

Cultural Property (Protection in Armed Conflict) Bill

15 August 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: CULTURAL PROPERTY (PROTECTION IN ARMED CONFLICT) BILL

1. We have considered the Cultural Property (Protection in Armed Conflict) Bill (PCO 13181/1.7) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill will be considered by the Cabinet Business Committee at its meeting on 18 August 2008.
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 potential inconsistencies with sections 14 (freedom of expression), 19 (freedom from discrimination) and 21 (unreasonable search and seizure) of the Bill of Rights Act.

PURPOSE OF THE BILL

3. This Bill meets various obligations which are required before New Zealand can accede to the two Protocols to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ('the Convention'). These are the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 ('the first Protocol') and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 ('the Second Protocol').
4. The Bill creates a number of criminal offences for acts or omissions against cultural property. As required under the Protocols, the Bill establishes jurisdiction over the most serious of these offences so that persons can be prosecuted in New Zealand, in certain circumstances, where an alleged offence takes place outside New Zealand, or where the alleged offender is not a national of New Zealand. These serious offences apply only to nationals of states party to the Second Protocol, including New Zealand, or to persons serving in the armed forces of these states. A penalty regime is established for the offences, and extradition provisions included.
5. The Bill also creates offences relating to the illegal removal of cultural property from occupied territory, and dealing in such property. The Bill empowers the New Zealand Customs Service to seize cultural property imported from occupied territory. A regime is provided for assessments of compensation to be made for good faith purchasers of cultural property that may have to be returned to a (previously) occupied territory from which it was taken.

6. The Bill protects the Convention Emblem ('the Emblem') by prescribing offences for unauthorised use of the Emblem.

CONSISTENCY WITH SECTION 14 OF THE BILL OF RIGHTS ACT

7. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning.
8. Clause 36 of the Bill makes it an offence to use the Emblem, or any design so closely resembling that Emblem as to be capable of being mistaken for it, without lawful authority, in a manner that indicates or suggests that:
 - property is protected cultural property;
 - a person is acting in an official capacity in execution of the Convention; or
 - a place or vehicle or other thing has a protected status under the Convention.
9. In our view, criminalising unauthorised use of the Emblem constitutes a restriction on freedom of expression.
10. Where a provision is found to be prima facie inconsistent with a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of the Bill of Rights Act. The section 5 inquiry is two-fold: whether the provision serves an important and significant objective, and whether there is a rational and proportionate connection between the provision and the objective.
11. We note that the purpose of the Emblem is to identify cultural property protected by the Convention in order to protect that property during armed conflict. The objective of restricting the use of the Emblem under the Bill is to enable reliable identification of what is, and what is not, protected cultural property.
12. The Ministry of Culture and Heritage has advised it is necessary to restrict the use of the Emblem during as well as outside times of armed conflict under the Bill. This would allow for the Emblem to be used in preparatory work to designate and identify cultural property protected by the Bill. During times of armed conflict there may be little time to properly designate and identify cultural property.
13. We have concluded that the restriction in clause 36 of the Bill is for an important and significant objective. The restriction is rationally and proportionally connected to that objective because it narrowly defines the types of uses of the Emblem that give rise to offences under the Bill. It does not impose an absolute prohibition on the unofficial use of the Emblem.

CONSISTENCY WITH SECTION 19 OF THE BILL OF RIGHTS ACT

14. Section 19 the Bill of Rights Act affirms the right to be free from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include, inter alia, ethnic or national origins (including nationality or citizenship).
15. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19(1) exists are:
 - Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?
 - Does the distinction involve disadvantage to one or more classes of individuals?
16. If these questions are answered in the affirmative, we consider that the legislation gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act and falls to be justified under section 5 of that Act.
17. Clause 8 of the Bill draws a distinction on the grounds of nationality because an individual's nationality determines whether or not they may be criminally liable for acts or omissions committed outside New Zealand. Only individuals who are nationals of, or who are serving in the armed forces of, states party to the Second Protocol will be liable to be prosecuted, upon arrival in New Zealand, for acts committed outside New Zealand. In our view, liability for criminal conviction on the basis of nationality constitutes a disadvantage and gives rise to prima facie discrimination which falls to be justified under section 5.
18. First, we assess the importance and significance of the distinction. We understand that the policy objectives behind the distinction arise as a consequence of several principles of broad application.
19. Generally, New Zealand does not seek to extend its jurisdiction extra-territorially, other than in respect of its nationals or members of its armed forces. However, without the distinction described above, nationals of states not party to the Second Protocol (unless they are serving in the armed forces of a state party to the Second Protocol) could become liable for acts which did not constitute a crime under domestic law in their 'home' country, or under domestic law in the country in which the act was committed. It is a principle of criminal law that the law ought to be knowable, and nationals of states not party to the Convention or its Protocols cannot be said to know that their acts or omissions constitute an offence. Secondly, it is important that New Zealand respect the principle of comity of nations. If a state is not a party to the Convention, New Zealand should not attempt to criminalise its nationals, or prosecute them for alleged offences which take place inside that state's territory. We consider these to be important and significant objectives.
20. We move on to consider whether the distinction drawn is rationally connected to the discriminating provision. In terms of the broad objective of protecting cultural property, arguably it may be more effective for New Zealand to criminalise all persons who contravene the Convention, regardless of their nationality.

21. We consider that other arguments are ultimately more persuasive and outweigh this point. Where a state has accepted the terms of the Convention, it can be said to have also accepted New Zealand's jurisdiction to prosecute its nationals for 'grave violations', in terms of Article 16(1)(c) of the Convention. Conversely, where a state has not accepted the terms of the Convention, New Zealand may be perceived as interfering in that state's domestic matters if it prosecuted nationals of that state.
22. Furthermore, the distinction in clause 8 promotes the purposes of the Convention by preventing, to a certain extent, New Zealand from becoming a safe haven for persons who offend under the Convention. We therefore consider that the distinction is rationally connected to the objective.
23. We are satisfied that there is no method, other than distinguishing on the basis of nationality, for respecting the principles outlined above. We therefore consider the response to be proportionate, and the distinction justified in terms of section 5.
24. For the same reasons, we are satisfied that the distinction drawn in clause 15 of the Bill is justified. Clause 15 makes it an offence for a New Zealand national or a person subject to the Armed Forces Discipline Act 1971, when outside New Zealand, to intentionally and unlawfully remove cultural property from a territory occupied by a state party to the First Protocol. The act will always occur outside New Zealand and can only be committed by New Zealand nationals or persons serving in the New Zealand armed forces. As the offences in clause 15 are not grave violations of the Convention, state parties cannot be said to have authorised New Zealand's prosecution of their nationals for alleged acts or omissions that are not grave violation offences committed outside New Zealand.
25. We have also considered an apparent distinction on the basis of nationality under clause 13 of the Bill in respect of extradition. Clause 13 deems grave violation offences (those offences under clause 7 of the Bill) to be offences described in any extradition treaty between New Zealand and another Second Protocol Party. Nationals of states not party to the Second Protocol are exempt from liability under clause 13 unless they are serving in the armed forces of a Second Protocol Party. It is worth noting that clause 13 only applies to offences in an extradition treaty concluded before commencement of the Bill and to alleged acts or omissions that occur after the commencement of the Bill. In view of the above, we are satisfied that there is no distinction drawn on the prohibited grounds in section 21 of the Human Rights Act 1993. CONSISTENCY WITH SECTION 21 OF THE BILL OF RIGHTS ACT
26. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Secondly, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.

27. We have assessed whether the search and seizure powers in Part 3 of the Bill are reasonable for the purposes of the Bill of Rights Act.
28. Clause 19 of the Bill provides for the forfeiture of smuggled property that is in New Zealand. Smuggled property is defined as cultural property that has been unlawfully removed (after 7 August 1956) from the territory of a state party to the First Protocol (other than New Zealand) when the territory was occupied by another First Protocol Party. The aim of seizing the property is to enable return to its rightful owner. We consider that this is a key objective directly connected to the purpose of the Bill and the reasons for ratifying the Convention.
29. The Bill includes procedural protections including conditions which must be fulfilled prior to a search and seizure being carried out, requiring a warrant for any search and seizure, and enabling challenge of the seizure. The Bill also enables a good faith purchaser to apply to the High Court for an assessment of compensation in respect of that property. In view of the importance of ensuring that cultural property is protected and returned to its proper owner, we consider that the search and seizure powers relating to forfeiture contained in the Bill are reasonable.

CONCLUSION

30. Based on the analysis set out above, 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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