

Conservation (Natural Heritage Protection) Bill

12 October 2012

ATTORNEY-GENERAL

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990: Conservation (Natural Heritage Protection) Bill

1. We have considered whether the Conservation (Natural Heritage Protection) 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'). The Bill is a Member's Bill in the name of Jacqui Dean. The Bill was introduced into the House of Representatives on 20 September 2012 and is awaiting its first reading. We understand that the next Members' Day is scheduled for 17 October 2012.
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 this conclusion, we have considered possible inconsistencies with s 25(c) (right to be presumed innocent).

The Bill

3. The purpose of the Bill is to better protect natural and historic resources and wildlife and to implement a consistent approach to penalties in Acts administered by the Department of Conservation. It does this by:
 - increasing the generic maximum penalties for offences that do not otherwise have a specified penalty in the Conservation Act 1987, National Parks Act 1980, and Reserves Act 1977; and
 - increasing the penalties for specific offences in the Wildlife Act 1953 and Wild Animal Control Act 1977.

Consistency with the Right to be Presumed Innocent

4. Section 25(c) of the Bill of Rights Act provides that everyone charged with an offence has "the right to be presumed innocent until proven guilty according to law". This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists. The prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty.
5. Strict liability and reverse onus offences raise a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act because, once the prosecution has proven the defendant committed the act in question, the defendant must prove the defence (or disprove a presumption) on the balance of probabilities to escape liability.

6. In other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. In the case of strict liability and reverse onus offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to her or his guilt.

7. The Bill significantly increases the penalties for a range of existing offences that are either strict liability or reverse the burden of proof in respect of an element of the offence. The Appendix to this advice contains a comparison of the current penalties and those in the Bill.

8. An example of one of the strict liability offences is s 24ZJ of the Conservation Act, which makes it an offence to disturb or damage the spawning ground of any freshwater fish. Section 43 of the Act provides that it is not necessary for the prosecution to prove intent for this offence. Instead, to avoid liability, the defendant must prove that he or she did not intend to commit the offence and that he or she took all reasonable steps to avoid the prohibited conduct.

9. An example of one of the offences with a reverse burden of proof is s 94(1)(c) of the Reserves Act 1977, which makes it an offence to wilfully break or damage any fence, building, apparatus, or erection on any reserve without the requisite authorisation (the proof of authorisation being on the defendant). Section 102(1) of the Act provides that, for this offence, "intent shall be presumed until the contrary is shown".

Is the limitation justified and proportionate under s5 of the Bill of Rights Act?

10. We have considered the following factors in assessing whether a departure from s 25(c) can be justified under s 5 of the Bill of Rights Act:

- the nature and context of the conduct to be regulated
- the ability of the defendant to exonerate themselves, and
- the penalty level.

Regulatory nature of the offence

11. Strict liability or a reversal of the onus of proof is generally considered to be more easily justifiable for "regulatory" offences, such as those to which the Bill relates. Bearing in mind the significant and important objective of the Bill to better protect natural and historic resources and protected wildlife, it is essential to have an effective enforcement regime in place.

Ability of the defendant to exonerate themselves

12. Strict liability or a reversal of the onus of proof can also be justified where the offence turns on a matter that is particularly within the knowledge of the defendant. In such cases, it is easier for the defendant to explain why he or she took (or failed to take) a particular course of action than it is for the Crown to prove the opposite. For the offences to which the Bill relates, we consider the defendant to be

in a better position to explain why they failed to comply with the relevant regulatory requirements, than for the Crown to prove the opposite.

Penalty Level

13. Strict liability and a reversal of the onus of proof is less of a concern where the penalty is relatively low and therefore has a less significant impact on the accused. As a general principle, strict liability offences should carry penalties at the lower end of the scale.

14. The Bill creates maximum penalties of up to two years' imprisonment for an individual (or up to three years where there is a commercial motive). This is combined with high maximum fines and the ability for the court to impose additional fines for continuing offences calculated on a daily basis. The penalties in the Bill are unusually high for strict liability offences and this creates some inconsistencies with the existing penalties for similar offences in the Acts amended by the Bill. In addition, it appears that, for individuals, the Court may impose both a fine and imprisonment. This is unusual (see s 19(3) of the Sentencing Act 2002) and different to the way the current penalties are structured.

15. On balance, we are satisfied that the maximum penalties in the Bill do not make the relevant offences inconsistent with s 25(c) of the Bill of Rights Act. In reaching this conclusion, we have taken into account that:

- a court retains the discretion to impose a lower penalty than the maximum prescribed in the Bill
- the maximum penalty of three years' imprisonment is available only where there is a commercial motive, which the prosecution is required to prove beyond reasonable doubt, and
- the offences address potential significant harm to natural and historic resources and protected wildlife.

Conclusion

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

Melanie Webb
Acting Chief Legal Counsel
Office of Legal Counsel

Appendix – Comparison of existing penalties to those in the Bill

	Current maximum penalty	Maximum penalty under the Bill
Individual		
Conservation Act 1987	1 year imprisonment or \$10,000 fine (+ \$1,000 per day for continuing offence)	2 years imprisonment and \$100,000 fine (+ \$10,000 per day for continuing offence or \$5,000 per animal/egg*)
National Parks Act 1980	3 months imprisonment or \$2,500 fine (+ \$250 per day for continuing offence)	
Reserves Act 1977	<i>Offence on national reserve:</i> 3 months imprisonment or \$2,500 fine (+ \$50 per day for continuing offence) <i>Other offences:</i> 1 month imprisonment and/or \$500 fine (+ \$10 per day for continuing offence)	
Wild Animal Control Act 1977	\$10,000 fine	
Wildlife Act 1953	<i>Section 67(fa)</i> 6 months imprisonment or \$250,000 fine (+ \$10,000 per animal/egg) <i>Section 67A(1) and 67B</i> 6 months imprisonment or \$100,000 fine (+ \$5,000 per animal/egg)	
Individual who commits offence for commercial purposes		
Conservation Act 1987	Same as individual	3 years imprisonment and \$200,000 fine (+ \$20,000 per day for continuing offence or \$5,000 per animal/egg*)
National Parks Act 1980		
Reserves Act 1977		
Wildlife Act 1953		
Wild Animal Control Act 1977		
Corporation		
Conservation Act 1987	\$80,000 fine (+ \$10,000 per	\$200,000 fine (+ \$20,000 per

	day for continuing offence)	day for continuing offence or \$10,000 per animal/egg*)
National Parks Act 1980	\$25,000 fine (+ \$2,500 per day for continuing offence)	
Reserves Act 1977	<i>Offence on national reserve:</i> \$5,000 fine (+ \$50 per day for continuing offence) <i>Other offences:</i> \$1,000 fine (+ \$10 per day for continuing offence)	
Wildlife Act 1953	\$200,000 fine (+ \$10,000 per animal/egg)	
Wild Animal Control Act 1977	\$80,000 fine	

*Whichever is applicable

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Conservation (Natural Heritage Protection) Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.