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30 October 2003

ATTORNEY-GENERAL

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
VISITING FORCES BILL 2003

1. We have considered whether the Visiting Forces Bill 2003 (PCO 5470/5) 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, 6 November 2003.

2. We consider that, taking into account the protections that will be available to service personnel under the domestic laws of States entering into a Status of Forces Agreement (a "SOFA") with New Zealand, the Bill does not appear to be inconsistent with the Bill of Rights Act. However, the Bill does give rise to a number of issues for non-members of a visiting force in relation to the rights and freedoms affirmed by sections 8, 19(1), 21 and 27(2) 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 repeal the Visiting Forces Act 1939. By so doing, the Bill will update and amend the law relating to armed forces of a foreign power that have been granted a right of entry into or passage through or over New Zealand (a "visiting force") to reflect recognised international practice. It will also enable New Zealand to give effect to SOFAs that are concluded with other States.

Issues of consistency with the Bill of Rights Act

Application of the Bill of Rights Act

6. The Bill allows the service law of another State to be used and enforced in New Zealand against the members of a visiting force, its civilian component, and their dependents while they are in New Zealand. We have concluded that these persons are entitled to a similar degree of protection as that accorded to other persons in New Zealand under the Bill of Rights Act. This means that when entering into a SOFA (as this is an act done by the executive branch of Government and, therefore, is subject to the protections affirmed by the Bill of Rights Act), the New Zealand government will have to ensure that the rights and freedoms granted to the members of the visiting force, its civilian component, and their dependents under the service law of the sending State are of the appropriate level.

7. We note that New Zealand has already entered into a SOFA with Australia. We have been advised that the service law of Australia is similar to New Zealand and, accordingly, Australian service personnel who are present in this country as part of a visiting force will be afforded a similar level of protection as that guaranteed under the Bill of Rights Act.

8. For these reasons, we consider that there will be sufficient protections to ensure that – with respect to the members of the visiting force, its civilian component, and their dependents – the actions of the service authorities of visiting forces are unlikely to be inconsistent with the Bill of Rights Act. We note, however, that the actions of the service authorities may encroach on the rights and freedoms of non-members of the visiting force.

Section 8: Right not to be deprived of life

9. Under clause 19 of the Bill, a coroner must not hold an inquest into the death of a member of a visiting force, its civilian component, or their dependents: whether the death occurred by natural causes or as a result of the use of force by the visiting force. We note that the obligation to protect the right to life – which is guaranteed by section 8 of the Bill of Rights Act – requires by implication that there should be some form of effective official investigation when individuals are killed as a result of the use of force by State authorities.

10. We are of the view, however, that clause 19 appears to be consistent with section 8. In reaching this conclusion, we note that the restriction on the coroner's ability to hold an inquest is limited to a specified group of persons. Moreover, Australian service law and that of a number of other States that are likely to enter into a SOFA with New Zealand require the relevant authorities to conduct an effective investigation into the death of such persons. In any case, the obligation to refrain from conducting a coronial inquest is subject to the decision of the Attorney General, who may take into account the fact that the sending State is unable or unwilling to conduct the inquest.

Section 19: Right to be free from discrimination

11. We note that for the purpose of the Bill, the term "dependent" does not include a New Zealand citizen or permanent resident that accompanies a member of the visiting force or its civilian component to New Zealand, and is the spouse or de facto partner of the member, or a member of his or her family. While this gives rise to a distinction based on the nationality status of accompanying person, we do not consider that this gives rise to any disadvantage. This is because such persons will still be accountable for their conduct under New Zealand law.

12. In the event that disadvantage does occur, we consider that the resulting nationality discrimination would be justifiable in terms of section 5 of the Bill of Rights Act. This is because the presence of these persons in New Zealand is independent to that of the visiting force. They have a genuine and ongoing link to this country and may choose not to return to the sending state when the visiting force departs the country. In our opinion, it is unlikely that the exclusion of such persons from the disciplinary regime of the visiting force would affect its ability to exist as an efficient force of the sending State.

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

13. The Bill confers extensive powers on the service authorities of a visiting force for the purpose of searching any ship, aircraft, vehicle or premises belonging to or occupied by the visiting force or a member of the visiting force, its civilian component, or their dependents. The powers also include the ability to seize items found on or in the possession of any of these persons. We have therefore formed the view that the powers to search and seize property fit within the ambit of section 21 of the Bill of Rights Act.

14. We note, however, that the range of property that the service authorities may search or seize is limited. Moreover, the service authorities will be required to comply with the service law of the sending State when exercising these powers and must guarantee to the property holder the various protections accorded thereunder. Accordingly, we consider that the search and seizure powers are reasonable for the purpose of section 21.

Section 27(2): Right to apply for judicial review

15. The Bill provides that the proceedings of a service tribunal of a visiting force may not be called into question in any proceedings before a New Zealand court. We are of the opinion that this provision constitutes a justifiable limitation on the right to apply for judicial review, as affirmed by section 27(2) of the Bill of Rights Act. In reaching this view, we have taken into consideration the limited range of persons who may be prosecuted by a service tribunal of a visiting force and the protections provided to members of the visiting force, its civilian component and their dependents under the service law of the sending state.

Enforcement of sentences

16. The Bill provides for sentences of imprisonment or detention of a service tribunal of a visiting force to be enforced in New Zealand. This enforcement will be served in accordance with Part IX of the Armed Forces Discipline Act 1971 and

its subordinate legislation. Since this legislation ensures the rights and freedoms of persons imprisoned or detained thereunder, we consider that this part of the Bill does not appear to be inconsistent with the Bill of Rights Act.

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

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

FULLER ANALYSIS: THE BILL OF RIGHTS ISSUES RAISED BY THE BILL

Overview of the Bill

18. The Bill proposes to repeal the Visiting Forces Act 1939 and, by so doing, update and amend the law relating to visiting forces to reflect recognised international practice. Further, the Bill enables New Zealand to give effect to SOFAs concluded with other States.

19. The Bill affirms the principle of international law that a state admitting a visiting force into its territory must be regarded as having conceded to the visiting force all authority necessary for it to continue to exist as an efficient force available for the service of the sending state.[1] Accordingly, the Bill permits a visiting force to exercise exclusive disciplinary jurisdiction over its members while they are in New Zealand.

20. The Bill, however, provides for concurrent jurisdiction as between New Zealand and the sending state to investigate and prosecute criminal offences committed by a member of the visiting force, its civilian component, or their dependents. The ability of the visiting force to exercise criminal jurisdiction in such cases will be subject to the terms of the relevant SOFA. It will also be subject to the requirement that it will not impose or carry out a sentence of death in New Zealand or commit any act of torture in this country.

Application and consistency of the Bill of Rights Act

21. The Bill, as stated above, essentially allows the service laws of another State to be used and enforced in New Zealand against the members of a visiting force, its civilian component, and their dependents while these persons are in New Zealand. The Bill itself, as an act of the Legislature of New Zealand, must be vetted to ensure that it consistent with the rights and freedoms affirmed in the Bill of Rights Act. However, a question arises regarding the extent to which these rights and freedoms extend to the members of a visiting force, its civilian component, and their dependants.

22. We have concluded that the members of a visiting force, its civilian component, and their dependants are entitled to a similar degree of protection as that accorded to other persons in New Zealand under the Bill of Rights Act. In reaching this conclusion, we have taken into account the fact that these persons are physically in New Zealand and that the visiting force is in this country

[1] *Wright v Cantrell* (1943) 61 WN (NSW) 38; applied by the English Court of Appeal in *Littrell v United States of America (no 2)* [1994] 4 All ER 203, 299; see also *Holland v Lampen-Wolfe* [2000] 3 All ER 833 (HL), which applied the same legal principles in a different military context.

pursuant to an act done by the executive branch of the New Zealand government (such acts being subject to the protections affirmed by the Bill of Rights Act). This means that when entering into a SOFA, the New Zealand government will have to ensure that the rights and freedoms granted to the members of the visiting force, its civilian component, and their dependents under the service law of the sending State are of the appropriate level.

23. In this connection, we note that capital and corporal punishments are still prescribed under the service law of certain States, some of which may wish to enter into a SOFA with New Zealand. To address the fact that such punishments are prohibited by the Bill of Rights Act, clause 9 of the Bill limits the jurisdiction of a visiting force by precluding punishments and other acts that may be repugnant to New Zealand public policy. We further note that, for the avoidance of doubt, clause 18 confirms that the Bill of Rights Act applies to acts done in New Zealand on behalf of a visiting force by public bodies and public servants, including members of the New Zealand Armed Forces.

24. We note that New Zealand has already entered into a SOFA with Australia, which was signed in 1998. In order to put the Bill in its full context, we would need to consider the Australian service law for consistency with the Bill of Rights Act. Clearly, this is not possible in the timeframe available. We have sought advice, however, from the New Zealand Defence Force (NZDF) on the content of the service law of Australia and the protections afforded to Australian service personnel. NZDF has advised that the service law of Australia is similar to that of New Zealand. In their opinion, therefore, Australian service personnel who are present in New Zealand as part of a visiting force will be afforded a similar level of protection as that accorded to other persons in New Zealand under the Bill of Rights Act.

25. Based on this information and the requirement that the Executive act consistently with the Bill of Rights Act, we consider that there are sufficient protections to ensure that – with respect to the members of the visiting force and its civilian component, and their dependents – the actions of the service authorities of visiting forces are unlikely to be inconsistent with the Bill of Rights Act.

26. We note, however, that the actions of the service authorities may encroach on the rights and freedoms of non-members of the visiting force. For the purpose of this advice, each of the identified sections of the Bill of Rights Act will be examined in turn.

Section 8 of the Bill of Rights Act 1990

27. Clause 19 of the Bill provides that a coroner, unless so directed by the Attorney General, must not hold an inquest into the death of members of a visiting force or its civilian component, or their dependents. This restriction applies whether the death occurred by natural causes or as a result of the use of force by the service authorities of the visiting force.

28. In light of the scope of section 8 of the Bill of Rights Act, we have considered whether this provision will obstruct, or render ineffective, official investigations of the cause of death of such individuals who have been killed as a result of the use

of force by the service authorities of the visiting force. Section 8 – which states the "fundamental principle of the sanctity of human life"[2] – provides:

"No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice."

29. The European Court of Human Rights – when considering the equivalent article of the European Convention on Fundamental Rights and Freedoms[3] – has stated that the general legal prohibition on arbitrary killing by agents of a State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by agents of the State.[4] In its opinion, the obligation to protect the right to life requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by State authorities.

30. We are of the view that clause 19 appears to be consistent with section 8 of the Bill of Rights Act. In reaching this conclusion, we note that the restriction on the coroner's ability to hold an inquest is confined to deceased persons who are a member of a visiting force, its civilian component, or their dependents. It does not apply to persons who are otherwise in New Zealand that are killed as a result of the use of force by the visiting force. We also note that Australian service law as well as that of a number of other States that are likely to enter into a SOFA with New Zealand requires the relevant authorities to conduct an effective investigation into such deaths. In any case, the obligation to refrain from conducting a coronial inquest is subject to the decision of the Attorney General. When considering whether an inquest should be held, the Attorney General may take into account the fact that the relevant authorities of sending state are unable or unwilling to conduct the inquest.

Section 19: Right to freedom from discrimination

31. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include, *inter alia*, ethnic or national origin.

32. 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 exists are:

    (i) Does the legislation draw a distinction based on one of the prohibited grounds of discrimination?

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[2] *Shortland v Northland Health Ltd* [1998] 1 NZLR 433, at p 444.

[3] Article 2 of the Convention provides:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purposes of quelling a riot or insurrection.

[4] *McCann and Others v the United Kingdom*, judgement of 27 September 1995, Series A no 324, p48 § 161; see also *Kaya v Turkey*, judgement of 19 February 1998, *Reports* 1998-I, p324 § 86.

(ii) Does the distinction involve disadvantage to one or more classes of individuals?

31. 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. Where this is the case, the legislation falls to be justified under section 5 of the Bill of Rights Act.

Possible Discrimination on the Ground of Nationality

32. Clause 4 of the Bill defines the term "dependent" to include any person who accompanies a member of the visiting force or its civilian component to New Zealand and is the spouse or de facto partner of the member, or a member of his or her family. For the purposes of the Bill, however, "dependent" does not include a person who is a New Zealand citizen or ordinarily resident in this country. The Bill therefore draws a distinction based on the nationality status of accompanying persons.

33. We note that the Bill, amongst other things, will allow the service authorities of a visiting force to arrest and prosecute a dependent of a member of the visiting force or its civilian component who has committed an offence under the service law of the sending State. In light of the definition of "dependent", the service authorities will be prohibited from arresting and prosecuting a person who has New Zealand citizenship or is ordinarily resident in this country who is accompanying a member of the visiting force or its civilian component.

34. We do not consider that this distinction will give rise to any disadvantage. This is because the Bill has been drafted to enable the visiting force to exercise an exclusive right of jurisdiction over its members and their dependents. This does not mean that a person accompanying a member of the visiting force or its civilian component who has New Zealand citizenship or is ordinarily resident in this country will not be held accountable for his or her conduct. The New Zealand authorities have the power and responsibility to arrest and prosecute such a person if his or her conduct is punishable under our criminal law.

35. In the remote possibility that disadvantage may occur – for instance, where conduct is punishable under the service law of the sending State but not under New Zealand law – we consider that the resulting nationality discrimination would be justifiable in terms of section 5 of the Bill of Rights Act. In reaching this conclusion, we note that by acknowledging that the maintenance of discipline falls within the exclusive jurisdiction of the sending State, the Bill ensures that the visiting force can function in an efficient manner. It also recognises the certainty and portability of the sending State's service law in the sense that its service personnel, civilian workers, and their dependents are subject to the same set of standards no matter where in the world they are stationed.

36. The corollary is that these standards need not be applied to a person whose presence in New Zealand is independent to that of the visiting force. Such a person has a genuine and ongoing link to this country and therefore, may choose not to return to the sending State when the visiting force departs the country. In our opinion, it seems unlikely that the exclusion of such a person from the

disciplinary regime of the visiting force would affect its ability to exist as an efficient force of the sending State.

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

37. Clause 8(2)(b) of the Bill provides that the service authorities of a visiting force may enter and search any ship, aircraft, vehicle or premises belonging to or occupied by the visiting force or a member of the visiting force, its civilian component, or their dependents. Clause 8(2)(b) enables the service authorities of a visiting force to seize any property, article or thing found on or in the possession of a member of the visiting force, its civilian component, or their dependents.

38. 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.

39. In our opinion, the search and seizure powers set out in the aforementioned provisions appear reasonable in terms of section 21 of the Bill of Rights Act. This is because the service authorities will be required to comply with the service law of the relevant sending State when exercising these powers and must guarantee to the property holder the various protections accorded thereunder.

40. In addition, the service authorities will be prevented from searching any ship, aircraft, vehicle or premises that is occupied by a person who is in New Zealand other than as a member of a visiting force, its civilian component, or their dependants. They will also be prohibited from seizing items that are in the possession of a person who is in New Zealand other than as a member of a visiting force, its civilian component, or their dependants. Finally, the Bill – by reference to section 99 of the Armed Forces Discipline Act 1971 – sets out the procedure for the disposal of seized items that belong to a person other than a member of the visiting force, its civilian component, or their dependants. In our opinion, this procedure accords with the requirements of section 19 of the Bill of Rights Act.

Section 27(2): Right to apply for judicial review

41. Clause 15 of the Bill states that the proceedings of a service tribunal of a visiting force may not be called into question in any proceedings before a New Zealand court. This provision appears to give rise to a *prima facie* issue of inconsistency with section 27 of the Bill of Rights Act. This section provides:

> "Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with the law, for judicial review of that determination."

Is this a justified limitation under section 5?

42. 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.

43. The operating principle behind the Bill is that a visiting force should exercise jurisdiction over its members and that, therefore, the service law of the sending State should determine how charges are determined and what remedies by way of appeal and review apply. By providing that the proceedings of a service tribunal of a visiting force shall not be subject to review by a New Zealand court, clause 15 ensures that the service authorities of the visiting force have the functions of command, control, and administration of that force. Without this authority, the visiting force may struggle to exist as an efficient force available for the service of the sending State. We consider that this is a significant and important objective and, therefore, the first limb of the section 5 inquiry is satisfied.

44. It is beyond dispute that prohibiting judicial review in these circumstances is rationally connected to the aim of ensuring that the service authorities of a visiting force can maintain effective control over the visiting force. We also consider that the prohibition is proportionally connected to this objective. This is because the range of persons that the service tribunal of a visiting force has jurisdiction over is limited to members of the visiting force, its civilian component and their dependents. It is also relevant, in terms of justifying this provision, that the remedies of appeal and review are guaranteed under the service law of Australia and a number of other countries that may enter into a SOFA with New Zealand and that the service tribunal is prohibited from imposing sentences that are repugnant to New Zealand public policy.

45. In our view, although this provision raises an issue of inconsistency with section 27(2) of the Bill of Rights Act, it is justifiable in terms of section 5 of that Act.

<u>Enforcement of sentences</u>

46. Clause 14 of the Bill provides for sentences of imprisonment or detention of a service tribunal of a visiting force to be enforced in New Zealand. We note that the enforcement of such sentences will be served in accordance with Part IX of the Armed Forces Discipline Act 1971 and its subordinate legislation, particularly the Defence Force Orders (Discipline) for the Operation of Detention Quarters in New Zealand. Accordingly, this enforcement would only occur at the request of the officer in command of the visiting force. Moreover, a person whose sentence is to be enforced in New Zealand would be treated as if a New Zealand court-martial sentenced him or her and, thereby, the person would be entitled to the protections provided to prisoners under this legislation. This includes, *inter alia*, the right not to be subjected to a cruel, degrading or disproportionately severe treatment, the right to be secure against unreasonable search and seizure, and the right to be treated with humanity and with respect for the inherent dignity of the person.

47. In our opinion, therefore, this clause does not appear to be inconsistent with the Bill of Rights Act.

Conclusion

48. 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.

49. 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 Defence, if you agree.

Val Sim
Chief Legal Counsel

Stuart Beresford
Senior Legal Adviser
Bill of Rights/Human Rights Team

CC: Minister of Justice
Minister of Defence
Copy for your information