MINISTRY OF JUSTICE
Tāhū o te Ture

LEGAL ADVICE

LPA 01 01 21

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Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: New Zealand Intelligence and Security Bill

Purpose

1. We have considered whether the New Zealand Intelligence and Security 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 19866/5.0). 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 18 (freedom of movement), s 21 (unreasonable search and seizure), s 25(c) (right to be presumed innocent) and s 27 (right to justice). Our analysis is set out below.

Summary

4. The Bill replaces the four Acts currently applying to the New Zealand intelligence and security agencies and their oversight bodies.

5. The Bill raises a number of potentially significant limitations, particularly with s 21 (unreasonable search and seizure) of the Bill of Rights Act. We also consider limits on s 14, s 18, s 25(c) and s 27. These rights are fundamentally concerned with fairness, individual autonomy, privacy and dignity. Any limitation on these rights requires careful scrutiny and justification.

6. We have also taken into account the unique environment that the intelligence and security agencies operate in. We recognise that safeguards need to adapt to this environment.

7. We conclude that the Bill is consistent with the rights and freedoms affirmed in the Bill of Rights Act.

The Bill

8. The Bill implements the Government response to the *Report of the First Independent Review of Intelligence and Security in New Zealand: Intelligence and Security in a Free Society* ('the Review').

9. The Bill replaces the four Acts currently applying to the Government Communications Security Bureau ('the GCSB'), the New Zealand Security Intelligence Service ('the NZSIS') and its oversight bodies, the Inspector-General of Intelligence and Security ('the Inspector-General') and the Intelligence and Security Committee ('the Committee').

10. The Bill contains a single warranting and authorisation regime applying to both agencies that covers their intelligence collection and protective security functions. Further, to support the GCSB and the NZSIS to carry out their functions and to ensure clarity and transparency around their access to information, the Bill contains a comprehensive information-sharing regime.

11. The Bill will also enhance the oversight of the intelligence and security agencies including the removal of the current restriction on the Inspector-General inquiring into operationally sensitive matters, and clarifying that the Inspector-General may review warrants on substantive, as well as procedural, grounds.

12. The Bill also re-enacts, on a permanent footing, provisions put in place by the Countering Terrorist Fighters Legislation Bill ('the Countering Terrorist Fighters Bill) in 2014, including the amendments to the Passports Act 1992, which enable the refusal of applications for, or cancellation of, New Zealand travel documents on the grounds of national or international security.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Right to freedom of expression

13. 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.[1]

14. A number of provisions in the Bill either prevent the disclosure of information, or may require people to provide certain types of information. For example:

    a. clause 177 re-enacts a duty to keep confidential all information that comes to knowledge in the performance of exercise of their functions, duties, and powers, and not to record, use, or disclose that information except for the purpose of carrying out their functions or duties

    b. clause 142 authorises the Inspector-General to require a person to provide information or documents in the course of an inquiry, and

    c. clauses 153 and 185 create offences for publishing or broadcasting information relating to an Inspector-General's inquiry or the identity of an employee of an intelligence and security agency.

15. We also note that the amendments to the Protected Disclosures Act 2000 limit the scope of whom a protected disclosure may be made to. Clause 267 will replace s 12 of the Protected Disclosures Act to require an intelligence and security agency, or any

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

other agency that has access to classified information or information about the activities of an intelligence and security agency, to have internal procedures which:

a. provide that disclosures must be made to a person with the appropriate security clearance and authorised to have access to the information

b. state the only appropriate authority to whom such information may be disclosed is the Inspector-General

c. invite any employee who has disclosed, or is considering the disclosure of, such information to seek information and guidance from the Inspector-General, and

d. state that no disclosure of such information may be made to an Ombudsman or to a Minister of the Crown other than the Minister responsible for an intelligence agency or the Prime Minister.

Is this a justified limitation under s 5 of the Bill of Rights Act?

16. 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:[2]

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?

17. Preventing unauthorised disclosure of information with national security implications is an important objective, as unauthorised use or disclosure could have serious ramifications for New Zealand's national security. The duties and obligations of confidence and restrictions on disclosure of information are rationally connected to this objective.

18. We consider that these provisions impair the right to freedom of expression no more than reasonably necessary and are proportionate with the objective. For example, the Inspector-General is the appropriate authority to receive protected disclosures because of the highly secret nature of the work and has wide powers of inquiry into the agencies' activities.

19. Moreover, s 6 of the Bill of Rights Act requires that wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights Act, that meaning must be preferred to any other meaning.

[2] *Hansen v R* [2007] NZSC 7 [123].

20. Given the effect of s 6 of the Bill of Rights Act on these provisions, we are of the view that any limits on freedom of expression would be interpreted consistently with the Bill of Rights Act.

Section 18 – Right to freedom of movement

21. Section 18(2) affirms the right of New Zealand citizens to enter New Zealand. Section 18(3) of the Bill of Rights Act affirms that everyone has the right to leave New Zealand.

22. We note that the 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.[3] 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.[4]

23. The Bill makes permanent a number of provisions introduced by the Countering Terrorist Fighters Bill. Clause 253 will insert new s 27GA into the Passports Act allowing the Minister of Internal Affairs, on grounds of national security, to:

    a. cancel or retain or refuse to issue a New Zealand passport,

    b. cancel or retain a certificate of identity, or

    c. cancel or retrain or refuse to issue a New Zealand refugee travel document to the person.

24. The Bill also makes it clear that the cancellation of travel documents can take place where the person is overseas. Clause 253 also inserts new s 27GE into the Passports Act to provide for temporary suspension of travel documents.

25. These provisions appear to give rise to a prima facie issue of inconsistency under s 18(2) and/or s 18(3) of the Bill of Rights Act.

26. The travel restrictions serve a significant and important objective, namely disrupting the movement of foreign terrorist fighters ('FTFs') and other persons who may pose a serious risk to national security. The United Nations Security Council ('the UNSC') Resolution 2178 urged nations to restrict the movement of FTFs, including their onward travel if the person is outside their home country. The UNSC expressed grave concern over the acute and growing threat posed by FTFs travelling for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or providing or receiving terrorist training.

27. The suspension or cancellation of travel documents is rationally connected to this objective. We also consider the safeguards in the Bill mean the right is limited no more than reasonably necessary.

28. In this regard, we note the Bill introduces a new safeguard concerning the power to cancel travel documents that was not included in the Countering Terrorist Fighters Bill.

[3] Article 12, ICCPR; Article 13, Universal Declaration of Human Rights.
[4] Article 12, ICCPR.

Any decision by the Minister of Internal Affairs to cancel or refuse to issue a travel document on security grounds must be referred to the Chief Commissioner of Intelligence Warrants. The Chief Commissioner of Intelligence Warrants must then arrange for a Commissioner of Intelligence Warrants to conduct a review of the Minister's decision to take that action.

29. If the Commissioner of Intelligence Warrants considers that the documents do not reasonably support the Minister's decision, the Commissioner of Intelligence Warrants must prepare a report of the review recommending that the Minister reconsider their decision and state the reasons for that recommendation.

30. The Minister must notify the person whose travel documents have been cancelled of the recommendation of the Commissioner of Intelligence Warrants, the reasons for it, and the outcome of the Minister's reconsideration. The decision of the Minister is subject to appeal and judicial review. The objective of restricting movement of FTFs is proportional to the protection of national security, public order and the rights and freedoms of others. The UNHRC also notes that restrictions on liberty of movement may be authorised to protect national security, public order and the rights and freedoms of others.

31. Refugees are particularly vulnerable to any restrictions on their freedom of movement. We note that cancellation of a refugee travel document would not, in itself, mean the person would lose their refugee status nor be expelled from New Zealand. The 1951 UN Convention Relating to the Status of Refugees and the 1967 Optional Protocol to the Treaty contemplate that compelling national security and public order grounds are sufficient reasons that a person should not hold a refugee travel document.[5]

Citizens' right of return not limited

32. In terms of the specific right of citizens to return to New Zealand, the powers to restrict and disrupt travel do not limit existing provisions to protect this right. Section 23(3) of the Passports Act requires the Minister to issue a journey-specific emergency travel document to a citizen outside New Zealand if the person has been refused a passport or their passport is cancelled and the emergency travel document is necessary to enable the person to return to New Zealand. An emergency travel document issued under s 23(3) cannot be cancelled on grounds of national security. The right of a citizen to enter New Zealand is illusory without the positive obligation on the Minister to issue an emergency travel document.[6]

Conclusion on the right to freedom of movement

33. In our opinion, the Bill therefore appears to be consistent with the right to freedom of movement affirmed in s 18 of the Bill of Rights Act.

Section 21 – Right to be secure against unreasonable search or seizure

34. 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

[5] See, for example, Art 28 UN Convention Relating to the Status of Refugees. The current powers to refuse to issue or cancel a refugee travel document were incorporated into the Passports Act in 2005 to help ensure New Zealand meets its obligations under those agreements.

[6] *Abdelrazik v Canada (Minister of Foreign Affairs & International Trade)* 2009 FC 580 at [152].

correspondence or otherwise. The right protects a number of values including personal privacy, dignity, and property.[7]

35. Assessing the reasonableness of search powers involves striking a balance between the interest of the public and of the particular individual or entity concerned to be 'left alone', and the public interest in the objective of the search.[8] Whether a search is unreasonable will depend on many factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale for the search.[9] The greater the degree of intrusiveness, the greater the justification required (and the greater the attendant safeguards required to ensure that the justification is present).

36. We note that, in the context of national security issues, it is appropriate that the safeguards are adapted to the unique environment of the intelligence agencies. Safeguards in this context are not exclusively judicial but include executive and parliamentary oversight.[10]

Warranting and authorisation regime

37. Part 4, Subpart 1 of the Bill establishes the framework for intelligence warrants. Clauses 50 – 52 provide that there will be two types of intelligence warrant:

    a. Type 1 intelligence warrants – to authorise an intelligence and security agency to carry out an unlawful activity to collect intelligence in respect of a person who is a New Zealand citizen or permanent resident,[11] and

    b. Type 2 intelligence warrants – will serve the same purpose as a Type 1 warrant, but in respect of a person who is not a New Zealand citizen or permanent resident.

38. Clause 63 provides that an intelligence warrant may authorise the carrying out of one or more activities that would otherwise be unlawful. These authorised activities include conducting surveillance, intercepting private communications, searching places or things, and seizing communications, information or things. Authorised activities may also include any human intelligence activity to be undertaken for collecting intelligence where that activity does not involve the use or threat of violence or perverts the course of justice.

39. The distinct powers of the intelligence agencies to give effect to these authorised activities are set out in cls 65 and 66. The NZSIS may, for example:

    a. enter a place, vehicle, or other thing specified in the warrant, owned or occupied by a person identified in the warrant, or where a person identified in the warrant is, or is likely to be, at any time

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[7] 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.

[8] 'Any search is a significant invasion of personal freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case': *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 407.

[9] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [172].

[10] See *Klass v Germany* (1979-80) 2 EHRR 214 and subsequent decisions.

[11] This includes a class of persons where at least one member of that class is a New Zealand citizen or permanent resident.

b. install, use, maintain, or remove a visual surveillance, tracking, or interception device

c. access an information infrastructure or class of information infrastructures

d. open (by any means) or interfere with a vehicle, container, receptacle, or other thing

e. bring and use a dog that is trained to undertake searching for law enforcement purposes and is under the control of its usual handler, and

f. use any force in respect of any property that is reasonable for the purposes of carrying out an activity.

40. Clause 65(1)(l) also permits the NZSIS to do any other act that is reasonable in the circumstances and reasonably required to achieve the purpose of the intelligence warrant.

41. The GCSB, meanwhile, will be authorised to exercise a number of similar powers, including the power to:

a. access an information infrastructure

b. install, use, maintain, or remove a visual surveillance, tracking, or interception device

c. do any act that is reasonable in the circumstances and reasonably required to keep the activities of the intelligence agency covert, and

d. do any other act that is reasonable in the circumstances and reasonably required to give effect to the intelligence warrant.

42. These powers are extensive and can represent a significant intrusion into the values of personal privacy and property affirmed by s 21 of the Bill of Rights Act. As such, they require robust safeguards adaptable to the intelligence environment.

43. The safeguards available in the Bill include:

a. satisfying the Attorney-General and the Commissioner of Security Warrants that the additional criteria for the issuance of a warrant are met (cl 57), for example that:

i. the proposed activity is proportionate to its purpose

ii. the purpose of the warrant cannot reasonably be achieved by a less intrusive means

iii. there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the warrant beyond what is necessary and reasonable, and

iv. there are satisfactory arrangements in place to ensure that any information collected in reliance on the warrant will only be retained, used, and disclosed in accordance with this Act or any other enactment.

b. obligations to mitigate the impact of intelligence warrants including obligations to minimise impacts on third parties and destroy irrelevant records, and

c. oversight by the Inspector-General

44. A warranted search power allows for prior and independent verification that the search is justified. Such a power will generally be reasonable and not limit the s 21 right if it requires an independent officer to be satisfied that there are reasonable grounds to suspect an activity prejudicial to security, or for the purpose of gathering foreign intelligence information essential to security.[12]

45. While powers of search and seizure in the Bill are broad, their exercise remains subject not only to the preconditions under the relevant provisions of the Bill, but also to oversight by the Inspector-General for consistency with s 21 of the Bill of Rights Act. Accordingly, the powers do not give rise to a risk of unreasonable search or seizure.

Urgent intelligence warrants and very urgent authorisations

46. If the Attorney-General and a Commissioner of Intelligence Warrants, or the Attorney-General alone for Type 2 warrants, are satisfied a situation of urgency exists and it is necessary to do so, they may issue an urgent intelligence warrant. An urgent intelligence warrant is revoked unless an application for an intelligence warrant is made and confirmed within 48 hours.

47. The Director-General of an intelligence agency may also authorise the carrying out of an unlawful activity for which an intelligence warrant is required if:

a. an application for the issue of an urgent intelligence warrant would otherwise be needed, but

b. the delay in making the application would defeat the purpose of obtaining the warrant.

48. The Director-General must immediately notify the Attorney-General and, for Type 1 warrants, the Chief Commissioner of Intelligence Warrants. Within 24 hours of giving the authorisation, the Director-General must make an application for a warrant pursuant to cl 53.

49. Warrantless search powers lack prior independent oversight, but may be reasonable where the delay inherent in obtaining a warrant would have a disproportionately adverse effect. Warrantless search powers have been accepted as reasonable where, for example, there is a serious threat to safety or property,[13] and where evidence may be lost or destroyed.[14] The capacity of courts to exclude evidence obtained as a result of an unreasonable search from a subsequent criminal trial provides an additional safeguard.[15]

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[12] *Hunter v Southam* [1984] 2 SCR 145.
[13] *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [123].
[14] *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [112].
[15] Section 30 Evidence Act 2006. This includes where, notwithstanding that the conditions for exercise of the warrantless power have been satisfied, it would have been reasonably possible to obtain a warrant: see, eg, *R v Laugalis* (1993) 10 CRNZ 350 (CA); *R v Dobson* [2008] NZCA 359 at [30] ff.

50. In addition to the conditions and corresponding justifications provided in the Bill, there is a consistent body of New Zealand case law that has indicated that use of a warrantless power may not be lawful, notwithstanding that the conditions for its exercise are satisfied, where it would have been reasonably possible to obtain a warrant.[16]

51. Moreover, if a warrant is not applied for and confirmed in the relevant time period it is revoked and the intelligence collected must be destroyed, unless cl 91 relating to retention of incidentally obtained intelligence applies.

52. We also note that the power must not be exercised unreasonably and therefore should not breach s 21.

53. We therefore consider that no issue of inconsistency arises under s 21 in respect of urgent warrants or very urgent authorisations.

Authorised activity lawful notwithstanding any other Act

54. Clause 49 of the Bill provides that an intelligence and security agency may carry out an otherwise unlawful activity only if authorised to do so by an intelligence warrant, a very urgent authorisation, or a removal warrant.

55. Clause 49(2) then provides that an authorised activity may lawfully be carried out by an intelligence and security agency despite anything to the contrary in any other Act. This clause appears to be modelled off s 4A of the NZSIS Act.

56. We have considered whether this provision would, in effect, oust the right to be secure against unreasonable search and seizure. We are not aware of this provision having been tested in case law. However, previous advice on a similar provision in the Countering Terrorist Fighters Bill noted that this language was not intended to limit the Bill of Rights Act. To do so it would require a specific legislative reference to overriding the Bill of Rights Act.[17] Consequently, we consider that provision must be read consistently with the Bill of Rights Act and thus not allow unreasonable search and seizure.

Retention of incidentally obtained intelligence

57. Intelligence unintentionally collected outside the scope of an authorised activity, or under an intelligence warrant which is subsequently revoked, must be destroyed. Clause 91, however, enables the Director-General of an intelligence and security agency to retain this incidentally obtained intelligence for the purpose of disclosing it to specified persons.[18]

58. To do so, the Director-General requires reasonable grounds to believe that the disclosure of the intelligence may assist in:

    a. preventing or detecting serious crime in New Zealand or any other country

[16] See, notably, *R v Laugalis* (1993) 10 CRNZ 350 (CA) and, more recently and among many others, *R v D* [2008] NZCA 359, [30]ff (though accepting that the "exigencies of policing" tending against seeking a warrant were in the circumstances a sufficient basis for invoking the warrantless power).

[17] *Hansen* at paras 53-56, 61, 150-158, 252, 285-290 (per Blanchard, Tipping, McGrath, Anderson JJ).

[18] These are any employee of the New Zealand Police, member of the New Zealand Defence Force, employee of the other intelligence and security agency, or public authority (whether in New Zealand or overseas) that the Director-General considers should receive the information.

b. preventing or responding to threats to the life of any person in New Zealand or any other country

c. identifying, preventing, or responding to threats or potential threats to the security or defence of New Zealand or any other country, or

d. preventing or avoiding loss of life of any person who is outside the territorial jurisdiction of any country.

59. We note the requirement for "reasonable grounds to believe" is a higher threshold than the previous threshold of "considers" in s 25 of the Government Communications Security Bureau Act 2003. We consider this threshold provides greater assurances that incidentally obtained intelligence may only be retained where reasonable for the purposes of s 21 of the Bill of Rights Act. Further, the information may only be retained and disclosed for the purposes outlined above. Therefore we consider cl 91 is a rational and proportionate mechanism for retention and disclosure of intelligence seized incidentally.

Direct access agreements

60. Clause 103 requires a holder agency[19] to allow the Director-General of an intelligence and security agency access to any database held by the holder agency specified in Schedule 2 of the Bill. That access must be in accordance with a written agreement entered into between the Minister responsible for the holder agency and the Minister responsible for the intelligence and security agency.

61. This information could include, for example, citizenship information held by the Secretary for Internal Affairs, adoption information held by the Registrar-General, and information collected under the Customs and Excise Act 1996.

62. We consider that the direct access agreements amount to a search for the purposes of s 21 of the Bill of Rights Act.

63. The question is then whether such a search is unreasonable. The most critical issue in this regards is an intelligence agency having access to data taken by Customs, for example, without a warrant and then using it for other purposes such as investigation of suspected criminal offending.

64. The Customs and Excise Act contains significant, often warrantless, search and surveillance powers, and the information may often be retained for law enforcement purposes. We also note that the Bill allows access to Customs' information for potentially broader purposes than the access to Customs' data provided for in the NZSIS Act, which is limited to counter-terrorism activities. The Bill will allow direct access where the relevant Ministers are satisfied that direct access is necessary to enable the intelligence and security agency to perform or exercise a function, duty or power.

65. However, in our view the search powers are still reasonable for the purposes of s 21 of the Bill of Rights Act. There is a clear public interest, the protection of national security, in the objective of the search. A direct access agreement must be necessary to pursue that public interest.

[19] Holder agencies are specified in Schedule 2 of the Bill.

66. Moreover, there are sufficient safeguards to ensure the power should not be used unreasonably. These safeguards include the requirement for direct access agreements to contain adequate privacy safeguards, consultation with the Privacy Commissioner and the Inspector-General, and publication of the direct access agreement (or a summary) on an internet website.

67. We note also that the Bill requires the creation of the direct access agreements, and provides what the agreements must specify. The contents of those agreements will need to be consistent with s 21 as there is no implicit or explicit authorisation in the Bill for these agreements to be inconsistent with the Bill of Rights Act.[20] Further, because they are not subject to the protection of s 4 they may be invalidated if they permit unreasonable searches.

68. We consider the safeguards listed above provide sufficient safeguards to protect against unreasonable search and seizure.

Conclusion on the right to be secure against unreasonable search and seizure

69. We conclude the Bill appears to be consistent with the right to be secure against unreasonable search and seizure.

Section 25(c) – Right to be presumed innocent until proved guilty according to law

70. 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.

71. 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.[21] To this end, the right includes three main components:[22]

    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.

72. The Bill contains offence provisions that do not explicitly include a *mens rea* element. For example, it is an offence under the Bill for:

    a. any person to publish, broadcast,[23] or otherwise disclose of distribute information relating to an Inspector-General's inquiry without the written consent of the Minister (cl 153), and

    b. a person appointed to assist the Committee to disclose or publish any sensitive information (or information likely to prejudice the interests protected in cl 182) unless the disclosure or publication is authorised or in the performance of the person's functions, duties or powers under the Bill (cl 164(4)).

[20] See, for example, *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).
[21] See *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at [212 – 213].
[22] 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.
[23] Publishing or broadcasting includes causing to be published or broadcast.

73. Clause 227 of the Bill also includes an amendment to the Immigration Act 2009 which will make it an offence to allow a person to travel to, or from, New Zealand before a decision has been made as to whether they may board the craft.

74. Where a statute does not contain *mens rea* there may, in some circumstance, be some uncertainty as to the nature of the offence. We note, however, that when the statute does not contain express *mens rea mens rea* is usually held to be implied as an ingredient of the offence, unless there is sufficient reason to the contrary.[24]

75. We note also that the Court of Appeal has found that it is "a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted".[25]

76. In the absence of an explicit reversal of the onus of proof or clear indication that proof of intention is not required, the prosecution would therefore be required to prove all elements of the offence, including mens rea. The Department of the Prime Minister and Cabinet has also advised that they do not see the offences in the Bill as imposing strict liability. Consequently, we consider the offence provisions in the Bill do not create a limitation on s 25(c) of the Bill of Rights Act.

77. We understand, however, the intent of the amendment to the Immigration Act is to create a strict liability offence. To the extent it may be interpreted this way, in light of the analysis above, we consider the limit to be justified.

78. The Immigration Act offence rationally contributes to the important objective of reducing the use of false travel documents for travel by making sure that a carrier does not allow a person to board a craft before the Chief Executive has confirmed that person may board a craft. The offence is committed by the carrier or person in charge of a commercial craft in a commercial or regulatory environment. Persons involved in the airline industry are already familiar with such obligations and the consequences of non-compliance in respect of inbound travellers. They can therefore be expected to have in place suitable procedures and safeguards to ensure compliance. We therefore consider the offence impairs the right no more than reasonably necessary and is proportionate to the objective.

Conclusion on the right to be presumed innocent until proved guilty

79. We therefore conclude the Bill is consistent with the right to be presumed innocent until proved guilty affirmed in s 25(c) of the Bill of Rights Act.

Section 27(1) - Right to justice

80. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice.

81. Section 27(1) is engaged by the amendments to the Passports Act previously made by the Countering Terrorist Fighters Bill. The right to natural justice is flexible and context-specific. Its requirements depend heavily on the statutory framework in question and

[24] See, for example, *R v Stevenson* [2012] NZCA 189 at [16 - 17].
[25] *Civil Aviation Department v MacKenzie* [1983] NZLR 78 also reported as *MacKenzie v Civil Aviation Department* (1983) 1 CRNZ 38 (CA), at 81; 41 per Richardson J quoting: *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347 (HL), at 149 per Lord Reid; *R v Strawbridge* [1970] NZLR 909 (CA).

nature of the power being exercised. Each of the clauses that engage s 27(1) is considered further below.

Notice for suspension or cancellation of travel documents

82. Clause 253 inserts new s 27GC into the Passports Act to allow the Minister of Customs to defer giving notice to a person that their travel document has been refused or cancelled, or a certificate of identity cancelled. This provision triggers the natural justice elements of prior notice and provision of reasons for a decision to the affected party.

83. Clause 27GC allows the Minister to defer notice for up to 30 days. The Minister must be satisfied that giving notice sooner would prejudice an ongoing investigation or put the security or safety of any person at risk.

84. Clause 253 also inserts new s 27GE which allow the Minister to suspend a person's travel documents for up to 10 working days, if that the Minister is investigating or considering whether to take an action under s 27GA; and is satisfied that the person is likely to travel overseas before a decision is made. We understand that notice would not normally be given, and that the deferral of notice provisions set out above would apply.

85. Deferring the requirement to give notice of a cancellation aims to avoid disclosure of an intelligence investigation and risks to intelligence operators or the public. Omitting notice of a suspension aims to avoid alerting a person to the intelligence investigation and thereby reduce the risk the person will attempt to leave the country by other means. We consider these to be important objectives.

86. The limits on s 27(1) are rationally connected to these objectives, as the absence or deferral of notice will reduce the safety and departure risks. The restrictions do not limit the right any more than is reasonably necessary. The Minister may only choose not to give notice in narrow circumstances. The limits are also in due proportion to the importance of the objectives. Further, the impact of the lack of notice is mitigated by the limited duration of the suspension. The absence of notice is likely to adversely affect only a subset of people whose travel documents are suspended or cancelled. Judicial review will be available to a person who does become aware of the suspension or deferral.

87. We consider that any possible limit on the right to the observance of the principles of natural justice is justified.

Extending closed court processes

88. Clause 258 provides that in litigation brought under s 29AA of the Passports Act involving classified security information, the information must be heard in the absence of the person affected, their lawyer, and members of the public, on request by the Attorney-General if satisfied that it is desirable to do so for the protection of the classified security information.[26] This provision triggers the natural justice elements of having access to all relevant material and having the opportunity to challenge that

[26] Refer Passports Act 1992, s 29AB.

material.[27] Clause 258 may result in a person who may not have committed a criminal offence being denied travel documents without knowing, or with limited knowledge of, the evidence on which the refusal, denial, cancellation or suspension was based (if the information is classified security information).

89. Clause 258 seeks to ensure that the legal proceedings that involve classified security information can take place and that national security and intelligence holdings are protected. This is an important objective.

90. We consider the provisions allowing the Court to hear such information in the absence of the person affected, members of the public, or his or her lawyer are rationally connected to this aim. There are a number of safeguards built into ss 29AA and 29AB of the Passports Act that illustrate this rational connection.

91. Sections 29AA(5) to (7) of the Passports Act set out the definition of 'classified security information'. These sections provide a clear indication of the kind of information that may be considered classified and the circumstances in which this information may be withheld. Section 29AB(2)(b) also requires that the person affected must be provided with a summary of the information upon which a decision has been made. This summary is provided by the Attorney-General, and must be approved by the Court.

92. We note that the principles of fairness do not require that the passport-holder has unrestricted access to the evidence against them. So long as all the information is available to the court in approving the summary released to them, their right to 'confront the evidence against them' is respected.

93. In our view, the provisions restricting available information to a summary reflect a balancing exercise between the importance of protecting classified information and the need to preserve an individual's right to natural justice. We consider the Bill provides a person with an adequate opportunity and ability to gain access to all relevant material relied on in reaching a particular decision, and ensures that the person has a reasonable opportunity to challenge that material.

94. Clause 259 provides that classified information may be withdrawn from proceedings where national security is involved. If this decision is taken, the classified information must be kept confidential, must not be disclosed, and must be returned to the relevant agency. The court must continue to make the decision or determine the proceedings without regard to the classified information or as if the information had not been available in making the decision subject to the appeal or review.

95. We understand that if the withdrawn classified information was the evidence relied upon by the decision maker, on review or appeal without that evidence the decision will appear to be unsupported by evidence and the challenge by the affected party will succeed.

96. We consider that, in light of the numerous safeguards incorporated in the proposal, the limitation is justified in terms of s 5 of the Bill of Rights Act.

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[27] *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130; *Taito v R* (2002) 19 CRNZ 224, (2002) 6 HRNZ 539; *R v Durval* (1995) 13 CRNZ 215.

Conclusion on the right to justice

97. We consider that the Bill is consistent with the right to justice affirmed in s 27(1) of the Bill of Rights Act.

Section 27(2) - Right to judicial review

98. Section 27(2) of the Bill of Rights Act provides that 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 law, for judicial review of that determination.

99. The right to judicial review is intended to ensure that a person with an interest in a decision can challenge the lawfulness of that decision. The 'White Paper a Bill of Rights' recognised that the phrase "in accordance with law"" may limit on the power of judicial review, but that "any attempt completely to deprive the High Court of its review powers would violate the guarantee."[28]

100. Clause 152 of the Bill provides that "[n]o proceeding, report, or finding of the Inspector-General may be challenged, reviewed, quashed, or called in question in any court except on the ground of lack of jurisdiction."

101. The exception of "on the ground of lack of jurisdiction" provided for in cl 152 includes any material error in law.[29]

102. In addition cl 125 clarifies that the carrying out of the Inspector-General's functions does not limit the jurisdiction of any court. Judicial review proceedings against an intelligence and security agency are not limited by the Bill.

103. We therefore do not consider the Bill materially limits the right to judicial review.

Section 27(3) - Right to bring civil proceedings against the Crown

104. Section 27(3) of the Bill of Rights Act affirms the right to bring civil proceedings against the Crown and have those proceedings heard in the same way as proceedings between individuals.

105. The amendments to the Passports Act provide a limitation on Crown liability in relation to any decision made under new ss 27GA, 27GD, or 27GE (for example, a decision to refuse to issue a passport on grounds of national security). The Crown would not be liable for any loss or damage unless a person acting under those clauses had not acted in good faith or has been grossly negligent.

106. Examples of the damages contemplated by this clause include individual loss due to prevention of travel, as well as loss to other individuals or commercial entities associated with the travel (such as an airline carrier).

107. On balance we do not think this right is unreasonably abridged. The likely cause of action that would be brought is an action for public law compensation, and the clause as drafted will not be effective to exclude that form of relief.[30]

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[28] 'A Bill of Rights for New Zealand: A White Paper' [1984-1985] I AJHR A6 at [10.175].

[29] See *Zaoui v Attorney-General (No.2*) [2005] 1 NZLR 690 (CA) at [16]; *Phan v Minister of Immigration* [2010] NZAR 607 at [32 – 33].

Conclusion

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

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[30] *Currie v Clayton* [2014] NZCA 511 at [80].