

10 November 2016

Hon Christopher Finlayson QC, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Customs and Excise Bill**

### **Purpose**

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1. We have considered whether the Customs and Excise Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 18995/18.2). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression), s 21 (unreasonable search or seizure), s 22 (liberty of the person), and s 25(c) (right to be presumed innocent). Our analysis is set out below.

### **Summary**

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4. The Bill replaces the Customs and Excise Act 1996 ('the principal Act').
5. The Bill raises a number of potentially significant limitations on rights and freedoms affirmed in the Bill of Rights Act, particularly s 21 (unreasonable search and seizure), s 22 (liberty of the person), and s 25(c) (right to be presumed innocent). We also consider possible limitations on s 14 and s 18 of the Bill of Rights Act.
6. These rights are fundamentally concerned with fairness, individual autonomy, privacy and dignity. Any limitation on these rights requires careful scrutiny and justification.
7. We have also taken into account the unique context of the border in terms of the public interest in Customs' effective regulation of people, craft and goods entering or leaving the country. The nature of the border means Customs has a limited opportunity to act, and may have to do so with limited information. We have also considered Customs' role in the collection of Crown revenue.
8. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

## **The Bill**

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9. The Bill revises the principal Act, following a review of that Act. The general modernisation of the principal Act is expected to reduce compliance costs and improve accessibility. In particular, the Bill:
- a. supports the movement of goods, people and craft into and out of New Zealand
  - b. modernises Customs' revenue system, clarifying businesses' obligations
  - c. confirms most of Customs' existing powers, and updates the range of sanctions and response available to protect New Zealand from people or goods that may cause harm
  - d. supports greater information-sharing between Customs and other agencies, with such arrangements being developed in consultation with the Privacy Commissioner, and
  - e. clarifies the extent of Customs' powers to examine electronic devices.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of expression**

10. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup>
11. The Bill includes two types of provisions that engage the freedom of expression:
- a. compelled expression – requiring an individual to provide information, and
  - b. censorship – preventing an individual from expressing themselves.
12. The compelled expression provisions in the Bill relate to Customs officers gathering necessary information (often through requiring individuals to answer questions) to ascertain whether an individual is meeting the relevant legislative requirements (such as asking an individual about their intended journey). The individual faces consequences for a failure to provide the required information. For example, cl 308 provides that failing to answer a Customs officer's question may result, on conviction, in a fine not exceeding \$5,000.
13. Clauses 195 and 196 of the Bill prohibit the use of electronic communication devices in Customs places or Customs-controlled areas, if there is a sign prohibiting the use of such devices. A Customs officer must also require 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.

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<sup>1</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

*Is the limitation justified and proportionate under s 5 of the Bill of Rights Act?*

14. Where a provision is found to limit 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 s 5 of that Act. The s 5 inquiry may be approached as follows:<sup>2</sup>
  - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. if so, then:
    - i. is the limit rationally connected with the objective?
    - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. is the limit in due proportion to the importance of the objective?
15. One of the main functions of the New Zealand Customs Service is to maintain and ensure compliance with the relevant legislation regulating border processes. The compelled expression provisions are connected to this purpose as they enable Customs officers to collect relevant information to ascertain whether the individual is compliant with legislative requirements.
16. The powers to require individuals to provide information are also proportionate and impair the freedom of expression no more than reasonably necessary because they are narrowly focused on obtaining necessary information to assess compliance. This is achieved by specifying who can be asked for information and what information can be compelled.
17. The clauses prohibiting the use of communication devices are designed to ensure that law enforcement at the border is not compromised by passengers using electronic communication devices. Customs places by their nature need to be secure environments. The Bill's prohibition on the use of communication devices effectively prevents activities that could undermine security such as:
  - a. preventing the area being photographed, and
  - b. preventing passengers from warning one another of impending detection or to pre-emptively destroy evidence.
18. Restricting the use of electronic communication devices in Customs places or Customs-controlled areas is rationally connected to the aim of maintaining adequate standards of law enforcement at the border. It is also proportional and minimally impairs the freedom of expression by providing that passengers are able to use electronic communication devices prior to entering, and once they have left, a Customs place or Customs-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.

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<sup>2</sup> *Hansen v R* [2007] NZSC 7 [123].

19. We therefore consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

### **Section 18 – Freedom of movement**

20. Section 18 of the Bill of Rights Act affirms that:
- a. everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
  - b. every New Zealand citizen has the right to enter New Zealand.
  - c. everyone has the right to leave New Zealand.
  - d. no one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.
21. Freedom of movement is one of the fundamental rights recognised by international human rights treaties. For instance, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ('the ICCPR'), to which New Zealand is a party, confirm that everyone shall be free to leave any country, including their own.<sup>3</sup> However, the ICCPR permits certain restrictions on this right, including where it is necessary to protect national security, public order, or the rights and freedoms of others.<sup>4</sup>
22. The Bill, by its nature, regulates individuals' ability to enter and exit New Zealand. The Bill also provides Customs officers with powers that could further affect the right to freedom of movement, including requiring a person to remain in a location, or directing a person to leave or refrain from entering a place. For example, cl 194(3) provides that a Customs officer may direct an unauthorised person to leave a Customs-controlled area, and remove the person from the Customs-controlled area if the person does not leave immediately.
23. We are satisfied that these limitations on s 18 imposed by the Bill are justifiable. Providing for the administration and enforcement of Customs controls at the border and facilitating border control through risk management are sufficiently important purposes to warrant a limit on the freedom of movement. The expectation of the freedom of movement at airports and sea-ports is also reduced. The provisions of the Bill are rationally connected to those objectives, impair rights no more than reasonably necessary, and are proportionate.
24. We therefore conclude that the Bill appears to be consistent with the freedom of movement affirmed in s 18 of the Bill of Rights Act.

### **Section 21 – Unreasonable search and seizure**

25. Section 21 of the Bill of Rights Act affirms that everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or

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<sup>3</sup> Article 12, ICCPR; Article 13, Universal Declaration of Human Rights.

<sup>4</sup> Article 12, ICCPR.

correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.<sup>5</sup>

26. The Bill contains significant, often warrantless, search and seizure powers, and the information obtained as a result of the search may often be retained for law enforcement purposes.
27. Ordinarily a provision found to limit a particular right or freedom may nevertheless be consistent with the Bill of Rights Act if it can be considered reasonably justified in terms of s 5 of that Act. However, the Supreme Court has held an unreasonable search logically cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.<sup>6</sup> In assessing whether the search and seizure powers in the Bill are reasonable, we have considered the importance of the objective sought to be achieved and whether the provisions are rationally connected and proportionate to that objective.
28. It is the nature of the Customs context that goods, craft and people passing through the border may be beyond reach by the time investigation or audit could take place, or evidence could be gathered. Customs has a limited opportunity to act before, for example, a person has left their jurisdiction or goods have been exported, consumed or processed in manufacturing. Customs must balance:
  - a. the need to ensure compliance, and
  - b. the need for efficient administration of the border so that persons, craft and goods are not unduly delayed.
29. This special border context affects expectations of privacy. The reasonable expectation of privacy underpinning s 21 is that held by the community at large, and this expectation will vary according to where the search is conducted or the nature of the search. Expectations of privacy are lower in public places, and are significantly lower for persons crossing borders than in entirely 'domestic' contexts.<sup>7</sup>
30. It is a long recognised aspect of customs regulation that those seeking to enter a country must establish that goods they bring with them may lawfully be brought into the country.<sup>8</sup> There is a strong public interest in the legitimate movement of goods at the border, for example in relation to the importation of dangerous goods. For such regulation to be effective, extensive powers for Customs are required.<sup>9</sup>
31. The Search and Surveillance Act 2012 establishes standards of lawfulness and reasonableness for the exercise of powers of search and seizure. Various parts of that Act apply to Customs powers discussed below, and provide safeguards in the exercise of those powers.

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<sup>5</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J; see also *Williams v Attorney-General* [2007] NZCA 52.

<sup>6</sup> *Ibid* at [33]; *Hamed v R*, above n 1 at [162].

<sup>7</sup> *R v B-P* [2002] NZAR 157 (CA) at 166-167, *R v Boateng* (1999) 5 HRNZ 450 (HC), *Udompun v Attorney-General* (2003) 7 HRNZ 238 (HC).

<sup>8</sup> *R v B-P*.

<sup>9</sup> See, for example, *S (CA712/2015) v R* [2016] NZCA 448.

### *Searches of electronic devices*

32. Clause 207 provides for the search of information in electronic devices, such as mobile phones, for investigative purposes where the device is subject to the control of Customs or reasonably suspected to be so.
33. Clause 6 of the Bill provides a range of circumstances in which goods are considered 'subject to the control of Customs'. This includes domestic and international cargo in a Customs-controlled area, goods that are imported, or are to be exported under a Customs-approved seal, and goods belonging to passengers passing through Customs-controlled areas which deal with international passengers.
34. Two levels of search are provided for as follows:
  - a. 'Initial' search may be conducted where Customs has a reasonable suspicion of a person's involvement in 'relevant offending', and
  - b. 'Full' search may be conducted where Customs has a reasonable belief of a person's involvement in 'relevant offending'.
35. 'Relevant offending' is defined in s 207(5) as importation or exportation that is either unlawful, concerns prohibited goods, or is an offence against the Act.
36. The person in possession of the device can be required to provide passwords or assistance, if reasonable and necessary for gaining access to the device, for both kinds of search. Sections 130(2) and (3) of the Search and Surveillance Act, relating to information tending to incriminate the person, apply to this requirement. Clause 207(8) provides that, if assistance is not given, the person commits an offence and the device may be detained so that access can be arranged.
37. An initial search may be conducted if a Customs officer has 'reasonable cause to suspect' that:
  - a. the person in possession of the device is or is about to be involved in relevant offending; or
  - b. the importer or exporter is or is about to be involved in relevant offending; or
  - c. the device itself, if unaccompanied and the importer or exporter cannot be found, is or is about to be involved in relevant offending.
38. An initial search means that the device may be accessed, searched, reviewed or evaluated either manually or by using technology aids (if Customs has completed a privacy impact assessment in consultation with the Privacy Commissioner). There are limitations to the extent of an initial search in that it must not take no longer than reasonably necessary to determine whether evidential material relating to relevant offending is on the device. Unless the device is to be detained for a full search, the device must be returned after the search and any temporary files created in the search must be then destroyed. The return of the device and destruction of any temporary files means therefore that the Search and Surveillance Act does not apply as the initial search will not result in any seized materials.
39. A full search may be conducted if Customs has 'reasonable cause to believe' that evidence of relevant offending is on the device. This belief may be formed through the

initial search. Reasonable belief is a higher standard to meet than reasonable suspicion. Reasonable belief requires that there must be “an objective and credible basis” for conducting a search while suspicion means “thinking that it is likely that a situation exists.”<sup>10</sup>

40. In a full search, any technology aid can be used in accessing and searching the device, and the device can be removed or detained while the search is conducted. Information may be copied or reviewed, and copies of information do not have to be destroyed afterward. Devices must be returned after the search unless evidence of relevant offending is found. A full search of a device is subject to the Search and Surveillance Act, Part 4, subpart 6, which establishes procedures applying to seized items.
41. Neither type of search is allowed to involve damage to, or interference with the operation of, the device. Whether the search is initial or full, the transmitting functions of the device must be disabled at the start of the search, if possible. Neither type of search extends to material accessible from the device but which is not stored on the device.
42. The exercise of the powers in cl 207 (that is, both initial and full searches) constitutes a search for the purposes of s 21. While public concern could arise given the scope and nature of information held in personal devices, the power would be useful in helping to detect objectionable material and evidence of other offending, such as drugs offences. We consider the searching of e-devices is confined and rationally connected to a particular customs purpose, concerned with investigation of relevant offending. This is a sufficiently important objective.
43. The power to search devices is proportional to this objective, being limited to instances of reasonable suspicion or belief of relevant offending. Where suspicion has been formed, the less invasive initial search can be undertaken in order to establish the reasonable grounds for belief required for a full search.
44. The seizure of e-devices for the purpose of searching them is also subject to subpart 6 of Part 4 of the Search and Surveillance Act, which facilitates the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by providing rules that recognise the importance of the rights and entitlements affirmed in the Bill of Rights Act.
45. We therefore consider the power to search electronic devices is not unreasonable for the purposes of s 21 of the Bill of Rights Act.

#### *Searches of persons*

46. Clause 189 provides that a Customs officer or constable may conduct a preliminary search of any person arriving or departing from New Zealand. The person may only be detained for a reasonable period of time for the purpose of the preliminary search.
47. The Bill defines a ‘preliminary search’ as involving little or no physical contact, and is conducted using aids such as a Customs dog, chemical substances, imaging or electronic equipment, and not by any more invasive means.

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<sup>10</sup> *R v Williams* [2007] 3 NZLR 207 (CA) at [213]; cited in *Vegneris v R* [2013] NZCA 306 at [14].

48. A Custom's officer may conduct a full search of a person if there is reasonable cause to suspect the person has hidden on or about his or her person:
  - a. any dutiable, uncustomed, prohibited, or forfeited goods
  - b. evidence relating to any such goods, or
  - c. any thing that is, or might be, evidence of a contravention of the Act.
49. A full search may also be conducted by a Customs officer if there is reasonable cause to suspect that a person possesses a dangerous item, posing a threat to safety which must be addressed immediately, where a preliminary search would pose greater risk.
50. Clause 190 provides for similar powers, but in relation to classes of person not tied as closely to the border. That is, it extends to those who have arrived in the preceding 24 hours, or are about to depart New Zealand, who are not arriving or departing from a Customs place. It also applies to any person in a Customs place.
51. The power is contemplated as being exercised away from designated border areas, or involving people who are not necessarily travellers or interacting with travelling craft, but close enough to the border to come into contact with these. For this reason the threshold is raised to require reasonable belief, rather than reasonable suspicion.
52. The searches mentioned above in cls 189 and 190 are both subject to Part 4 of the Search and Surveillance Act 2012 (which relates to search and inspection powers), except for subpart 3 (which relates to the need for search warrants).
53. We consider the search powers are rationally connected to sufficiently important Customs objectives, namely the effective administration of the border and ensuring compliance with the law. The powers are proportional to these objectives, requiring reasonable suspicion or belief of contravention of the Act, and providing for a less invasive preliminary level of search. The power is, again, subject to the requirements of the Search and Surveillance Act, which (as mentioned earlier) provides rules that recognise the importance of the rights and freedoms affirmed in the Bill of Rights Act.
54. We therefore consider the powers in cls 189 and 190 to search persons are not unreasonable for the purposes of s 21 of the Bill of Rights Act.

#### *Searches using dogs or other aids*

55. Clause 205 provides that a Customs officer or any person exercising any power of boarding, entry or search may use certain aids for the purpose of searching. The specified aids are a Customs dog, any chemical substance, X-ray or imaging equipment and any mechanical or electronic devices.
56. None of these aids may be used in a private dwelling or marae without consent of an owner or occupier, except under warrant.
57. We do not consider the use of such aids will make a search under the Bill unreasonable. The particular search powers throughout the Bill, in the context of which aids will be used, are themselves limited in scope and justified by sufficiently important Customs objectives. The use of an aid to search craft, persons in Customs areas, goods and so on, will not make that search unduly invasive given the objectives they serve.



### *Forfeiture and seizure*

58. Subpart 8 of Part 3 of the Bill provides a regime relating to the forfeiture, seizure and condemnation of goods and applies to all forfeitures arising under the Bill.
59. Goods are forfeit if they are unlawfully imported or exported or if there is an attempt to do so, or if they are goods in respect of which certain offences have been committed. This includes prohibited, fraudulent, concealed, or uncustomed goods. The forfeiture relates back to the time of the offence or ground for forfeiture.
60. Clause 373 of the Bill means that attempts to commit offences under this Act are treated the same as actual commission, and so give rise to the same cause for seizure.
61. If goods are forfeited, or there is reasonable suspicion that they are, they may be seized by a Customs officer. The Bill provides that reasonable force may be used in seizure, but this must be reported under cl 415. Any seizure and the reasons for it must be notified to those with interests in the goods, who may apply for a review of the seizure.
62. Goods are condemned to the Crown either when no application for review is made within the allowed time, or once such a review is discontinued or dismissed. Condemned goods may be sold, used, destroyed or disposed of.
63. This regime provides the power by which Customs interdicts and seizes various prohibited or restricted goods, such as illicit drugs, weapons or endangered flora and fauna. The regime operates *in rem* against the goods themselves, and does not require the person to have been actually convicted of an offence.
64. The New Zealand Customs approach to forfeiture, seizure and condemnation is not unusual. Such legislation is commonly, and necessarily, far-reaching in English, Australian and Canadian jurisdictions.<sup>11</sup>
65. We do not consider these powers of seizure will be unreasonable for the purposes of s 21. The provisions require, at a minimum, reasonable cause to suspect goods are forfeited. Forfeiture requires a relevant contravention of the Act. The provisions elsewhere in the Act which give rise to forfeiture or by which forfeited goods are discovered, such as offence and search provisions, are appropriately limited and serve the objective of effective administration of the border and ensuring compliance.

### *Requiring biometric information*

66. Clause 182 of the Bill provides that a Customs officer may, during the processing of a person's arrival in, or departure from, New Zealand, request the person to provide biometric information.
67. Biometric information is defined in the Bill as including a photograph of the person's head and shoulders, the person's fingerprints and iris scan. Because the obligation to allow the collection of biometric information involves compulsory access to information, including personal information, it impinges upon reasonable expectations of privacy that members of the public would have in relation to that information. However, for the

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<sup>11</sup> *Williams v Attorney-General* [1990] 1 NZLR 646 at [677] cited in *Mihos v A-G* (2007) CIV 2004–485–1399 at [50].

reasons below we conclude that the power to require biometric information is not unreasonable.

68. Allowing the collection of biometric information improves the integrity of the border management system by allowing Customs to quickly and accurately verify the identity of travellers. Biometric information may only be used for the purpose of verifying the person's identity, as provided in cl 182(2).
69. Biometric information establishes a record of a person's identity, verifies their identity and assists in decision making under the Act. We also note that it is well recognised that persons who cross international borders can legitimately be required to sacrifice aspects of their privacy in return for the ability to travel. In other words, at and around the time of travel, particularly in a Customs context, expectations of privacy are lower.
70. We therefore conclude the search and seizure powers related to biometric information are not unreasonable in terms of s 21 of the Bill of Rights Act.

*Conclusion on the right to be secure against unreasonable search or seizure*

71. For the reasons above, we conclude that the Bill appears to be consistent with the right to be secure against unreasonable search or seizure affirmed in s 21 of the Bill of Rights Act.

**Section 22 – Liberty of the person**

72. Section 22 of the Bill of Rights Act affirms that everyone has the right not to be arbitrarily arrested or detained. The purpose of the right not to be arbitrarily detained is the protection of human dignity, autonomy and liberty.<sup>12</sup>
73. To trigger the concept of detention there must be a “substantial intrusion on personal liberty”<sup>13</sup>, whether a physical deprivation or a statutory constraint. The Court of Appeal has held that:<sup>14</sup>

“An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.”
74. Where an enactment is inconsistent with s 22, there can be no role for justification under s 5. The term “arbitrarily” is intended to provide a measure of the reasonableness of statutory powers<sup>15</sup>, as well as the exercise of those powers. At issue is whether there is sufficient justification for detention and whether the Bill carefully circumscribes who may detain a person, for how long, and under what conditions.
75. The Bill confers powers to detain in a range of circumstances, for example where:
  - a. a person fails to comply with a direction to remain in a designated place having refused to provide biometric information for identity verification (cl 183)

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<sup>12</sup> *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

<sup>13</sup> *Police v Smith* [1994] 2 NZLR 306 (CA) at [316] per Richardson J.

<sup>14</sup> *Neilsen v Attorney-General* [2001] 3 NZLR 433; (2001) 5 HRNZ 334 (CA).

<sup>15</sup> *Surrey County Council v P* [2014] 2 WLR 642 (UKSC).

- b. there is reasonable cause to suspect a person has any thing that is, or might be, evidence of a contravention of the Bill, or is in possession of a dangerous item (cl 189)
- c. there is reasonable cause to believe a person is committing, or about to commit, an offence under cls 20, 34 or 188 of the Bill (cl 191), and
- d. there is reasonable cause to suspect a person is attempting to enter or leave New Zealand without authorisation in order to question them or make inquiries to establish their responses are correct (cl 199).

76. In our view, these powers are not “arbitrary” for the purposes of s 22 of the Bill of Rights Act.

77. The powers to detain may only be exercised by specified persons, usually Customs officers and constables. The powers may only be used for purposes relevant to the regulatory context of the Bill and where an appropriate threshold is met, such as where a person fails to comply with a lawful direction or where a Customs officer reasonably suspects or believes that a person is committing an offence. Further, any detention may not be longer than reasonably necessary and several provisions even contain express limits on how long a person may be detained.

78. For example, cl 185 provides that a Customs officer may detain a person where they have failed to satisfactorily answer questions about goods or debt and the officer has reasonable suspicion an offence is being, or is about to be, committed. The detention must be for a reasonable period not exceeding four hours and may only be used only to:

- a. enable the Customs officer to make any inquiries necessary to establish whether an answer to a question or a reason or an explanation given is correct, or
- b. obtain the attendance, or make inquiries, of another Customs officer or other person entitled to exercise any power to question, detain, or arrest a person under the Bill.

79. We therefore consider the Bill appears to be consistent with the right not to be arbitrarily arrested or detained affirmed in s 22 of the Bill of Rights Act.

### **Section 25(c) – Right to be presumed innocent until proved guilty**

80. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

81. The purpose of s 25(c) is to protect the fundamental liberty and dignity of those accused of offences in light of the grave consequences a criminal charge and conviction may entail.<sup>16</sup>

82. To this end, the right to be presumed innocent includes three main components:<sup>17</sup>

<sup>16</sup> See *R v Oakes* (1986) 26 DLR (4<sup>th</sup>) 200 (SCC) at [212 – 213].

<sup>17</sup> See, Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [23.4.19]; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at [675].

- a. the onus of proof lies with the prosecution throughout
- b. the standard of proof is “beyond reasonable doubt”, and
- c. mens rea (a guilty mind) is a requirement of the offence.

*Reverse onus provisions*

83. Reverse onus provisions raise a prima facie issue of inconsistency with s 25(c) because, once the prosecution has proven the defendant committed the act in question, the defendant must prove a defence, or disprove a presumption, on the balance of probabilities in order to escape liability. In the case of reverse onus offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to their guilt.
84. There are a number of reverse onus provisions in the Bill. For example, under cl 40(1)(a) a person commits an offence if they fail to produce a certificate of clearance when required by a Customs officer. The prosecution is only required therefore to prove that the person failed to produce the certificate when required.
85. The Bill however provides defences for this and other similar offences at cl 54 of whereby it is a defence to a prosecution for the offences in subpart 3 of Part 1 of the Bill<sup>18</sup> if the defendant proves that in any case where it is alleged that:
  - a. anything required to be done was not done, the defendant took all reasonable steps to ensure that it was done, or
  - b. anything unlawful was done, the defendant took all reasonable steps to ensure that it was not done.
86. The Bill also contains provisions which provide similar defences in relation to specific offences, including:
  - a. failure to produce or account for goods (cl 213)
  - b. failure to make an entry required under the Bill or making an erroneous or defective entry (cls 340 and 341)
  - c. failure to answer questions (cl 360), and
  - d. offences relating to levy orders (cl 396).
87. We consider that the reverse onus offences in the Bill appear to be justified. In reaching this conclusion, we have taken into account the nature and context of the conduct being regulated, the ability of the defendants to exonerate themselves and the penalty levels.
88. The offences in the Bill are public welfare regulatory offences designed to protect the general public from possible harm and to regulate industries. For example, the offences concern obligations in relation to the arrival and departure of craft, import and export of goods, and the operation of Customs and the Ministry for Primary Industries’ joint border management system.

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<sup>18</sup> Except for cls 34 and 52.

89. The courts have generally accepted that there is a distinction between "truly criminal offences" and offences that are considered to be in the realm of "public welfare regulatory offences".<sup>19</sup> A reversal of the onus of proof is generally considered to be more easily justifiable for regulatory offences. Those who choose to participate in regulated industries should be expected to meet certain expectations of care and accept the enhanced standards of behaviour required of them.<sup>20</sup> As noted above, the Bill also contains defences which are relevant to the ability of the defendant to exonerate themselves.
90. There are a range of penalty levels for the reverse onus provisions contained in the Bill. The majority of the reverse onus provisions provide only for a fine and not a sentence of imprisonment. Several of the offences, however, carry a maximum of 12 months' imprisonment. Offences with terms of imprisonment of 12 months or less may be suitable to be strict liability offences or involve a reversal of the burden of proof, provided the other prerequisites for the offence are met. We consider that the penalty levels in the Bill appear to be reasonable given the public welfare regulatory context and the ability of defendants to exonerate themselves.

*Presumptions in relation to certain matters*

91. Clause 407 of the Bill provides that in any proceedings under the Act instituted by the Crown,<sup>21</sup> every allegation made by or on behalf of the Crown in any statement of claim, statement of defence, plea, or charge in relation to any of the following matters is presumed to be true unless the contrary is proved:
- a. the identity or nature of any goods
  - b. the value of any goods for duty
  - c. the country or time of exportation of any goods
  - d. the fact or time of the importation of any goods
  - e. the place of manufacture, production, or origin of any goods, or
  - f. the payment of any duty on goods.
92. Provisions of this type have traditionally been interpreted as placing an onus on the defendant to prove the matter in issue on the balance of probabilities. Clause 407 is therefore a prima facie limit on s 25(c) of the Bill of Rights Act.
93. We consider these presumptions to be justifiable. Further to the justifications outlined above, we note that Customs relies on information provided by various classes of people and for various purposes. Information provided to Customs supports a number of functions in the Bill, including the collection of revenue, notification of arrivals and departures of craft, and the movement of goods across the border. It is reasonable that Customs can expect to rely on information provided to it in this context and, where it may be disproved, that information is likely to be peculiarly in the knowledge of the defendant.

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<sup>19</sup> *Civil Aviation Authority v MacKenzie* [1983] NZLR 78.

<sup>20</sup> *R v Wholesale Travel Group* (1992) 84 DLR (4th) at 213.

<sup>21</sup> Except for a prosecution under cls 306, 307, 347 and 367.

94. We therefore consider the presumptions in cl 407 are justifiable limitations on s 25(c) in the context of criminal proceedings under the Bill. For the sake of completeness, we also note that cl 407 also applies to civil proceedings to which s 25(c) of the Bill of Rights Act does not apply.

*“Without reasonable excuse” provisions*

95. The Bill also contains a number of clauses providing that an offence will be committed if done “without reasonable excuse”, including:
- a. failure to comply with term, condition, or restriction of licence (cl 69)
  - b. removal of goods from Customs-controlled areas without authorisation or in contravention of condition in a permit or authorisation (cl 86)
  - c. failure to produce evidence of identity, entitlement to travel (cl 181), and
  - d. failure to comply with a direction relating to prohibited use of an electronic device in certain areas (cl 196).
96. “Without reasonable excuse” provisions were formerly considered to reverse the onus of proof (at least where the defendant was proceeded against summarily), thereby limiting a defendant’s right to be presumed innocent until proved guilty. However, upon the repeal of s 67(8) of the Summary Proceedings Act 1957, offences of this nature in the Bill should be interpreted consistently with the presumption of innocence.

*Conclusion on the right to be presumed innocent*

97. For the reasons above, we conclude that the Bill appears to be consistent with the right to be presumed innocent until proved guilty affirmed in s 25(c) of the Bill of Rights Act.

**Conclusion**

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98. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr  
**Chief Legal Counsel**  
**Office of Legal Counsel**