

7 December 2004

Attorney-General

**LEGAL ADVICE**  
**CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:**  
**PROTECTED OBJECTS AMENDMENT BILL 2004**

1. We have considered whether the Protected Objects Amendment Bill 2004 (PCO 5669/31) (“the Bill”) is consistent with the New Zealand Bill of Rights Act 1990 (the “Bill of Rights Act”). We understand that the Bill is to be considered by the Cabinet Legislation Committee on 9 December 2004.
2. The Bill raises a *prima facie* issue of inconsistency with section 25(c) (right to be presumed innocent until proven guilty). We have come to the conclusion that the extent to which the Bill limits this right appears to be justifiable in terms of section 5 of the Bill of Rights Act.
3. The Bill therefore appears to be consistent with the Bill of Rights Act.

**Overview of the Bill**

4. The Bill seeks to amend the Antiquities Act (“the Act”) to:
  - Rename it the Protected Objects Act 1975;
  - describe more systematically and precisely the types of protected New Zealand objects subject to export regulation and prohibit their permanent export in appropriate circumstances;
  - prohibit the wilful damage of protected New Zealand objects that have been refused export permission or are subject to an export application;
  - improve the process for establishing the ownership of ngā taonga tūturu that are found;
  - increase the penalties for offences against the principal Act; and
  - enable New Zealand’s participation in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (done at Paris on 14 November 1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (done at Rome on 24 June 1995).

**Issue of consistency with the Bill of Rights Act**

**Section 25(c): right to be presumed innocent until proved guilty**

5. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty.

## Clause 24 of the Bill

6. Clause 24 of the Bill provides that any person who manufactures a replica taonga tūturu (artifact) and fails, without reasonable excuse, to identify it clearly and permanently as a replica, commits an offence. This offence give rise to a *prima facie* issue of inconsistency with section 25(c) because of the impact of section 67(8) of the Summary Proceedings Act 1957, which requires the accused to prove (on the balance of probabilities) the excuse to avoid liability. Usually in criminal proceedings an accused must merely *raise* a defence in an effort to create reasonable doubt. This means where the accused is unable to prove the defence, then he or she could be convicted even though reasonable doubt exists as to his or her guilt.
7. We consider that a limit on a right can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.<sup>1</sup>

### *Significant and important*

8. The overall purpose of the Act is, *inter alia*, to provide for the better protection of ngā taonga tūturu, prevent the permanent loss of important social, cultural and historical objects from New Zealand and to ensure that authentic objects of value to Māori retain their integrity and value. Regulation of the manufacture and sale of replica ngā taonga tūturu is intended to:
- create certainty in the legitimate international and domestic trade in cultural objects;
  - prevent the devaluation of authentic protected objects;
  - minimise risks of uncertainty in academic study and research of such objects; and
  - provide a disincentive for the organised criminal production of fakes.

We consider this to be an important and significant objective.

### *Rational and proportionate response*

9. Activities in the identification, trade and export of ngā taonga tūturu are subject to a number of regulatory controls that are imposed with the aim of preserving the cultural, social and historic heritage of New Zealand. The government has a legitimate interest in regulating cultural objects on the basis that the government has positive obligations to protect and conserve the cultural heritage of New Zealand.<sup>2</sup> The restrictions on the manufacture and identification of replica ngā taonga tūturu are aimed at achieving these objectives.

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<sup>1</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

<sup>2</sup> Obligations derive from the Treaty of Waitangi and from the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

10. In our view, justification for the reverse onus provision can occur where:
- it relates to a public welfare regulatory regime rather than truly criminal behaviour;
  - the information sought is 'peculiarly within the realm of the defendant'; and
  - the penalty for breach is at the lower end of the scale.
11. We have concluded that the reverse onus offence contained in the Bill is consistent with the above conditions. The aim of the Bill, as stated above, is to protect and preserve the authentic cultural heritage of New Zealand. The offences have been framed as reverse onus offences to ensure that there is an onus on persons involved in the manufacture and sale of replicas to be aware of, and meet their obligations under the Bill. We have also accepted the view of the Ministry of Culture and Heritage that the person who is manufacturing the replica for sale is best placed to prove that he or she had taken all reasonable steps during the manufacturing or packaging process to ensure that the replicas were clearly and permanently identified. Finally, the penalties imposed for breach of the proposed offence are at the lower end of the scale being a \$10 000 fine for an individual or \$20 000 for a body corporate and not involving imprisonment.
12. We therefore consider that, on balance, the limit the reverse onus offence places on section 25(c) of the Bill of Rights Act is justifiable in terms of section 5 of that Act.

## Conclusion

13. We have concluded that the provisions of the Bill appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.
14. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. Copies are also attached for referral to the Minister of Culture and Heritage, if you agree.

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cc. Minister of Justice  
Minister for Culture and Heritage

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