

Customs And Excise Amendment Bill

26 June 2006

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: CUSTOMS AND EXCISE AMENDMENT BILL

1. We have considered whether the Customs and Excise Amendment Bill (PCO 6547/12) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that this Bill is to be considered by the Cabinet Legislation Committee on 29 June 2006.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we considered potential issues of inconsistency with sections 14, 21 and 22 of the Bill of Rights Act.
3. Below is a summary of how the issues of inconsistency arise. This summary is followed by a fuller analysis which discusses each of the issues raised under the Bill of Rights Act noting; where relevant; the justificatory material in each instance.

SUMMARY OF THE BILL OF RIGHTS ACT ISSUES

4. The Bill seeks to enhance border security measures by amending the Customs and Excise Act 1996 (the Act) to provide for more effective and integrated border management by government agencies.
5. We considered whether the Bill raises issues under section 14 of the Bill of Rights Act (freedom of expression) as the Bill:
 - prohibits the use of electronic communication devices in certain places;
 - requires persons in charge of a craft to answer questions relating to who and what is on board and where the craft is travelling to; and
 - prohibits the exportation of electronic publications that have a strategic use or could be used for terrorist purposes.
6. The Bill empowers Customs officers to search for and confiscate dangerous items hidden on or about a person's body, and seize dangerous civil aviation goods, unlawful travel documents, and items that are risk goods for the purposes of biosecurity legislation or evidence of one of a number of border-related offences. These powers give rise to an issue under section 21 of the Bill of Rights Act (the right to be free from unreasonable search and seizure).
7. The Bill enables Customs officers to require persons arriving in or departing from New Zealand to stay in the relevant border processing area until they have been processed under

the Immigration Act and the Biosecurity Act, and detain persons for public health or law enforcement purposes. We have considered whether these powers are consistent with the right not to be arbitrarily detained, as protected by section 22 of the Bill of Rights Act.

8. Where an issue arises, a provision 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 that Act. We have reached the conclusion that, upon consideration of these issues under section 5 of the Bill of Rights Act, the Bill appears to be consistent with the rights and freedoms contained in the Bill of Rights Act.

PURPOSE OF THE BILL

9. The purpose of the Bill is to enhance border security measures. It strengthens the Act to provide for more effective and integrated border management by government agencies with an interest at the border. The Bill includes a number of amendments which will assist in the fight against terrorism and trans-national organised crime and strengthens the ability of the Customs Service to deal with false and forged travel and identity documents to counter identity fraud.

ISSUES OF CONSISTENCY WITH THE BILL OF RIGHTS ACT

Section 14: Freedom of Expression

10. Section 14 of the Bill of Rights Act provides:

"Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinion of any kind and in any form."

11. The right to freedom of expression extends to all forms of communication that attempt to express an idea or meaning.^[1] The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.^[2]

Prohibiting the use of electronic communication devices in certain places

12. New section 32A of the Act prohibits the use of electronic communication devices in Customs places or Customs-controlled areas, if there is a sign prohibiting the use of such devices and if a Customs Officer requires a person not to use or to stop using such devices. Failure to comply with any requirement to cease using electronic communication devices is an offence punishable by a fine not exceeding \$1,000 (new section 194A(2)).
13. We note that the right to freedom of expression in section 14 is defined in inclusive terms, and therefore is sufficiently broad to include anything that may be said, without regard to the nature of a particular communication or the context in which it occurs. The right to impart information includes the ability to communicate information free from any obstruction by the State. It also protects the way the information is expressed, that is the choice of the place and the time that the information is imparted.^[3] The right of freedom of expression also extends beyond the interests of speakers. It includes the ability to seek and receive information: an important component of which is the ability to obtain the information at the source.^[4] Following this approach, section 14 would protect the right of

traveller to use electronic communication devices in Customs places or Customs-controlled areas.

14. Where an issue arises a provision 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 that Act. The section 5 inquiry is essentially two-fold: whether the provision serves an important and significant objective; and whether there is a rational and proportionate connection between the provision and that objective.^[5]
15. Customs have advised that the objective of new section 32A is to ensure that law enforcement at the border is not compromised by passengers using electronic communication devices. The measure will ensure that passengers are unable to warn one another of impending detection or to destroy evidence before officials can get to it. Other risks posed by electronic communication devices include officer safety and interference with prompt passenger processing. We consider that these are significant and important objectives, and therefore the first limb of the section 5 inquiry is satisfied.
16. Restricting the use of electronic communication devices in Customs places or Customs-controlled areas is rationally connected with the aim of maintaining adequate standards of law enforcement at the border. In our view, the measure is also proportionally connected to the stated objective. This is because passengers are able to use electronic communication devices prior to entering and once they have left a Customs place or Custom-controlled area, and there are signs to inform them where they may and may not use devices. Further, the measure does not apply to devices used to assist with a disability, such as a hearing aid, a cochlear implant or a prosthetic voice box.
17. We consider that, while new section 32A is inconsistent with section 14 of the Bill of Rights Act, it is justified in terms of section 5 of that Act.

Certificate of clearance

18. We have considered whether new sub-sections 34(b) and (c) raise issues in relation to section 14 of the Bill of Rights Act. These provisions require the person in charge of any craft to answer any question asked by, or produce any document required by, a Customs officer relating to the craft and its passengers, crew, cargo, stores and intended voyage or journey. Any person who refuses to answer any question asked by, or produce any document required by, a Customs officer under these sub-sections commits an offence and is liable upon conviction to a fine not exceeding \$5,000 (section 193(3)).
19. We consider that new sub-sections 34(b) and (c) are not inconsistent with the right to freedom of expression. We acknowledge that the right to freedom of expression, as protected by section 14 of the Bill of Rights Act, includes the right to say nothing or the right not to say certain things. Further, the High Court in *Duff v Communicado Ltd*^[6] found that freedom of expression should generally be defined widely and the question of limits generally be determined pursuant to section 5. However, we do not consider that information regarding who and what is on board a craft, and where that craft is travelling to, is sufficiently expressive so as to attract the protection afforded by section 14.
20. In reaching this view, we note (while acknowledging the minor differences between section 14 of the Bill of Rights Act and section 2(b) of the Canadian Charter) the decision of the Supreme Court of Canada in *Irwin Toy Ltd v Attorney-General (Quebec)*^[7] that “expression”

has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content.” Here, a requirement that the person in charge of a craft must provide information about its passengers, crew, cargo, and stores, and where the craft is travelling to, does not appear to be sufficiently “expressive” in content to attract the protection of section 14. Rather, this information can be described as factual and descriptive in nature as opposed to expressive or representative of expressive content.

Exportation of electronic publication

21. Clause 8 amends section 56 of the Act to prohibit the electronic export (for example, by e-mail or website) of publications that have or may have a strategic use or could be used for terrorist purposes. The term “strategic use” relates to the following:

- the development, production or deployment of nuclear explosive devices and their means of delivery;
- the development, production or deployment of biological weapons and their means of delivery;
- the development, production or deployment of chemical weapons and their means of delivery; and
- military use or applications, or the development, production or deployment of military goods or other goods that have a civilian use but are intended for military use or that may have military applications.

Any person who commits an offence under this section is liable on conviction to a fine not exceeding \$5,000 (in the case of an individual) or \$10,000 (in the case of a body corporate) (section 209(3)).

22. Although this provision appears to be prima facie inconsistent with section 14 of the Bill of Rights Act, we consider that it is justifiable in terms of section 5 of that Act. In reaching this conclusion, we note that the purpose of this provision is to control information that could be used in the manufacture of strategic goods or that could constitute the goods themselves (eg an encryption device). Further, the electronic export of such strategic information may occur with the prior approval of the Secretary of Foreign Affairs and Trade (new section 56(2C)).

Section 21: Unreasonable search and seizure

23. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs of the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a “search or seizure”. Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are “unreasonable” in the circumstances.

Search and seizure of dangerous items

24. Clause 14 inserts new sections 168A and 168B into the Act. These provisions provide that a Customs officer may immediately detain and search a person for dangerous items and may seize any items found if the officer has reasonable grounds to believe that:
- the person has a dangerous item hidden or in clear view on or about his or her person;
 - the item poses a threat to the safety of the officer or any other person; and
 - there is a need to act immediately in order to address that threat.
25. Clause 13 repeals section 168(2) and substitutes a provision enabling search warrants to seize dangerous items in the circumstances described in the paragraph above.
26. Reasonable force may be used to detain and search the person, as well as seize the dangerous item (new section 168A(3)). However, a customs officer who undertakes a search must, within 3 working days, provide a written report of the search to the Chief Executive (new section 168A(5)), and dangerous items must be delivered as soon as practicable, into the custody of the police (new section 168B(2)).
27. We consider that the search and seizure powers contained in these provisions appear reasonable. In reaching this conclusion, we note that the powers are not intended to confer a power to specifically search for the dangerous items, but to take steps, once the item is discovered, to reduce the threat to the safety of the Customs officer and any other person. Our focus has therefore been on the way in which the search and seizure was conducted, rather than the reasons for the search and seizure. We note that a Customs officer cannot seize the item if he or she does not have reasonable grounds to believe that the dangerous item posed a threat to the safety of the officer or any other person. Further, there are procedures under the Summary Proceedings Act 1957 for persons to apply to have their items returned to them in appropriate circumstances.
28. We consider that the powers under new sections 168(2), 168A and 168B to search for and seize dangerous items are reasonable for the purposes of section 21 of the Bill of Rights Act.

Seizure of dangerous civil aviation goods

29. Clause 15 repeals section 175A and substitutes a virtually identical provision providing for the seizure and detention of dangerous civil aviation goods. The latter term is adopted to replace the current “dangerous goods” used in the current section 175A, as that current term might be easily confused with the dangerous items provided for in new sections 168A and 168B.
30. In our advice to the former Attorney-General on current section 175A (which was inserted into the Act by the Customs and Excise Amendment (No 3) Bill 2001), we concluded that the power set out in this section was reasonable for the purposes of section 21 of the Bill of Rights Act. In reaching this conclusion, we noted that the power complements, and largely duplicates that under the Civil Aviation Act 1990, as amended by the Civil Aviation Amendment Bill 2001. Furthermore, a Customs officer cannot seize goods if the officer does not have a reasonable belief that the dangerous goods may not lawfully be carried on an aircraft: that is, the goods must be prohibited under the Civil Aviation Act.
31. We see no reason to change our view on the reasonableness of revised section 175A.

Seizure of unlawful travel documents

32. New section 175B provides Customs officers with express authority to retain and seize unlawful travel documents. Travel documents are passports and other documents used to identify a person on entering or leaving a country. A travel document is unlawful if it is false (i.e. obtained on the basis of false information), forged, or misused by a person for whom the travel document is not intended. This section authorises a Customs officer to retain or seize any document presented for inspection or found in the course of a search or examination, if the Customs officer has cause to suspect that the document is an unlawful travel document.
33. Certain provisions of the Act apply to unlawful travel documents as if unlawful travel documents were prohibited goods (new section 175B(4)). The principal effect of that application is to authorise searches and interviews if there is reasonable cause to suspect the presence of unlawful travel documents. The powers conferred by this new section apply also to equipment used to produce unlawful travel documents (see new section 175B(1)). Any unlawful travel document retained or seized must be given to the police (new section 175(6)).
34. We consider that the power to search for and seize false and fraudulent identity documents would advance the effective management of the border. This is because false and fraudulent identity documents are often used to facilitate identity crime, which in turn makes possible a range of different types of criminal activity and is the enabler of trans-national offending such as illegal migration, people smuggling, drug-trafficking, terrorism and money laundering. We further note that the powers conferred by new section 175B can only be exercised where an officer has cause to suspect that the document is an unlawful travel document. The provision contains a range of other safeguards, which are identical to those set out in section 175C (which are discussed in paragraph 36 below). For these reasons, we consider that the powers conferred by new section 175B are reasonable in terms of section 21 of the Bill of Rights Act.

Seizure of items covered by other border related legislation

35. A small number of Government agencies, including Customs, are statutorily authorised to exercise powers at New Zealand's border in relation to people, craft and goods. While exercising these powers an officer from one agency may come across items that are of interest to another agency. New section 175C authorises a Customs officer to seize and detain goods that are presented or located in the course of exercising any power of inspection, search or examination under the Act if the officer has cause to suspect on reasonable grounds that the goods are:
 - risk goods (within the meaning of the Biosecurity Act 1993) for which no biosecurity clearance has been given under that Act; or
 - evidence of one of a number of specified border-related offences (such as smuggling migrants, importing prohibited medicines etc).

The detained goods must, as soon as practicable, be delivered into the custody of the police or other relevant regulatory agency.

36. To the extent that this power raises issues under section 21 of the Bill of rights Act, we consider that the power appears reasonable. In reaching this conclusion, we recognise that there is a need to strengthen risk management at the border, thereby maximising the limited resources available and ensuring that agencies work together towards the government's border outcomes rather than focusing on limited classes of border activity. We consider, however, that despite the fact that expectations of privacy are lower in the context of border control, there should still be appropriate safeguards in place to ensure that the right to be secure from unreasonable search and seizure is respected. Such safeguards exist in connection with new section 175C. For instance:

- the power to seize items may only be exercised where there is a clear indication that the seizure will advance the effective management of the border;
- the power is not intended to confer an ability to specifically search for the goods; and
- the Summary Proceedings Act 1957 provides that persons whose goods are detained may apply to have their items returned to them in appropriate circumstances.

Section 22: Arbitrary Detention

37. Section 22 of the Bill of Rights Act provides that “everyone has the right not to be arbitrarily arrested or detained.”

Completion of processing under Immigration Act and Biosecurity Act

38. New section 32B requires persons arriving in, or departing from, New Zealand to stay in the relevant border processing area until they have been processed under the Immigration Act 1987 and the Biosecurity Act 1993. This obligation is in addition to the current express obligations in the Act that requires persons to stay in the processing area until Customs processing has been completed. A person who wilfully fails to comply with this requirement is liable on conviction to a fine not exceeding \$1,000.

39. We note that a person will be regarded as detained within the meaning of section 22 of the Bill of Rights Act if, amongst other things, there are statutory restraints on a person's movements (accompanied by penalties for non-compliance). However, only those restraints that amount to a “substantial intrusion on personal liberty” will trigger the concept of “detention” for Bill of Rights purposes.^[8] We consider that, although a person's movement is constrained by the requirement that they remain in a designated place until processing under Immigration Act and Biosecurity Act is completed, this does not amount to a detention, despite the penalty for non-compliance.

40. In reaching this view, we note that by allowing Customs officials to require persons to remain at their place of arrival or departure so that they can be referred to other agencies for further processing, this power ensures compliance with border processing requirements, which in turn assists the proper functioning of the border. The processing must occur immediately unless a particular case requires the attendance of a specialist officer who is not currently within the border processing area. In which case, a reasonable time shall be granted for that officer to attend. It cannot be said that this provision imposes a substantial intrusion on personal liberty.

Detention for public health or law enforcement purposes

41. New section 32C authorises a Customs officer to direct a person who arrives in, or departs from, New Zealand to stay up to 4 hours in a border processing area if the officer reasonably suspects that the person:

- has an infectious disease for which the person can be detained;
- is liable to be arrested under a warrant or is wanted by the police on suspicion of having committed an offence punishable by imprisonment;
- has contravened a number of enactments specified in the new section; or
- is endangering, or threatening to endanger, the life, health or safety of a person or group of persons.

42. Under new section 148C a Customs officer will be authorised to detain a person who fails to comply with a direction given under new section 32C to stay in the border processing area so that the assistance of a member of the police or other relevant officer can be obtained. The maximum time for which a person may be detained is 4 hours or, if the person is already detained under certain other provisions of the Act, the remaining balance of the maximum time prescribed under the other provision, whichever is less.

43. Although this form of detention falls within the ambit of section 22 of the Bill of Rights Act, we do not consider that the provisions could be interpreted as authorising “arbitrary detentions”. The courts have said that a detention is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.”^[9] For this reason, arbitrariness should not be equated with “against the law”, but should be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

44. Applying these standards to the present case, we consider that new sections 34C and 148C clearly set out the circumstances in which the power may be used, who may affect the detention and how long a person may be held. The ability to detain persons who are arriving in or departing New Zealand for public health or law enforcement purposes is both necessary and reasonable, and will help maintain the integrity of the border.

CONCLUSION

45. We consider that the provisions in the Bill do not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

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Footnotes

1 *R v Keegstra* [1990] 3 SCR 697, 729, 826

2 *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th)

3 A Butler and P Bulter, *The New Zealand Bill of Rights Act: A Commentary* (2005) at para.

13.7.38.

4 *Ibid*, at 12.7.30

5 See *Moonen v Film Literature Board of Review* [2000] 2 NZLR 9 and *R v Oakes* (1986) 26 DLR (4th)

6 [1996] 2 NZLR 89

7 [1989] 1 SCR 927

8 *Police v Smith & Herewini* [1994] 2 NZLR 306, 316 (CA) (Richardson J)

9 *Neilsen v Attorney-General* [2001] 3 NZLR 433 (CA) para 34

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