

Maritime Security Bill

22 August 2003

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: MARITIME SECURITY BILL 2003

1. We have considered whether the Maritime Security Bill 2003 (PCO 5084/18) 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 Thursday, 28 August 2003.
2. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise a number of issues in relation to sections 18, 21 and 25(c) of that Act.
3. The following summary provides you with:
 - a brief overview of the contents of the Bill,
 - a note of the provisions of the Bill which appear to raise issues under one of the sections of the Bill of Rights Act, and
 - our conclusion as to the Bill's consistency with the Bill of Rights Act.
4. 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

Overview of the Bill

5. The Bill seeks to establish in New Zealand a maritime security framework that will reduce the risk of security incidents affecting merchant ships or port facilities, particularly those used in international trade. In doing so, the Bill will enable New Zealand to fulfil its obligations under amendments to the Annex to the International Convention for the Safety of Life at Sea 1974, which were adopted in December 2002.
6. The Bill proposes the establishment of a maritime security regulatory framework, the components of which include:
 - assessment of security risks for each and every ship and port facility
 - development of ship and port facility security plans based on risk assessment
 - specification of security levels at which ships and port facilities must operate

- maintenance of communication protocols for ships and port facilities
- prevention of unauthorised access to ships, port facilities and restricted areas
- prohibition of unauthorised weapons, incendiary devices, or explosives aboard ships and within port facilities.

Issues of consistency with the Bill of Rights Act

Section 18: the right to freedom of movement

7. The Bill proposes that persons other than those on official duties will be prevented from entering a port security area (clause 45). Further, the Bill enables the chief executive to require a ship that has been expelled from a port to proceed and wait at anchor in a specified area (clause 30) and to declare an exclusion zone around a ship if necessary for the maintenance of effective security for that ship (clause 58). These measures appear to be prima facie inconsistent with section 18 of the Bill of Rights Act.
8. We consider that the measures are a vital component of the maritime security framework, the purpose of which is to reduce the risk of terrorist incident in New Zealand involving port facilities and ships engaged in international trade and tourism. It can, therefore, be argued that the measures serve a significant and important objective and, given the limited circumstances in which they can be invoked, are rational and proportionate to this objective. The measures are therefore justifiable in terms of section 5 of the Bill of Rights Act.

Section 21: the right to be secure from unreasonable search and seizure

9. The Bill proposes to bestow extensive powers on maritime security agencies for the purposes of screening, searching and inspecting of passengers, crews, cargo, maritime vessels and port installations. The powers also include the ability to seize information and dangerous or illegal material from maritime vessels and port installations.
10. We have formed the view that the powers to screen, search, inspect and seize property fit within the ambit of section 21 of the Bill of Rights. While these powers are broad, we consider that since they are governed by specific criteria for use and are accompanied by adequate safeguards they are reasonable for the purposes of section 21.

Section 25(c): the right to be presumed innocent

11. The Bill contains offence provisions that contain a reverse onus whereby the accused must prove something in order to escape liability (clauses 66 and 67). We are of the opinion that these provisions constitute "justified limitations" on the right to be presumed innocent that is protected by section 25(c) of the Bill of Rights Act. In reaching this view, we have taken into consideration the fact that the offences in question may be described as public welfare regulatory in nature and the importance of ensuring that the

participants in the security framework are aware of and meet their statutory obligations.

Extension of the Bill to domestic commercial shipping

12. Clause 74 of the Bill permits the Minister to extend the application of the Bill to ships engaged in domestic voyages and port facilities that serve these types of vessels. The fact that there is an ability to extend the Bill in this way will not alter our conclusion regarding the fact that the above-mentioned clauses of the Bill do not appear to be inconsistent with the Bill of Rights. This is because the Bill can only be extended in limited circumstances, domestic shipping companies will be informed of the extension by notice in the Gazette and the extension will not apply to certain categories of ships, which include, in particular, pleasure craft.

Conclusion on consistency of the Bill with the Bill of Rights Act

13. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ACT ISSUE RAISED BY THE BILL

Section 18: Right to freedom of movement

14. In order to fulfil its obligations under the new international agreement for maritime security, the Bill proposes that persons other than those on official duties will be prevented from entering a port security area (clause 45: restrictions with respect to port security areas). Further, the Bill enables the chief executive:

(i) to require a ship that is expelled from a port to proceed to and wait at anchor in a specified location within New Zealand's territorial sea or internal waters (clause 30: Control of ships in ports)

(ii) to declare an exclusion zone around a ship if necessary for the maintenance of effective security for that ship (clause 58: Chief Executive may declare exclusion zones for ships)

15. These measures appear to be *prima facie* inconsistent with the right to freedom of movement, as affirmed by section 18 of the Bill of Rights Act. This is because they restrict the ability of persons to enter a port security area or board or disembark from a ship that has been expelled or is subject to an exclusion zone.

Is this a justified limitation under section 5?

16. 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 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 the objective.

17. The explanatory note to the Bill states that the purpose of the security framework - of which the above-mentioned measures are a vital component - is to reduce the risk of a terrorist incident involving New Zealand's ports and ships serving its inter-national trade and tourism. By enhancing ship and port security, the safety and security of the crew and passengers of a ship as well as all persons located within a port facility will also be protected. We consider that these are significant and important objectives and, therefore, the first limb of the section 5 inquiry is satisfied.

18. The exclusion of unauthorised persons from a port security area and the requirement that no-one boards or disembarks from a ship that has been expelled or is subject to an exclusion zone is rationally connected with the aim of preventing terrorism. We also consider that the measures are proportionally connected to this objective. This is because

- all possible efforts must be made to avoid a ship that has been expelled being unduly detained or delayed (clause 30(5)(c))
- persons (including both crew members and passengers) who are on board a ship that has been expelled may leave the ship for emergency or humanitarian reasons (clause 30(5)(d))
- the exclusion of unauthorised persons from a port security area does not apply to passengers or crew members boarding or disembarking a ship that is situated in the port security area (clause 45(6))
- a person who enters a port security area without authorisation will only be sanctioned if he or she intentionally fails or refuses to provide an authorised person with his or her name and address (clause 69) or does not immediately leave the port security area when ordered to do so (clause 70)
- a exclusion zone may only be declared around a ship for a period of 5 days, renewable for a further period not exceeding 5 days (clause 59(2))
- the penalty for individuals who intentional enter or leave an exclusion zone is regulatory in nature rather than criminal and is at the lower end of the scale (a fine not exceeding \$5,000) (clause 71)

19. In our view, although the measures raise an issue of inconsistency with section 18 of the Bill of Rights Act, they are justifiable in terms of section 5 of that Act.

Section 21: Right to be secure from unreasonable search and seizure

Search and Screening Powers

20. The Bill sets out proposed search and screening powers for:

- a maritime security officer acting on a direction of the Minister or chief executive (clause 50: Screening and searching powers)

- a Customs officer (clause 50: Screening and searching powers) and
 - a member of the police (clauses 50: Screening and searching powers and 54: Search of persons refusing consent to be searched)
21. The screening and search powers come within the scope of section 21 of the Bill of Rights Act, but are considered to be reasonable as they are governed by specific criteria for use and are accompanied by adequate safeguards.
22. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to this right. First, section 21 is applicable only in respect of those activities that constitute a "search and seizure". Second, where certain actions do constitute a search and seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
23. The main issue that arises out of the proposed screening powers set out in clause 50 of the Bill is that the powers can be exercised without a warrant. These powers, however, appear to be reasonable as they involve the screening of persons and their belongings before boarding a vessel. A person may avoid the screening process simply by leaving the area. The screening is not intended to be invasive (such as strip-searching) and the power to screen exists for only a limited period of time.
24. The search powers contained in clauses 50, and 54 of the Bill also appear reasonable as the person authorised to carry out the search is required to establish that there are reasonable grounds to engage in the search and must conduct it reasonably. Furthermore, adequate safeguards are provided for non-warranted searches: for instance, enforcement officers are required to show proof of identity and authorisation upon entry and on any subsequent request.

Inspection powers

25. In addition to the screening and search powers listed above, the Bill also provides various officials with inspection and monitoring powers:
- Clause 30: Control of ships in ports
 - Clause 33: Steps to take if ship does not comply with Act
 - Clause 57: Right of access to port security areas
26. The nature and extent of these inspection powers indicates they are covered by section 21 of the Bill of Rights Act. We feel, however, that these powers are reasonable, particularly as they are less invasive than a search and accompanied by significant safeguards:
- (i) clauses 30, 33 and 57 propose powers for inspection to ascertain whether the requirements of the Bill are being met (an inspection). This can be distinguished from a search, as characterised elsewhere in the Bill, where a reasonable belief exists for gathering evidence to prosecute an offence (an investigation).

(ii) clause 57 allows maritime security officers to enter "any ship, building, vehicle or place [located] in any part of a port security area" for the purpose of carrying their powers, functions and duties under the Bill. This clause includes a safeguard requirement for a warrant or consent before inspecting a harbour-masters dwelling house, the private quarters of a ship's crew or the cabins of its passengers.

(iii) clause 57 includes safeguards in relation to people entering certain types of property. For example, there are requirements for inspecting officials to provide proof of identity and authorisation.

Seizure Powers

27. Clause 51 of the Bill enables an authorised person to seize a firearm, weapon or similar item that may not be lawfully taken on board a ship. We believe that the various safeguards that surround this provision would ensure that this power is reasonable in terms of section 21 of the Bill of Rights Act. In reaching this conclusion, we note that the Bill specifies that an inventory of seized items will be made available to their owner and the Designated Authority is liable for any loss arising from the item being unduly seized.

Section 25(c): Right to be presumed innocent

28. Section 25(c) of the Bill of Rights Act provides for the right to be presumed innocent until proved guilty according to law. In *R v Wholesale Travel Group* [1], the Supreme Court of Canada held that the right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt and that the state must bear the burden of proof.

29. In strict liability offences, once the Crown has proved the actus reus, the defendant can escape liability by proving, on the balance of probabilities, either the common law defence of total absence of fault, or a statutory defence that embodies this such as "without reasonable excuse". In general, defendants should not be convicted of strict liability offences where an absence of fault or a "reasonable excuse" exists.

30. A statutory defence reverses the usual burden of proof by requiring the defendant to prove, on the balance of probabilities, the defence. Because the burden of proof is reversed, a defendant who is able to raise doubt as to his or her fault but is not able to prove to the standard of the balance of probabilities, absence of fault or a "reasonable excuse" would be convicted. We consider, therefore, that as the defendant is required prove something in order to escape liability, the use of strict liability offences is contrary to the presumption of innocence captured by section 25(c) of the Bill of Rights Act.

Clauses 66 (failure to comply with control measures) and 67 (failure to comply with steps) of the Bill

31. Clause 66 of the Bill provides that a person commits an offence if they fail, "without reasonable excuse", to comply with a control measure imposed on a ship by the chief executive. A further offence is created by clause 67 in

relation to a person who, "without reasonable excuse", fails to comply with a step taken by the chief executive if a ship is not in compliance with the Bill. These provisions contain reverse onus provisions which, by virtue of the phrase "without reasonable excuse" and section 67(8) of the Summary Proceedings Act, place a burden of proof on the defendant. As stated above, this gives rise to a prima facie issue under section 25(c) of the Bill of Rights Act.

32. The aim of the Bill, as stated above, is to put in place in New Zealand a maritime security regulatory framework that will reduce the risk of security incidents affecting merchant ships or port facilities, particularly those used in international trade. This framework requires systems to ensure that the security risks for individual ships are assessed and security plans are developed based on this risk assessment. To this end, the Ministry of Transport has indicated that the offences have been framed as a strict liability offence to ensure that there is an onus on the participants in the security framework (e.g. ship companies and masters) to be aware of, and meet their obligations under the Bill.
33. It is also relevant in terms of justification of a reverse onus provision that these are public welfare regulatory (rather than truly criminal) offences and that the penalties are not at the higher end of the scale. The penalties imposed by clauses 66 and 67 of the Bill are a term of imprisonment not exceeding 1 year or a maximum fine of \$10,000 in the case of an individual, or a fine not exceeding \$100,000 in the case of a body corporate.
34. We therefore consider that, on balance, the limit that the reverse onus provisions in clauses 66 and 67 place on section 25(c) of the Bill of Rights Act, is justifiable in terms of section 5 of that Act.

Extension of the Bill to domestic shipping

35. Clause 74 of the Bill permits the Minister to extend the application of the Bill to ships engaged in domestic voyages and port facilities that serve these types of vessels. The fact that there is an ability to extend the Bill in this way will not alter our conclusion regarding the fact that the above-mentioned clauses of the Bill do not appear to be inconsistent with the Bill of Rights. This is because the circumstances in which the Bill can be extended are limited (i.e. there must be reasonable cause to believe a security risk exists and the extension will enhance ship or port security or prevent terrorism). Further, domestic shipping companies will be informed by notice in the Gazette of the Bill's extension and the period of time that it will be extended for. We also note that the Minister may not extend the application of the Act to certain categories of ships, which include, in particular, pleasure craft (as defined in section 2(1) of the Maritime Transport Act 1994).

Conclusion

36. 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.

37. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Transport, if you agree.

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CC: Minister of Justice
Minister of Transport
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Footnotes

1. R v Wholesale Travel Group 84 DLR (4th) 161, 188 citing R v Oakes [1986] 1 SCR 103.