

12 June 2017

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Brokering (Weapons and Related Items) Controls Bill

Purpose

1. We have considered whether the Brokering (Weapons and Related Items) Controls 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. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 25(c) (right to presumed innocent until proven guilty). Our analysis is set out below.

The Bill

3. The Bill establishes a regime to regulate the brokering of weapons and related items by New Zealanders and New Zealand entities. Brokering involves negotiating, arranging, or facilitating the international movement of arms and military equipment from one foreign country to another foreign country. It does not involve imports, exports, or internal movements of arms and military equipment within New Zealand. This Bill supports New Zealand's commitments under the Arms Trade Treaty, which was ratified in 2014.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

4. 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.
5. Clauses 21 and 22 of the Bill engage s 14 by compelling expression. Clause 21 of the Bill requires brokers to keep records for a period of at least 5 years, and must answer any questions from the Secretary of Foreign Affairs and Trade or a constable or provide copies to them when required to do so.
6. Clause 22 establishes an offence for failing to comply with these requirements without reasonable excuse. An individual is liable on conviction to a term of imprisonment not exceeding six months and/or a fine not exceeding \$10,000 for failing to comply with the requirements of cl 21 without a reasonable excuse.

Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?

7. Limitations on rights and freedoms may still be consistent with the Bill of Rights Act if they can be considered reasonable limits that are demonstrably justified under s 5 of that Act. The s 5 inquiry may be summarised as:¹
 - a. does the objective serve a purpose 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?
8. There is a risk of weapons or related items moving to illegitimate users or undesirable locations. The objective of the provision is to reduce that risk. The public has a strong interest in records of brokering being kept, and in those records being inspected by the Secretary of Foreign Affairs and Trade or a constable where necessary. This objective is sufficiently important to justify the limitation on a broker's freedom of expression, and the limit on that right is rationally connected with that objective.
9. We also consider that the right to freedom of expression is impaired no more than is reasonably necessary, and that the limit is in due proportion to the importance of the objective. The offence in cl 22 is not a strict liability offence. A broker will not be convicted for failing to comply with the requirements in cl 21 if the prosecution cannot prove that they did not have a reasonable excuse for not doing so. Finally, due to strong public interest in keeping records relating to brokering, it is logical that failing to comply with cl 21 could carry with it a term of imprisonment.
10. We consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Section 25(c) – Right to be presumed innocent until proven guilty

11. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
12. The purpose of s 25(c) is to protect the fundamental liberty and dignity of those accused of offences in light of the grave consequences a criminal charge and conviction may entail.² To this end, the right includes three main components:³
 - a. the onus of proof lies with the prosecution throughout
 - b. the standard of proof is “beyond reasonable doubt”, and

¹ *Hansen v R* [2007] NZSC 7.

² See *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at [212 – 213].

³ See, Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [23.4.19]; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at [675].

- c. *mens rea* (a guilty mind) is a requirement of the offence.
13. The Bill contains two clauses providing that an offence will be committed if done “without reasonable excuse”. These are:
- a. breaching the conditions of a registration or permit other than in the course of carrying out brokering activity (cl 13)
 - b. failing to keep or produce records or answer questions (cl 22)
14. “Without reasonable excuse” provisions were formerly considered to reverse the onus of proof (at least where the defendant was proceeded against summarily), thereby limiting a defendant’s right to be presumed innocent until proved guilty. However, upon the repeal of s 67(8) of the Summary Proceedings Act 1957, offences of this nature in the Bill should be interpreted consistently with the presumption of innocence. Accordingly, the prosecution must prove beyond a reasonable doubt that a defendant did not have a reasonable excuse once an evidential burden is met.⁴
15. We consider that the Bill appears to be consistent with the right to be presumed innocent until proven guilty affirmed in s 25(c) of the Bill of Rights Act.

Conclusion

16. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

⁴ *King v Police* [2016] NZHC 977 at [24].