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Hon David Parker, Attorney-General

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

Purpose

1. We have considered whether the Maritime Powers Extension 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 21 (unreasonable search and seizure) and s 22 (liberty of the person). Our analysis is set out below.

Summary

3. The Bill amends the Customs and Excise Act 2018 ('the principal Act') and the Misuse of Drugs Act 1975. It extends the New Zealand Customs Service ('Customs') operations to include disruption of drugs smuggling, and makes it an offence to be involved in the importation or exportation of controlled drugs, or precursor substances, equipment, or materials with the knowledge that these are to be used in producing or manufacturing drugs.
4. Powers provided to Customs in the Bill engage s 21 (unreasonable search and seizure) and s 22 (liberty of the person) affirmed in the Bill of Rights Act. These rights are fundamentally concerned with fairness, individual autonomy, privacy, and dignity. Any limitation on these rights requires careful scrutiny.
5. We have taken into account the international context within which these powers are being exercised and the legislative safeguards put in place around their use.
6. We conclude that the Bill is consistent with the rights and freedoms in the Bill of Rights Act.

The Bill

7. The Bill amends the principal Act and the Misuse of Drugs Act to incorporate into domestic law New Zealand's rights and obligations under article 108 of the United Nations Convention on the Law of the Sea¹ and article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.²

¹ http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

² https://www.unodc.org/pdf/convention_1988_en.pdf

8. The objectives of the Bill are to provide Customs with an additional mechanism to disrupt drugs smuggling and to establish jurisdiction over offences under the Misuse of Drugs Act.
9. Clause 7 of the Bill amends the Misuse of Drugs Act to introduce a new offence provision relating to drugs smuggling outside New Zealand. The provision would make it an offence to be involved in the importation or exportation of controlled drugs, or precursor substances, equipment, or materials with the knowledge that these are to be used in producing or manufacturing drugs. The offences are intended to apply if a person on a ship in international waters is:
 - a. in control of the prohibited item, with the intent of importing the item into New Zealand; or
 - b. involved in other ways in the smuggling of prohibited items into or out of New Zealand.
10. The Bill also introduces a new sch 5A to the principal Act. Schedule 5A would provide a framework for how Customs may stop, board, search and take necessary enforcement action in international waters. The powers may be exercised only where:
 - a. Customs has reasonable cause to suspect that a drugs smuggling offence has been, is being, or is likely to be committed; and
 - b. in the case of foreign ships, the flag State has authorised action in accordance with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.
11. Schedule 5A also includes a power to arrest a person on the ship whom a Customs officer has reasonable cause to believe has committed an offence under the Misuse of Drugs Act related to drugs smuggling. A Customs officer can also detain the ship if satisfied that it is reasonably necessary to do so for the purpose of exercising powers in sch 5A. Certain items to do with drugs smuggling offences found on the ship, and the ship itself if it has been involved in drugs smuggling, may be forfeited to the Crown.

Consistency of the Bill with the Bill of Rights Act

Section 21 – unreasonable search and seizure

12. 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, or correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.³
13. The Bill contains significant, warrantless, search and seizure powers, and the information obtained as a result of the search may be retained for law enforcement purposes.
14. 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 an unreasonable search logically

³ See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.⁴ 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.

15. Customs operations usually take place in a special border context that affects expectations of privacy. The reasonable expectation of privacy underpinning s 21 is that held by the community at large, and this expectation will vary according to where the search is conducted or the nature of the search. Expectations of privacy are lower in public places, and are significantly lower for persons crossing borders than in entirely 'domestic' contexts.⁵
16. It is a long recognised aspect of customs regulation that those seeking to enter a country must establish that goods they bring with them may lawfully be brought into the country.⁶ Customs has a limited opportunity to act before, for example, a person has left their jurisdiction or goods have been exported, consumed or processed in manufacturing. Customs must balance both the need to ensure compliance, and the need for efficient administration of the border so that persons, craft and goods are not unduly delayed.
17. There is a strong public interest in the legitimate movement of goods at the border, for example in relation to the importation of dangerous goods. For such regulation to be effective, extensive powers for Customs are required.⁷
18. The Bill, however, seeks to extend the powers of Customs officers to vessels outside New Zealand's territorial jurisdiction. 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.⁸
19. 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.⁹ The greater the degree of intrusiveness, the greater the need for justification and attendant safeguards.

Powers to stop, board and search ships, and search people

20. Clause 5 of new sch 5A proposes the use of warrantless search powers to search vessels and, if necessary, people and electronic devices aboard. A warranted search power provides prior and independent verification that a search is justified. Nonetheless, warrantless search powers may be justified, 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.¹⁰

⁴ Ibid at [162] per Blanchard J.

⁵ *R v B-P* [2002] NZAR 157 (CA) at [27] – [31]; *R v Boateng* (1999) 5 HRNZ 450 (HC); *Udompun v Attorney-General* (2003) 7 HRNZ 238 (HC).

⁶ *R v B-P* at [17].

⁷ See, for example, *S (CA712/2015) v R* [2016] NZCA 448 at [39] – [40].

⁸ 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].

⁹ *Hamed v R*, above n 3, at [172].

¹⁰ See, for example, *R v Rao* (1984) 12 CCC (3d) 97.

21. We consider that that clause 5 does not authorise the use of unreasonable search powers because:
- a. in the context of international waters, activities can be highly volatile and require urgent action and responses. There are many opportunities for drug smugglers to evade law enforcement activities in open waters and delays in obtaining a warrant could impede these initiatives;
 - b. under cl 3, Customs will be required to seek flag state authorisation when it needs to board foreign vessels. This provides additional safeguards on the use of powers as States can impose conditions on Customs officers when giving consent;¹¹
 - c. the use of powers is conditional on a Customs officer having reasonable grounds to suspect the commission of drug smuggling offences. While this threshold is not as high as requiring a reasonable belief,¹² it will still require a Customs agent to have cause to think that it is likely that a vessel contains evidence of relevant offending based on an objective assessment.¹³ The purpose of the search will be to board a vessel and undertake investigatory measures to determine whether an offence is being committed. Accordingly, we believe the threshold to be appropriate in the context of the purpose of the search;
 - d. more intrusive powers are governed by higher thresholds:
 - i. powers to search a person are limited to conducting a preliminary search or rub-down search unless a Customs officer has a reasonable belief that the person has drugs smuggling evidence or a relevant document on or about their body;
 - ii. for electronic devices, while an initial search requires a reasonable suspicion of relevant offending, “full searches” can only be undertaken where a Customs official has formed a reasonable belief of offending occurring, which attract the same safeguards as equivalent searches occurring in the border context; and
 - e. the powers are subject to Part 4 (except subpart 3) of the Search and Surveillance Act 2012,¹⁴ which establishes standards of lawfulness and reasonableness for the exercise of powers of search and seizure that accommodates rights and entitlements in the Bill of Rights Act.
22. We note in addition that the courts have the power to exclude evidence obtained as a result of an unreasonable search in any subsequent criminal trial.¹⁵
23. Taken together, we consider the search powers are rationally connected to sufficiently important Customs objectives – that is, the detection and prevention of drugs smuggling. The powers are proportional to this objective as they move from a reasonable suspicion

¹¹ This requirement does not apply to stateless vessels or hot pursuit in accordance with article 111 of the United Nations Convention on the Law of the Sea.

¹² 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].

¹³ 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].

¹⁴ We note that ss 125(4), 131(5)(f), and 133, and subparts 6 and d9 of the Search and Surveillance Act do not apply to goods treated as forfeited under cl 8 of sch 5A, or other forfeited goods: see cl 9(4) of sch 5A.

¹⁵ Evidence Act 2006, s 30.

test for less intrusive searches to a reasonable belief standard for searches with a higher privacy impact.

24. We therefore consider the Bill appears to be consistent with the right to be secure against unreasonable search and seizure affirmed in s 21 of the Bill of Rights Act.

Forfeiture and seizure

25. Clause 8 of new sch 5A provides that a Customs officer may treat as forfeited to the Crown:
- a. any controlled drug, or precursor substance, equipment or material that is capable of being used to manufacture drugs, found after searching a ship; and
 - b. the ship itself if it is involved in drugs smuggling.
26. The Customs approach to forfeiture, seizure, and condemnation is not unusual, and such legislation is commonly, and necessarily, far-reaching in other comparable jurisdictions.¹⁶ Although the usual procedures for forfeited goods under the principal Act, such as notice of the seizure to people interested in the goods, review of the seizure or sale of the seized goods, do not apply to controlled drugs, or precursor substances or associated equipment and material for manufacture, it would be inappropriate to return or sell such substances and equipment. The usual processes under the principal Act, however, do apply to ships involved in drugs smuggling.
27. We do not consider these powers of seizure are unreasonable under s 21 of the Bill of Rights Act.

Section 22 – liberty of the person

28. 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.¹⁷
29. To trigger the concept of detention there must be a “substantial intrusion on personal liberty”,¹⁸ whether a physical deprivation or a statutory constraint. The Court of Appeal has held that:¹⁹
- “An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.”
30. 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,²⁰ 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.

¹⁶ *Williams v Attorney-General* [1990] 1 NZLR 646 (CA) at [677].

¹⁷ *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

¹⁸ *Police v Smith* [1994] 2 NZLR 306 (CA) at 316 per Richardson J.

¹⁹ *Neilsen v Attorney-General* [2001] 3 NZLR 433; (2001) 5 HRNZ 334 (CA) at [34].

²⁰ Butler and Butler, above n 8, at [19.8.1].

31. Clause 6 of proposed new sch 5A confers a power on Customs officers to detain a person on a vessel on the high seas if they have reasonable grounds to believe that the person is committing or has committed a drug smuggling offence.
32. In our view, this power is not “arbitrary” for the purposes of s 22 of the Bill of Rights Act. The powers to detain may only be exercised by Customs officers and will be used in furtherance of a legitimate purpose of arresting those reasonably believed to have committed serious offending. The person arrested must also be delivered as soon as possible into the hands of a constable. This places a person within the usual law enforcement processes and should facilitate a person’s s 23 rights.
33. Clause 7 also authorises the detention of a ship (and accordingly the people on it) if, and only for so long as, a Customs officer is satisfied that the exercise of the power is reasonably necessary to enable the exercise of other powers in sch 5A. Clause 11 of the Bill confers similar powers of detention of ships in the contiguous zone for the purposes of carrying out an investigation into the commission of an offence. Again, we do not consider this detention to be “arbitrary” as there is a legitimate purpose for the detention – to search the ship and/or people where there are reasonable grounds to suspect (and for more intrusive searches reasonable grounds to believe) that a drugs smuggling offence has been, is being, or is about to be committed; or reasonable cause to believe other offences against the principal Act are being committed. The detention lasts only so long as is required to stop and search the ship, or investigate the commission the offence.
34. We therefore consider the Bill appears to be consistent with the right not to be arbitrarily arrested or detained affirmed in s 22 of the Bill of Rights Act.

Conclusion

35. 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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