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Hon Christopher Finlayson QC, 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') 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 certain breaches of international peace and security. 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.¹
4. The Bill has the effect of:
 - a. providing a legislative framework for autonomous sanctions
 - b. enabling autonomous sanctions to be imposed 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 of suspicion in specified circumstances, and
 - d. providing for the monitoring and enforcement of autonomous sanctions.
5. The Bill provides for flexibility by empowering the Governor-General (on the recommendation of the Minister responsible for the administration of the Act) to make regulations that prescribe prohibitions or restrictions of any kind (referred to in the Bill as "autonomous sanctions"). Autonomous sanctions can apply to assets, services

¹ Note however, that the threshold for recommending autonomous sanctions is that there is a threat to peace and security in the Asia-Pacific region or the United Nations Security Council either has not acted under article 41 of the Charter of the United Nations (whether because of a veto or otherwise) or it has acted under article 41, but the action is insufficient to maintain or restore peace and security.

entities or persons, and are a prohibition or restriction imposed persons travelling to, entering, or remaining in New Zealand, or dealing with certain assets, or with certain services.

6. 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

Scope of the regulation making powers

7. The Bill's description of "autonomous sanctions", its purpose, and the range of regulation making powers contained in it, are all very broad in scope. This wide scope potentially allows regulations to be made which could limit a number of the rights and freedoms affirmed in the Bill of Rights Act (for example, the right to freedom of expression, affirmed in s 14, and the rights to freedom of association and movement, affirmed in ss 17 and 18).
8. In addition, provisions in the Bill relating to the duty to report suspicions (cl 15) and prohibitions and restrictions on individuals who are not New Zealand citizens or holders of a residence class visa travelling to, entering or remaining in New Zealand (cl 10) could be given effect through the making of regulations under the Bill. These provisions, once able to be enforced, could also limit the rights and freedoms noted above.
9. Section 6 of the Bill of Rights Act requires an Act to be given a meaning that is consistent with the rights and freedoms affirmed in the Bill of Rights Act, where such an interpretation is properly available. Although the Bill contains broad powers that could affect rights protected under the Bill of Rights Act, it also contains limits on the exercise of those powers. Any regulations made pursuant to the Bill will have to be consistent with the Bill of Rights Act or, where a measure is imposed that does limit a right affirmed by the Bill of Rights Act, this must be justifiable under s 5 of that Act. To be justifiable under s 5, the regulation or measure would have to be directed at, and proportionate to a sufficiently important objective,² which, in the case of this Bill, would be responding to a specific threat to peace or security.
10. There are also safeguards in the Bill that protect rights affirmed by the Bill of Rights Act and support the requirement for any regulations made under the Bill to be consistent with the Bill of Rights Act.

Safeguards

11. Clause 13 of the Bill gives an individual the right to apply to the Minister for amendment or revocation of a sanction or an exemption from it, and a person affected by the exercise of statutory decision making powers under the Bill would have the right to judicially review a decision affecting them, as affirmed by s 27 of the Bill of Rights Act. Both these measures overcome a problem experienced with overseas sanction schemes that have been criticised because of a lack of review mechanisms.³

² *Hansen v R* [2007] NZSC 7.

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.

12. Clause 8 requires the Minister to be satisfied, before making a recommendation for regulations to be made, that any proposed regulations are consistent with the purpose of the Bill, which reflects the need for any prohibitions or restrictions to be justifiable. While the purpose of the Bill is very broad, the Minister's determination of whether regulations meet the purpose must be exercised in accordance with general principles of administrative law. This requires the Minister to make a determination that the basis for making the particular regulation meets the objective of the Bill, with regard to objective standards (as opposed to subjective discretion). Such standards include the requirement to make proper inquiry and to pursue the statutory purpose.
13. Clause 9(a) requires regulations made under the Bill to state the purpose of the regulations and to include a description of the particular threat to 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 again reflects the requirement for the prohibitions and restrictions to be justifiable.
14. 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 and for prescribing the methodology for calculating such compensation. This provides a means of addressing the potential restriction on the right to freedom of association affirmed by section 17 of the Bill of Rights Act.

Conclusion

15. While the Bill allows for the imposition of sanctions upon people, countries, assets and services, the express limitations on the Bill's regulation and notice making powers and the safeguards within the Bill mean that any sanctions imposed in accordance with the Bill are required to be consistent with the Bill of Rights Act.
16. We have therefore concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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