

2 June 2023

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Fisheries (International Fishing and Other Matters) Amendment Bill**

### **Purpose**

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1. We have considered whether the Fisheries (International Fishing and Other Matters) Amendment 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 in relation to the latest version of the Bill (PCO 24435/9.1). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.

### **Summary**

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3. The Bill amends the Fisheries Act 1996. It includes new powers of search and detention in relation to investigating serious fishing violations, amongst other provisions.
4. 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:
  - a. s 21 (unreasonable search and seizure);
  - b. s 22 (liberty of the person);
  - c. s 23(4) (right of persons arrested or detained to refrain from making any statement); and
  - d. s 25(c) (the right to be presumed innocent until proven guilty).
5. Our analysis is set out below.

### **The Bill**

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6. The Bill amends the Fisheries Act 1996 (the principal Act) with the aim of:
  - a. enabling New Zealand to better meet its international fisheries management and compliance obligations in relation to illegal, unreported, and unregulated (IUU) fishing, including those obligations flowing from the international arrangements to which New Zealand is a party, and
  - b. improving the efficiency and clarity of the statutory provisions and associated decision-making processes related to international fisheries.
7. The Bill includes, amongst other provisions:
  - a. new and updated definitions and provisions relating to IUU fishing and vessels, fisheries organisations or arrangements, and international conservation and management measures;

- b. powers of detention and search to enable investigation of serious violations as defined in the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea 1982; and
  - c. new offences, and amendments to existing offences and penalties, to enable effective enforcement.
8. The Bill also consequentially amends the Search and Surveillance Act 2012 and various instruments made under the principal Act.

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

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

9. 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, correspondence or otherwise. The right protects an amalgam of values including property, personal freedom, privacy and dignity. The touchstone of this section is the protection of reasonable expectations of privacy, although it does not provide a general protection of personal privacy.<sup>1</sup>
10. The Bill grants various powers to high seas fisheries inspectors that we consider constitute a search for the purposes of s 21. These include:
- a. new s 113SA(2) – power to board and inspect a vessel for evidence relevant to its nationality where there are reasonable grounds to suspect it is without nationality;
  - b. powers to enable investigation of serious violations,<sup>2</sup> which apply where an inspector believes a vessel has been used to commit such a violation and the flag State has failed to respond to a notification or take action under its own law:<sup>3</sup>
    - i. new s 113UA(2) – power to detain the vessel at port;
    - ii. new s 113UB(2) and (3) – powers to inspect the vessel and other specified things, conduct a remote access search, and take samples or records; and
    - iii. new s 113UD(3)(c)-(f) – powers to question and require an answer from a vessel’s master or crew member; require the production of records or documents; and take copies of records or documents.<sup>4</sup>

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<sup>1</sup> See, for example, *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161] per Blanchard J.

<sup>2</sup> See Article 21.11 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 at Schedule 1A of the principal Act. Examples of serious violations include fishing without a valid licence or failing to maintain accurate catch records.

<sup>3</sup> A vessel’s flag State (for a non-New Zealand ship) is the State in which the vessel is registered or otherwise the State whose flag it flies (s 113B of the principal Act). The powers in new ss 113UA-UD apply only to foreign-flagged vessels that fall under s 113S(1) of the principal Act. If the vessel is deemed to be a ship without nationality under new s 113SA, it is treated as a New Zealand vessel.

<sup>4</sup> These powers would also engage the right to freedom of expression in s 14, but we do not discuss this separately as the same reasoning as s 21 would apply. The power to question and require an answer from the vessel’s master or crew member would also engage s 23(4) (right of persons arrested or detained to refrain from making any statement), which is discussed below.

11. 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 that logically, an unreasonable search cannot be demonstrably justified and therefore the inquiry does not need to be undertaken.<sup>5</sup> Rather, in order for a statutory power to be consistent with s 21, engagement of the right must not be unreasonable. Whether a search will be unreasonable turns on a number of factors, including the nature of the place or object being searched, the degree of intrusiveness into personal privacy and the rationale of the search.<sup>6</sup>
12. We consider the search powers in the Bill to be reasonable, because:
  - a. they serve the important purpose of supporting effective international fisheries management, including by enabling serious fishing violations to be investigated;
  - b. a vessel may be detained under s 113UA only as long as reasonably necessary to enable investigation of the serious violation, and must be released at the request of the flag State or on payment of a reasonable bond;
  - c. a search warrant is required to enter a vessel's living quarters (where the potential for intrusion into personal privacy is higher) or conduct a remote access search. Relevant provisions of the Search and Surveillance Act 2012 apply to searches under new s 113UB;
  - d. search powers under new s 113UD may be exercised only at the request or with the consent of the vessel's flag State;
  - e. The document production power in new s 113UD(3)(e) is limited to records or documents in a person's possession or control that may be relevant to the investigation.

## **Section 22 – Liberty of the person**

13. 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>7</sup>
14. Where an enactment is inconsistent with s 22, there can be no role for justification under s 5 of the Bill of Rights Act. Rather, the term "arbitrarily" is intended to provide a measure of the reasonableness of statutory powers,<sup>8</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.
15. New s 113UD(3)(a) and (b) grant powers to a high seas fishery inspector to detain the vessel's master or a member of its crew on board the vessel or at another location. As noted above, these provisions apply when a vessel is detained at a port to enable the inspector to investigate a serious violation, where the vessel's flag State has failed to

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<sup>5</sup> Above n 1 at [162] per Blanchard J.

<sup>6</sup> Above n 1 at [172] per Blanchard J.

<sup>7</sup> *R v Briggs* [2009] NZCA 244 at [85] per Arnold J.

<sup>8</sup> Andrew Butler and Petra Butler, *New Zealand Bill of Rights Act: a Commentary* (2<sup>nd</sup> ed, LexisNexis, Wellington 2015), at [19.8.1].

respond to the inspector's notification or to take action under its own law in respect of the serious violation.

16. In our view the detention authorised by these provisions is not "arbitrary" for the purposes of s 22 of the Bill of Rights Act. The power to detain a person:
  - a. may be exercised only for the purpose of investigating the serious violation and where the authorities of the vessel's flag State have requested or consented to the exercise of the powers; and
  - b. must end when:
    - i. if the person is on the vessel, detention of the vessel ends; or
    - ii. if the person is not on the vessel, the inspector is satisfied that the person's continued detention is no longer reasonably necessary to investigate the serious violation; or
    - iii. requested by the vessel's flag State.
17. In addition, the power to detain a person would need to be exercised consistently with other rights in the Bill of Rights Act as well as international minimum standards for detention.
18. We therefore consider that the Bill appears consistent with the right not to be arbitrarily arrested or detained affirmed in s 22 of the Bill of Rights Act.

#### **Section 23(4) – Right of persons arrested or detained to refrain from making any statement**

19. Section 23(4) of the Bill of Rights Act says that everyone who is arrested or detained under any enactment for any offence or suspected offence shall have the right to refrain from making any statement and to be informed of that right.
20. New s 113UD(3)(c) and (d) of the Bill, also discussed above in respect of s 21 of the Bill of Rights Act, enable an inspector (for the purpose of investigating a serious violation) to question the master or crew member of a vessel and require them to provide an answer. Where a serious violation also constitutes an offence, these powers prima facie limit s 23(4) of the Bill of Rights Act.
21. Under s 5 of the Bill of Rights Act, a limit on a right may be justifiable where the limit serves an important objective, and where the limits on the right are rationally connected to achieving that objective; no greater than reasonably necessary to achieve the objective; and proportional to the objective's importance.<sup>9</sup>
22. We consider the limit on s 23(4) of the Bill of Rights Act to be justified because:
  - a. the powers serve the important objective of enabling serious violations to be investigated, and appear proportionate to that objective's importance;
  - b. requiring information from members of a vessel believed to have been used to commit a serious violation is rationally connected with the objective; and
  - c. the powers appear no greater than reasonably necessary to achieve the objective, noting that:

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<sup>9</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

- i. they may be exercised only with the request or consent of the flag State; and
- ii. provisions of the Search and Surveillance Act 2012 relating to privilege and confidentiality apply; and the privilege against self-incrimination is explicitly protected.

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

23. Section 25(c) of the Bill of Rights Act affirms that anyone charged with an offence has the right to be presumed innocent until proven guilty according to the law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the state must bear the burden of proof.<sup>10</sup> This means the state must affirmatively prove the physical and mental elements of the offence and must also negative any matter of defence raised by the evidence.
24. Strict liability offences prima facie limit section 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred (which could be the physical elements of the offence and/or the existence of particular circumstances) without proof of any mental element. The accused is required to prove a defence (on the balance of probabilities) such as the absence of fault, or disprove a presumption, to avoid liability.
25. The Bill creates new strict liability offences for:
- a. contravening the requirement that fishing within a foreign jurisdiction is to be in accordance with local law (new s 113DAAA)<sup>11</sup>; and
  - b. assisting, or having other specified interactions with or connections to, vessels that appear on the final IUU vessel list (new s 235A). This is a publicly available list that identifies vessels used to carry out or assist IUU fishing.
26. The Bill also extends the existing strict liability offences in s 229 (obstructing fisheries officers) of the Principal Act to include high seas fisheries inspectors (cl 55 of the Bill).
27. Each offence carries a maximum fine of \$250,000.
28. Strict liability offences have been found more likely to be justifiable where:
- a. the offences are regulatory in nature and apply to persons participating in a highly regulated industry;
  - b. the offence is directed at conduct having a tendency to endanger the public or a section of the public;
  - c. the defendant is in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
  - d. the penalty for the offence is proportionate to the importance of the Bill's objective.

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<sup>10</sup> Ibid at [26] and [27] per Elias J.

<sup>11</sup> Note that the foreign law may include a mental element.

29. We consider the limit on s 25(c) to be justified because:
- a. the offences are of a regulatory nature and the defendant is likely to be best placed to justify why they have not complied with the law;
  - b. statutory defences apply, including where the contravention was due to a cause beyond the defendant's control and they took reasonable precautions to avoid it. For offences relating to assisting an IUU-listed vessel, it is also a defence where this was necessary to save human life or avert a serious threat to the vessel; and
  - c. although the penalties are relatively high for strict liability offences, they reflect the commercial context. These offences serve the important objective of ensuring compliance with international fishing arrangements and appear proportionate to that objective.

### **Conclusion**

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30. 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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