LEGAL ADVICE

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7 September 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Outer Space and High Altitude Activities Bill

Purpose

1. We have considered whether the Outer Space and High Altitude Activities Bill 2016 ('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 19604/21.0). We will provide you with further advice if the final version of the Bill includes amendments that affect 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 (right to be free from unreasonable search and seizure), s 25(c) (right to be presumed innocent until proved guilty) and s 27(2) (right to judicial review). Our analysis is set out below.

Summary

4. The Bill establishes a regulatory regime to govern outer space launches from New Zealand and by New Zealand nationals operating overseas. It also provides a legal framework for high altitude activities that originate from New Zealand.

5. Particular provisions of the Bill engage the rights to:

    a. freedom of expression

    b. freedom of movement

    c. be secure against unreasonable search or seizure

    d. be presumed innocent until proved guilty, and

    e. judicial review.

6. Any limiting measures are designed to impair the right no more than is reasonably necessary and we consider those limits to be consistent with the Bill of Rights Act.

The Bill

7. The objectives of the Bill are to:

a. facilitate the development of a space industry and its safe and secure operations

b. implement New Zealand's international obligations relating to space activities and space technology

c. manage New Zealand's liability arising from our obligations as a launching state

d. establish a system to control certain high altitude activities taking place from New Zealand, and

e. preserve New Zealand's national security and national interests.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Right to freedom of expression

8. We have considered whether cl 56(2)(a) and cl 54 of the Bill raise issues in relation to section 14 of the Bill of Rights Act, which protects the right to freedom of expression. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.[1]

9. Clause 56(2)(a) enables the Minister responsible for administering the Act ('the Minister') to seek and receive any information (including medical reports) as the Minister thinks fit for the purpose of determining whether or not a person is a fit and proper person to hold a licence. Clause 54 allows the Minister to ask the applicant, or holder of any licence or permit, to provide any information that the Minister requires in order to perform functions relating to the licence or permit.[2] The Minister may refuse to grant a licence if the applicant does not provide the information within a reasonable timeframe, or the Minister is unable to verify the information. There is no explicit limit on the power conferred by cl 56(2)(a) or cl 54, such as a requirement that the Minister considers the information reasonably necessary.

10. However, we note that someone seeking a licence for the relevant activities in the Bill should reasonably be expected to provide information that they are a fit and proper person. Further, we consider that these provisions are not inconsistent with the right to freedom of expression. Section 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.

11. Given the effect of section 6 of the Bill of Rights Act on this provision, we are of the view that cl 56(2)(a) and cl 54 would be interpreted consistently with the Bill of Rights Act.

Section 18 – Right to freedom of movement

12. Section 18(1) of the Bill of Rights Act affirms that everyone lawfully in New Zealand has the right to freedom of movement and residence within New Zealand.

13. Clause 67 of the Bill could limit s 18(1) as it allows the Minister to declare[3] that a particular location is a security area or a security enhanced area. Only certain persons

[1] See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).
[2] For example, grant, revoke, or vary a licence or permit.
[3] By affixing a sign at the perimeter of an area (such as a launch area) or by other appropriate notification.

are entitled to enter or remain the in the area and enforcement officers may direct a person to leave or refrain from entering the area. Clause 67(6) makes it an offence not to comply with an enforcement officer's direction.

14. We are satisfied that the limitation on s 18(1) imposed by cl 67 of the Bill is justifiable. The purpose of the clause is to ensure the safety of individuals in the event of a launch or equipment emergency. Protection of the public may be seen as a sufficiently important objective to justify limitation on the right to freedom of movement and cl 67 is rationally and proportionately connected to that objective. This conclusion is reinforced by the fact that, under cl 67(3), the Minister may only declare private land to be, or to be included within, a security area or security enhanced area with the consent of the owner.

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

15. 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, their property or correspondence, or otherwise. The right to be secure against unreasonable search or seizure protects a number of values including personal privacy, dignity, and property.[4]

16. In order for a statutory power to be consistent with s 21 the intrusion into these values must be justified by a sufficiently compelling public interest. The intrusion must be proportional to that interest and accompanied by adequate safeguards to ensure it will not be exercised unreasonably.

17. Clause 64 of the Bill confers the power for enforcement officers[5] to enter any launch facility or other place where any launch vehicle, payload, high altitude vehicle, related equipment, or technical data is held for the purposes of inspection, or seizure and detention. There is no requirement that these powers be exercised reasonably or that a search warrant be obtained from the court when those powers are to be exercised.

18. We further note that the definition of technical data[6] could confer power of entry and search for a broad range of places where such data is held. A person would not necessarily need a licence or permit to create or hold 'technical data' but could nonetheless be subject to the search and seizure powers conferred by cl 64.

19. However, cl 64(2) applies the provisions of subparts 1, 4, 5, 6, 7, 9, and 10 of Part 4 of the Search and Surveillance Act 2012. These subparts place reasonableness and lawfulness requirements on the search and seizure powers conferred by cl 64. In particular:

    a. s 110 (in subpart 4 of Part 4) of the Search and Surveillance Act specifies that the time of the search, any force or equipment used during the search, any measures used to access a computer system or data storage must be reasonable, and

    b. s 110 also states that any items must be seized lawfully.

[4] See, for example, *Hamed v R* [2012] 2 NZLR 305 at [161] per Blanchard J.
[5] Suitably qualified enforcement officers may be appointed under cl 61 of the Bill by the chief executive.
[6] Clause 4 defines technical data as information in any form including oral information, blueprints, drawings, photographs, video materials, plans, instructions, computer software, and documents that is required for the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintenance, modification, enhancement, or modernisation of launch vehicles or payloads or related equipment, but not including publically available information.

20. Other safeguards from the Search and Surveillance Act will similarly apply. Further, enforcement officers may only execute these powers for the purpose of their lawful functions, which are prescribed in cl 63. We therefore consider to the Bill requires the search and seizure powers to be exercised reasonably for the purposes of s 21, and is therefore consistent with the Bill of Rights Act.

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

21. 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.

22. The Bill creates a number of strict liability offences where it is not necessary for the prosecution to prove that the defendant intended to commit the offence. Strict liability offences 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 to escape liability. In the case of strict liability offences, a defendant who is unable to prove a defence, or disprove a presumption, could be convicted even if reasonable doubt exists as to her or his intent.

23. We have identified the following strict liability offences in the Bill:

    a. interfering with a launch vehicle or payload (cl 77(2)), and

    b. providing false information to enforcement officer (cl 83(2)).

24. We consider that the strict liability 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.

Section 27(2) - Right to judicial review

25. 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.

26. 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 on 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."[7]

27. Section 27(2) of the Bill of Rights Act is engaged by cl 59(4), which limits the ability of a court to review the information and advice given by security agencies that a launch or relevant activity poses a significant risk to national security.

28. Clause 59 provides that the Minister must consult security Ministers about the implications on national security interest of a decision made under the Bill to, for example, issuing a launch licence. The Minister must refer the application or matter to the Minister for National Security and Intelligence, if a Minister thinks it is appropriate

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

for national security reasons. The Minister for National Security and Intelligence may (after consultation with the Ministers and considering advice of intelligence and security agencies) issue a certificate that the activity or proposed activity poses a significant risk to national security. A security certificate means that a relevant permit or licence would have to be refused or revoked

29. Clause 59(4) provides that:

    a. a certificate issued by the Minister for National Security is conclusive evidence of the matters stated in it, and

    b. the advice given by an intelligence and security agency to the Minister, a security Minister, or the Minister for National Security and Intelligence must not be challenged, reviewed or called into question in any court.

30. For the purposes of this advice, we have considered whether, to the extent cl 59(4) limits judicial review, such a limit is justified. The protection of highly sensitive information, which, if released, could compromise national security, may be seen as an important objective.[8] Preventing disclosure of the classified information on which it is based may be seen as a rational way to protect New Zealand's interests.

31. We consider the right is impaired no more than is reasonably necessary and is a proportionate means of achieving the national security objective. In reaching this conclusion, we have considered the risky and highly regulated nature of the activity in question: 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.[9]

32. Ministerial rather than judicial oversight also reflects the recommendations of Sir Guy Powles report on the Security Intelligence Service,[10] that national security was properly the responsibility of the Executive. This view was endorsed by Parliament at the time, and was reconfirmed when substantial amendments were made to the New Zealand Security Intelligence Service Act in 1999. We have found no indication that this view has changed.

33. There are similar restrictions in other legislation with regards to national security such as:

    a. s 19(9) of the Inspector-General of Security and Intelligence Act 1996 which 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." The exception of "on the ground of lack of jurisdiction" has been interpreted to include any material error in law[11], meaning the Inspector-General's findings are subject to judicial review; and

    b. s 4A(6) of the New Zealand Security Intelligence Service Act 1969 which provides that with regards to the issue of an intelligence warrant, no civil or

[8] For example, *Canada (Minister of Employment and Immigration) v. Chiarelli* [1992] 1 S.C.R. 711 at [48]; *Ruby v.* Canada (Solicitor General), [2002] 4 S.C.R. 3 at [43], [44]; *Charkaoui* [2004] 3 F.C.R. 32 (F.C.) at [100], [101]; *R. v. Shayler*, [2002] 2 All E.R. 477 (H.L.); *Murray v. United Kingdom* (1995), 19 EHRR 193 (E.C.H.R.) at [58].
[9] See *Klass v Germany* (1979-80) 2 EHRR 214 and subsequent decisions.
[10] (1976) AJHR A.4A.
[11] 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].

criminal proceedings shall lie against any authorised person giving effect to the warrant, and the issue of the warrant shall not be subject to judicial review under Part 1 of the Judicature Amendment Act 1972 or otherwise.

34. We understand cl 59(4) would not restrict judicial review of the decision to issue the certificate, only the advice that led to it. A material error of law by the Minister in issuing the certificate, for example, could still be subject to judicial review, given the approach that courts conventionally take to statutory provisions that restrict judicial review.[12]

35. Judicial review is also not restricted with regard to the decision to grant a permit. The only information that will not be able to be reviewed by the court is the advice given by the security agencies which results in the issue of a certificate by the Minister for National Security and Intelligence that the activity poses a significant risk.

36. Further, under cl 60 of the Bill, the applicant may lodge a complaint with the Inspector-General of Intelligence and Security in relation to any advice given by an intelligence agency to a relevant Minister. If, in the course of their inquiries,[13] the Inspector-General considers there is evidence of a breach of duty or misconduct by an employee of an intelligence and security agency, the Inspector-General shall inform the chief executive of the relevant agency and the relevant Minister immediately. After receiving the Inspector-General's findings and under cl 60(2), the Minister for National Security and Intelligence may then withdraw or confirm the certificate.

37. It is further noted that under cl 90 of the Bill, the Minister must commence a review on the operation and effectiveness of the Bill, as soon as practicable after the expiry of three years from the commencement of the Bill. The Minister must present a report to Parliament as soon as practicable after the review has been completed.

38. We therefore consider the limit is no more than reasonably necessary and proportionate to the importance of the objective. In our view, the Bill is therefore consistent with s 27(2) of the Bill of Rights Act.

Conclusion

39. 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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[12] See *Zaoui v Attorney-General* (No.2) [2005] 1 NZLR 690 (CA); *Spencer v Attorney-General* [2015] 3 NZLR 449 (CA).
[13] In accordance with s 25 of the Inspector General of Intelligence and Security Act 1996.