without reasonable excuse interfere with, by any means, the closing of a security area, knowing that it is a security area (cl 76). It is an offence to intentionally and without reasonable excuse, knowing that it is a security area, to fail to stop a vehicle when required to do so, or to keep a vehicle stopped as long as is reasonably necessary (cl 77).
30. A person who commits an offence against the Bill is liable upon conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 (cl 98).

Closure of airspace

31. Airspace may be designated as APEC security airspace to prevent a risk to security at, or near, an APEC event or leaders’ event and to ensure that only authorised aircraft enter the airspace (cl 80). Rules can be made in respect of APEC security airspace that ensure only authorised aircraft enter that airspace, or that otherwise prevent a risk to security by aircraft in that airspace (cl 81).
32. Where a constable suspects on reasonable grounds that an unauthorised aircraft *without* a person on board is, has just been, or will be, in APEC security airspace, the constable may seize, detain, take control of, or destroy the aircraft (cl 82). Where a constable has reasonable grounds to suspect that an unauthorised aircraft *with* a person on board is, has just been, or will be in APEC security airspace, the constable may seize or detain it to prevent its operation (cl 83). Detention or seizure at cls 82 and 83 may only last so long as the constable considers it is necessary to prevent a risk to security.
33. A constable may enter and search without warrant aircraft, aerodromes, vehicles, vessels, and buildings or places (including homes or marae). To do so, the constable

must have reasonable grounds to suspect there is, or will be, an activity in APEC security airspace that constitutes a risk to security, and that the risk emanated from the place being searched (cl 86).

34. If a constable has reasonable grounds to suspect that an aircraft is, will be, or has just been, in APEC security airspace in breach of applicable rules, the constable may require a person who the constable reasonably believes operated the aircraft to provide their personal details, and if known, that of the aircraft's owner (cl 87). If that person questioned is not, in fact, the operator of the aircraft, the constable may require the person provide, if known, the personal details or other identifying particulars of the operator and owner.
35. It is an offence to intentionally and without reasonable excuse operate an aircraft or do an activity in breach of the rules applicable to APEC security airspace (cl 88). It is also an offence to intentionally and without reasonable excuse act in breach of, or fail to comply with, any requirement, condition, direction, or prohibition made as in respect of the statutory provisions outlined above (cl 89).
36. These offences are liable upon conviction to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 (cl 98).

Powers to use wireless electronic counter-measure technology

37. The Commissioner is empowered to authorise a constable or a foreign security agency to use specified wireless electronic counter-measure technologies at APEC events and other leaders' events (cl 92). The Commissioner may only authorise the use of the technology if the use is to counter potential or actual risks to security (cl 90). The technology can be used to detect, intercept, transmit, retransmit, modify, disrupt, disable, or interfere with radiocommunication, and a person authorised to use the technology may use any information derived from the radiocommunication (cl 97).
38. The Commissioner may only authorise the use of the technology for the minimum time that is required to counter potential or actual risks to security at specified locations, which includes areas adjacent to security areas (cl 92(4)-(5)). Planned use of the technology may only affect radiocommunications in a planned range of frequencies, whereas reactive use allows the technology to be used to react and respond to types of radiocommunications as necessary (cls 93 and 94).
39. The Commissioner may impose any condition on the use of the technology that they see fit (cl 63(2)). Authorised users of the technology must make any alternative arrangement required by the Commissioner relating to an existing service that may be affected by the authorisation, such as radio services essential to protect life and property or services authorised under existing radio spectrum licences (cls 96(1)(e) and 96(3)). However, there is no obligation on the Commissioner to consult with providers of existing services before authorising the use of the technology and setting the conditions of its use.
40. All information collected by the technology must be disposed of as soon as it is no longer required to counter potential or actual risks to security (cl 96). Authorised users of the technology must not disclose a radiocommunication, or information derived from the radiocommunication that is a private communication or personal information, unless required by another Act, or for the purposes of prosecution under the Bill (cl 97(2)-(3)).

Consistency of the Bill with the Bill of Rights Act

Democratic and civil rights affected by the Bill (ss 14, 16, 17, and 18(1))

41. 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. Section 16 of the Bill of Rights Act provides that everyone has the right to freedom of peaceful assembly. Section 17 of the Bill of Rights Act provides that everyone has the right to freedom of association. Section 18(1) of the Bill of Rights Act provides that everyone lawfully in New Zealand has the right to freedom of movement.
42. The freedoms of expression, peaceful assembly, association, and movement are all democratic and civil rights which together ensure that New Zealanders can participate in the shaping of society and public opinion. They are the essential building blocks to a free and democratic society.¹ In relation to these rights, we note the following:
- a. freedom of expression is “as wide as human thought and imagination”.² The right has been interpreted to include the right not to be compelled to say certain things or to provide certain information.³ A person’s conduct may amount to expression where the conduct is intended to convey meaning.⁴ Political speech has high expressive value;⁵
 - b. the choice of method, place, and time of peaceful assembly is integral to the free exercise of that right;⁶
 - c. the ambit of freedom of association is “broad and encompasses a wide range of associational activities...”.⁷ It has been held to include the right of an individual to associate with any other individual.⁸ Freedom of association encompasses both formal and informal assemblies and the participation in community life;⁹ and
 - d. freedom of movement includes the right to use roads and move through public places.¹⁰ The freedom has been asserted to include the right of an individual not to be moved, and to be protected against forced evictions.^{11,12} Notably, art 12 of the International Covenant on Civil and Political Rights, which the Bill of Rights Act affirms, provides that “everyone... shall... have the... freedom to choose his residence”, suggesting the right may include the freedom not to be moved from a chosen residence in certain circumstances. While the scope of freedom of movement is not settled in this respect, this analysis proceeds on the basis that

¹ *Handyside v United Kingdom* (1976) 1 EHRR 737.

² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, (1999) 5 HRNZ 224 (CA) at [15].

³ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

⁴ *Attorney-General v Smith* [2018] NZCA 42 at [46].

⁵ *Morse v Police* [2012] NZSC, 45 at [14] per Elias CJ.

⁶ *Brooker v Police* [2007] NZSC, 30 at [116] per McGrath J.

⁷ *Turners and Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72].

⁸ *B v JM* [1997] NZFLR 529 (HC) at 532.

⁹ *Morse*, referred above n 5, at [110] per McGrath J.

¹⁰ *Kerr v Attorney-General* [1996] DCR 951 (DC) at 955.

¹¹ Andrew Butler and Petra Butler the New Zealand Bill of Rights Act: A Commentary (2nd ed, LexisNexis, Wellington, 2015) at 16.4.5; *Family and Whanau Violence Legislation Bill – Consistency with the New Zealand Bill of Rights Act* (Crown Law, ATT395/261, 3 March 2017) at [9].

¹² However, this is a disputed proposition, at least so far as it relates to freedom campers. See: *New Zealand Motor Caravan Association Inc v Thames-Coromandel District Council* [2014] NZHC 2016 at [131].

the freedom includes the right to be protected against forced evictions from legal or customary residences.

43. The Bill contains many provisions that limit the above freedoms. These can be grouped together as:
- a. those provisions that enable the closure of public places, private places, roads, and marine areas, and the effects of those closures;
 - b. those provisions that restrict access to airspace through the designation of airspace as APEC security airspace; and
 - c. those provisions that enable the use of electronic counter-measure technology.
44. The provisions of the Bill that limit the democratic and civil rights identified above may be consistent with the Bill of Rights Act if they can be justified in a free and democratic society.¹³ This inquiry may be approached as follows:¹⁴
- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Are the provisions of the Bill that enable closure of public places, private places, roads, and marine areas justified in a free and democratic society?

45. As outlined previously (refer paras 11 – 28 above), various provisions of the Bill enable the closure of public places, roads and marine areas. This can either be done:
- a. as a planned closure of a public place, private place, road, or marine area, where the Commissioner reasonably believes the closure is required to prevent a risk to security at, or near, a leaders' event or near a protected person (cls 47, 48, 50, and 51);
 - b. as a reactive closure of any place by a constable if the constable reasonably believes the closure is required to prevent or respond to a risk of security at, or near, a leaders' event or near a protected person (cl 52); or
 - c. as temporary closure of a road or marine area by a constable in order to create a secure transport route, if the road or marine area leads to or from an aerodrome, leaders' event, or protected person's accommodation and the constable reasonably believes the closure is required to ensure the security of protected persons while travelling (cls 57 and 58).

¹³ New Zealand Bill of Rights Act 1990, s 5.

¹⁴ See *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

46. Each of these closures will limit freedom of movement. This is because areas that are closed can be blocked off by any means, and people prevented from entering or remaining in the area (cls 45 and 54). This limits the ability of people to travel through those areas. It also may result in the eviction of people who reside in those areas. This includes both people who might customarily reside in a public place that is closed (e.g. homeless people), as well as those who are owners or occupiers of residences in areas that are closed off (cl 49).
47. Each of these closures will limit freedom of association. Participation in normal community life will not be possible in places that are closed. Permission to enter or remain in a security area is possible only with the permission of a constable (cl 60), and a constable may direct a person to stop any activity that may cause a risk to security (cl 64), even if that activity would otherwise be lawful. Owners or occupiers of closed private places, such as residences, will be prohibited from permitting people to enter or remain in their residence (cl 49).
48. Each of these closures will limit freedom of peaceful assembly. People will not be able to freely assemble at places that are closed, and can be prevented from doing activities that may cause a risk to security, even where that activity would otherwise be lawful. This will limit protesters' choice as to site and method of protest.
49. Each of these closures will also limit freedom of expression. The limitations arise indirectly from limits on peaceful assembly, but also in two other ways. First, cl 63 requires that person must, when asked, provide accreditation or evidence of permission to enter or remain in a secure area, along with their reason for doing so, and their personal details. Second, cl 49 prohibits an owner or occupier of a public or private place from excluding or ejecting from that place people who a constable has permitted to be there. To the extent that the expulsion was intended to convey a meaning, such as a political message, the owner or occupier's freedom of expression would be limited.

Do the limits serve a sufficiently important objective?

50. The purpose of these provisions is to maintain security at a major international event, where the need for security is fundamental to the success of the event, and to facilitate an efficient delivery of APEC 2021. Leaders from up to 21 APEC economies (and other people in need of security protection) will need to be moved around Auckland efficiently, and to safely meet at events. We consider this objective is sufficiently important to justify some limitation on the democratic and civil rights referenced above.

Are the limits rationally connected with the objective?

51. The closing of a place facilitates a high degree of Police control over the area. It enables the Police to restrict access to people who could create a risk to security and regulates the conduct of people who are permitted to be in the area. The limits that stem from the closing of areas are rationally connected to delivering a safe and secure APEC 2021.

Do the limits impair the rights or freedoms no more than is reasonably necessary for sufficient achievement of the objective?

52. Parliament is entitled to appropriate latitude to achieve its objectives.¹⁵ The issue here is whether the means are minimally impairing of the rights, and whether the means proposed are carefully tailored to the objective.

¹⁵ *Canada v JTI-MacDonald* [2007] 2 SCR 610 at [42] – [45].

53. It is notable that the Bill gives specified decision-makers a discretionary power to close areas only where the decision-maker has a reasonable belief that closure is required to prevent or respond (as the case may be) to a risk to security, or to otherwise ensure the security of protected persons while travelling. The Bill envisages that areas “near” leaders’ events or a protected person may be closed, in addition to the place where the event is taking place itself. Discretionary powers in the Bill must be given a meaning consistent with the Bill of Rights Act,¹⁶ and while “near” is not defined by the Bill, the Bill does not provide for places to be closed where this would not be proportionate to achieving the security objective.
54. More generally, this obligation to act consistently with the Bill of Rights Act extends to all the discretionary powers granted under the Bill. Decision-makers will need to consider the proportionality of their actions when exercising the powers granted by this Bill.
55. Similarly, the Bill creates discretionary powers at cl 49 with respect to limiting the rights of owners or occupiers of private places in various ways (including their eviction). Any discretionary power exercised under this provision that affects freedom of movement, association, peaceful assembly, or expression must, in practice, be demonstrably justified in a free and democratic society.
56. It is also relevant that these discretionary powers only apply during the three-week leaders’ event period, limiting the overall duration that the provisions can limit the various rights. Further, the relevant powers relating to the closing of places explicitly envisage that a place could be closed for part of a day, rather than a whole day, ensuring that there is scope for the discretionary powers to be exercised in a way that is closely tailored to the specific security requirements.
57. Importantly, the Bill does not create a blanket restriction on “non-accredited” people entering security areas. A person’s ability to enter and remain in a security area is at a constable’s discretion (cl 60). This ensures that, should large parts of public areas be closed, such as the Auckland Domain,¹⁷ consideration can be given to facilitating the entry and use of the place by people who have legitimate reasons to enter or use the place and who do not pose a real risk to security. The extent, nature, and duration of areas closed, along with the actual need for security at each site, will be relevant to considering the proportionality of the closure, and whether access by “non-accredited” people needs to be facilitated.
58. With respect to cl 63, the provision requires a person provide only that information which is necessary for a constable to assess the security impacts of allowing the person to enter or remain in a security area. Notably, a person who refuses to provide the information can be removed from the security area (cl 62), but will not be held to have committed an offence (cl 75(2)). This exception from criminal liability ensures the limitation on expression goes no further than is required to achieve the security objective.

Are the limits in due proportion to the importance of the objective?

59. The discretionary powers at cl 49 could potentially enable severe intrusions to be made into freedom of movement. Owners or occupiers of private residences, as well as people who customarily happen to occupy public places (e.g. homeless people) can be evicted

¹⁶ Section 6, New Zealand Bill of Rights Act 1990.

¹⁷ As happened previously with the Auckland Domain (Temporary Closure for APEC) Act 1999.

from their place of residence for the duration of the closure. These individuals can also be forced to allow people to remain in their homes at the direction of a constable.

60. The Bill does not provide any explicit mandatory relevant considerations that a decision-maker must consider when exercising the powers at cl 49. To an extent, the Bill is also not clear on who is empowered to exercise these range of powers. Nevertheless, in our view, the Bill does not authorise these discretionary powers to be exercised inconsistently with the Bill of Rights Act. It is possible that, in some limited circumstances, it could be a proportionate response to require people to vacate their homes for certain periods of time.
61. Practically, we understand that very few private residences are likely to be closed, and that this is mostly likely to occur where a person resides in a private apartment in a building that is also contains a hotel. Amongst other relevant considerations, whether the eviction of an owner or occupier is proportionate will likely turn on:
 - a. the specific risk posed by the individual being excluded;
 - b. the number of people to be excluded;
 - c. the actual security needs associated with the particular event or the individual protected person;
 - d. whether reasonable alternatives to exclusion could be put in place to sufficiently mitigate the risk;
 - e. the degree to which access could be facilitated to the residence during certain periods of time;
 - f. whether the need for security at the site could be avoided altogether by a change of venue;
 - g. whether the person has a legal right to occupy the place or is merely squatting; and
 - h. the availability and provision of alternative accommodation to adversely affected people.
62. The other limitations on freedom of movement from the closure of places, e.g. the ability to freely travel through closed areas, are less severe. Movement through roads and other places is frequently regulated and restricted, particularly as is required to achieve important safety and security objectives. The Bill includes sufficient mechanisms to ensure that the power to close roads and other areas can be applied proportionally, such as the consultation and public notification requirements for planned closures.
63. The degree of the limit on freedom of association, and the diminution of community life, will depend on the overall scope of size, nature, and duration of closures. It is possible that the overall limit on association could be quite significant. The proportionality of the impact on community life is a consideration that decision-makers exercising powers to close areas under the Bill will need to consider.
64. The degree of the limit on freedom of peaceful assembly and expression will also depend on the overall scope of size, nature, and duration of closures. For the closure powers to be exercised proportionally, peaceful assembly “near” leaders’ events must be

reasonably accommodated, relative to the particular security need. Political speech (which includes political protest) is recognised as being of high expressive value. The extent of the closures must not be such as to effectively deny people the ability to freely express themselves peacefully, such as through speech-making, chanting, the holding banners or signs, or other expressive acts like the flying of balloons.

65. With respect to the information that is required to be provided at cl 63, the information is not of high expressive value. Further, the provision contains explicit limits on when the information can be required. In contrast to this limited infringement on expression, there is a very high need for security at APEC 2021. As such, the limits are in due proportion to the importance of the objective.

Overall, are these limits justified?

66. In light of the above discussion, we consider that the provisions of the Bill that provide for areas to be closed are justified limitations on the rights to freedom of movement, association, peaceful assembly and expression. This is primarily because the powers are largely discretionary in nature and there is nothing in the Bill to suggest that Parliament is authorising the powers be exercised disproportionately.

Are the provisions of the Bill that deal with designated APEC airspace justified in a free and democratic society?

67. Clauses 80 and 81 of the Bill provide for the Director of Civil Aviation to designate any portion of airspace over a security area (along with surrounding areas) as APEC security airspace and to make emergency rules relating to that airspace for the purposes of preventing risks to security at, or near, a leaders' event and to ensure only authorised aircraft enter the airspace.
68. These clauses could limit freedom of movement as it relates to aircraft that have people on-board. The rules may restrict or severely limit the passage of aircraft through designated airspace at certain periods of time. However, in our view these limits are clearly justified under s 5 of the Bill of Rights Act. The purpose of the provisions is to protect security. Aircraft travelling through a security area are likely to present a significant risk to security if not appropriately regulated, and the powers to designate APEC security airspace and make rules are discretionary. There is nothing in the Bill that is intended to authorise the powers be exercised in a way that is not consistent with the Bill of Rights Act. Overall, the impacts of freedom of movement are minor (aircraft can move around the areas), whereas the need for security is high.
69. Clause 87 of the Bill makes it a requirement that a person who a constable reasonably suspects is operating an aircraft in breach of APEC airspace rules must provide the constable with their personal details, and if known, the personal details or identifying particulars of the owner of the aircraft. Notably, it is also an offence to fail to comply with this requirement (cl 89).
70. This clause limits freedom of expression in that it compels a person to provide information. However, this limit is clearly justified under s 5 of the Bill of Rights Act. The provision clearly supports the security objective. The presence of unauthorised aircraft in APEC secure airspace would be a significant threat to security, and the requirement that a person operating such an aircraft identify themselves (along with the owner of the aircraft) supports the Police to:

- a. efficiently investigate the risk;
- b. obtain information necessary to support a proportional response to the risk; and
- c. issue a summons in relation to any offending that may have occurred, in cases where it was not necessary that the person be taken into custody on the spot.

71. All of the information that cl 87 requires be provided is necessary to identify and swiftly respond to the risk posed by the unauthorised access of aircraft to APEC security airspace. Overall, the nature of the information sought is not of high expressive value, whereas the security needs are very high.

Are the provisions of the Bill that enable the use of electronic counter-measure technology justified in a free and democratic society?

72. Clause 97 of the Bill provides for the use of electronic counter-measure technology in security areas, which could enable wireless electronic communications to be intercepted, modified, disrupted, or otherwise interfered with. This provision will prevent people from communicating with each other, limiting the freedom of expression. The provision also amounts to a search under s 21 of the Bill of Rights Act. This aspect of the provision is considered later in the analysis.

73. The limits on freedom of expression arising from the use of electronic counter-measure technologies is clearly justified under s 5 of the Bill of Rights Act. The provisions enabling the use of electronic countermeasure technologies support the security objective by mitigating the security risks that could emanate from the use of wireless communication technologies, such as remote triggering devices or remote-control devices.

74. The Bill contemplates that electronic countermeasure technology may significantly interfere with communications, including communications that do not actually present a security risk. The Bill also envisages that the technology could disrupt communications entirely, modify the messages being sent, and intercept private communications and/or other personal information. This could create a chilling effect with respect to a broad range of high-value expression in security areas.

75. However, the Bill provides for the Commissioner to exercise discretion in setting the time, place, and frequency restrictions (cl 92). Further, the Commissioner is empowered to impose any condition they see fit on the use of the technology, and the user of the technology is required to make alternative arrangements required by the Commissioner as it relates to existing services that might be affected (cl 96).

76. Altogether, these limitations provide the Commissioner with a high degree of flexibility in relation to authorising and controlling the use of electronic countermeasures technology. In turn, this ensures that the technology will be used in a way that is carefully tailored to the security objective, which results in a proportionate response.

Unreasonable search and seizure (s 21)

77. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.¹⁸

¹⁸ See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.

78. There are several provisions of the Bill that provide for the searching or screening of places, people, and things. In most cases, the Bill provides for those searches to be carried out under a warrant or by consent. In general, we consider these search powers to be reasonable. However, three provisions in the Bill that provide search powers merit further consideration as to whether they are reasonable—
- a. cl 66 of the Bill provides for warrantless searches of security areas that are not a home or marae. Clause 66 also allows for warranted searches of homes or marae, where by its particular location in a security area, the home or marae poses a risk to security if it has not been searched for any risk item or substance, and it would be a risk to security if there were a risk item or substance there;
 - b. cl 68 provides for a person to be searched without their consent where a constable has reasonable grounds to suspect that there is a risk to security and it requires an immediate response. A person can only be searched under cl 68 if they are at the entrance to a security area or if the person is in a security area; and
 - c. cl 97 provides for the use of electronic counter-measure technologies in secure areas, which will result in the collection of people’s communications.
79. The Supreme Court has held that unreasonable search or seizure cannot be demonstrably justified with reference to s 5 of the Bill of Rights Act.¹⁹ As such, the question with respect to these provision is whether the search is reasonable. The reasonableness of a search can be assessed with reference to the purpose of the search and the degree of intrusion on the values which the right seeks to protect.

Reasonableness of the search at cl 66 of the Bill

80. The ability to provide secure areas is necessary for the safe hosting of APEC 2021. As noted above, searches under cl 66 can only occur in areas that have already been closed (making them a “security area”) in accordance with the Bill. If security areas are to serve their essential function, it is important that those areas can be searched if necessary and for risk items to be located and removed.
81. Overall, we consider that search powers under cl 66 provide sufficient protections to ensure that only reasonable searches are conducted. This is because:
- a. owners or occupiers of private places will generally be consulted before their private property is closed. Planned closures will also be notified publicly. This ensures that the inspection of a closed private place should not usually come as a surprise to owners or occupiers of those private places;
 - b. private places that have a high privacy interest—e.g. homes and marae—will be subject to searches only where a warrant has been issued. Judicial officers will be responsible for considering the reasonableness of any search warrant they are asked to consider and must be satisfied that there are reasonable grounds to believe that it is necessary to search the home or marae;
 - c. private areas other than homes or marae will likely only be closed where the owner or occupier of that place entered into an agreement to host an APEC 2021 event or a protected person. In this way, the owner or occupier of that place can

¹⁹ *Cropp v Judicial Committee* [2008] 3 NZLR 744 at [33]; *Hamed v R* [2012] 2 NZLR 305 at [162].

be considered to have consented to the search as part of fulfilling their private agreements;

- d. the provision of secure areas is essential to the hosting of APEC 2021; and
- e. searches under this provision will only be possible when an area is closed under the Bill, which itself is a discretionary power that will need to be exercised consistently with the Bill of Rights Act.

Reasonableness of the search at cls 68 and 70 of the Bill

- 82. The power to search people is set out in cl 70. A person can be searched at an entrance to, or in, a security area or secure transport route. This power may be exercised by a constable only (and not by other security staff). The Bill provides that searches of a person must be undertaken with the consent of the person (cl 68(1)(a)); however, a search may be undertaken without consent if there are reasonable grounds to suspect that there is a risk to security and it requires an immediate response. This power exists alongside the power of a constable to remove a person from a security area who does not consent to be searched (cl 69).
- 83. Overall, we consider that searches under cls 68 and 70 provide sufficient protections to ensure that only reasonable searches are conducted. This is because:
 - a. people who choose to enter security areas can be taken to consent to the conditions of entry associated with that area;
 - b. cl 70 explicitly provides that constables can undertake “reasonable” searches only. Thus, for example, a search cannot occur where the security risk could be sufficiently mitigated by denying the person entry to the security area or by removing the person from the security area;
 - c. as noted above, the provision of secure areas is essential to safe hosting of APEC 2021; and
 - d. searches under this provision will only be possible in an area is closed under the Bill, which itself is a discretionary power that will need to be exercised consistently with the Bill of Rights Act.

Reasonableness of the search at cl 97 of the Bill

- 84. As outlined previously, one consequence of the use of electronic countermeasure technology (authorised under cl 97) is that private communications could be intercepted. This interception amounts to a search.
- 85. Overall, we consider that the Bill provides sufficient protections to ensure that only reasonable searches are conducted as a consequence of the use of electronic countermeasure technology. This is because:
 - a. the Bill tightly prescribes the circumstances in which the Commissioner may authorise the technology be used, and provides the Commissioner with a high degree of flexibility in relation to regulating the use of this technology—nothing in the Bill is intended to authorise these discretionary powers to be exercised in a way that would result in unreasonable searches;

- b. the Bill provides extensive protections regarding the use and storage of any information collected through the use of the technology—in particular, any information collected must be disposed of as soon as it is no longer required for a purpose of the Bill (cl 96(1)(d));
- c. use of this technology is essential to maintaining secure areas during APEC 2021; and
- d. the technology can only be used in secure areas closed under the Bill, which itself is a discretionary power that will need to be exercised consistently with the Bill of Rights Act.

Conclusion

86. 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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