Marine Protection Legislation Bill

14 August 2012

ATTORNEY-GENERAL

Legal Advice

Consistency with the New Zealand Bill of Rights Act 1990:
Marine Protection Legislation Bill

1. We have considered whether the Marine Protection Legislation Bill (PCO 13546/22.7) (‘the Bill’) is consistent with the New Zealand Bill of Rights Act 1990 (‘Bill of Rights Act’). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 16 August 2012.

2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with sections: 14 (freedom of expression); 21 (unreasonable search and seizure); 22 (arbitrary detention); and 25(c) (presumption of innocence) of the Bill of Rights Act.

PURPOSE OF THE BILL

3. The Bill is an omnibus Bill that amends the Maritime Transport Act 1994 (the MTA) and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2010 (the EEZ Act).

4. The Bill amends the MTA to make changes relating to port and harbour safety and to enable New Zealand to accede to three international maritime conventions. It also makes changes relating to maritime and marine protection rules, and other miscellaneous amendments.

5. The Bill amends the EEZ Act in order to transfer from Maritime New Zealand to the Environmental Protection Authority the regulation of discharges of harmful substances and the dumping of waste (except emergency dumping) into the Economic Exclusive Zone (EEZ) or the continental shelf. The Bill also adds new provisions prohibiting activities relating to the dumping and storage of toxic or hazardous waste and adds provisions for making regulations that prescribe standards, methods, requirements and classifying areas and activities in relation to discharges and dumping.

Consistency with Section 21 (Unreasonable Search and Seizure) and Section 14 (Freedom of Expression)
6. Section 21 of the Bill of Rights Act affirms the right of everyone to be secure against unreasonable search and seizure, whether of the person, property, correspondence or otherwise.

**Power to enter a vessel**

7. New s 33F of the Bill confers powers on the harbourmaster to enter and remain on a vessel, and to give directions to the master of the ship. The power to enter and remain on private property could engage s 21 of the Bill of Rights Act.

8. The purpose of new s 33F is to enable the harbourmaster to take all reasonable steps to ensure maritime safety and enforce regulations, rules and navigation bylaws made under the Act. We therefore consider the entry powers conferred by the new s 33F are ‘reasonable’ in terms of s 21 of the Bill of Rights Act.

**Power to require information**

9. New s 33F(1)(i) authorises the harbourmaster to require the owner of a ship, where an alleged offence against the regional council’s navigation bylaws is committed, to give all information they hold that may lead to the identification of the person (not being the owner) who committed the offence. Similarly, new s 33O authorises the Director of Maritime New Zealand to require a person who operates, maintains or services a port facility to provide any information he or she considers relevant to an inspection or audit.

10. A request for information or documents constitutes a search for the purposes of s 21 of the Bill of Rights Act. These sections may also engage s 14 of the Bill of Rights Act, which protects the right to freedom of expression, including the freedom to seek, receive, and impart information.

11. The stated objective of these provisions is to enable decisive, legally enforceable intervention to assist in the management of maritime safety risks and marine environmental protection in New Zealand ports and harbours.

12. We do not consider these powers ‘unreasonable’ in terms of s 21 of the Bill of Rights Act. We also consider that s 14 is not limited, as there is low expressive value in the information required.

**Powers to require breath/blood tests**

13. New ss 40H, 40I, 40L and 40M authorise enforcement officers to require seafarers to undergo a breath screening test, evidential breath test, or blood test in certain circumstances. The purpose of these provisions is to provide the most effective method to adequately enforce the offences against the alcohol limit set out in the Bill.

14. We consider that the demand for a breath or blood sample is a search for the purposes of s 21 of the Bill of Rights Act. The Court of Appeal has said that the “touchstone” of section 21 is the protection of reasonable expectations of
privacy. Expectations of privacy are not as great in the commercial world as they are in the domestic sphere. It is an exercise in balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public interests.

15. Seafarers who are performing designated safety, security, or environmental duties at the time of an alleged offence against the alcohol limits set out for industry have lower expectations of privacy because that expectation needs to be balanced against legitimate health and safety interests.

16. In relation to blood tests, which require a much more intrusive procedure than breath tests, there is a safeguard in place as new Section 40F creates a defence for failing or refusing to supply a blood specimen when the taking of blood would have been harmful to the seafarer’s health.

17. For these reasons, we do not consider these powers to be unreasonable.

**CONSISTENCY WITH SECTION 22 (RIGHT NOT TO BE ARBITRARILY DETAINED)**

18. Section 22 of the Bill of Rights Act provides that ‘everyone has the right not to be arbitrarily arrested or detained.’

19. New ss 40H, 40I and 40L authorise enforcement officers to require a seafarer to remain at the place where she or he underwent a breath screening test, or accompany an enforcement officer elsewhere to undertake an evidential breath or blood test. New s 40U authorises an enforcement officer to arrest a seafarer without a warrant if he or she has good cause to suspect that the seafarer has committed an offence against the alcohol limits set out in the Bill.

20. The Courts have said that a 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.”

21. The stated purpose of these provisions is to ensure that safety, security and environmental duties are performed to a high standard. Enforcement officers can only detain seafarers who are involved in an incident or are suspected of being intoxicated while on duty, this reduces the possibility of ‘arbitrariness’.

22. By virtue of s 22 of the Bill of Rights Act, the enforcement officer is obliged, by virtue of s 22 of the Bill of Rights Act, to ensure that the person is not detained for an unreasonable time.

23. We do not consider that the above provisions could be interpreted as authorising arbitrary detentions.
Consistency with section 25(c) (Presumption of Innocence)

24. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty according to law. This means that the prosecution must prove, beyond reasonable doubt, that the accused is guilty and an individual must not be convicted where reasonable doubt as to his or her guilt exists.

Presumptions relating to blood and breath testing

25. New s 40R states that it will be conclusively presumed that the level of alcohol at the time of the alleged offence was the same as that indicated in subsequent testing. In relation to proceedings for a breath or blood alcohol offence, new s 40F states that it is no defence that there was or may have been an error in the result of the breath screening test or evidential breath test. The defendant cannot challenge the result of the test, which appears to limit s 25(c) of the Bill of Rights Act.

26. Where a legislative provision limits a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be justified under s 5 of that Act. Section 5 permits reasonable limitations, prescribed by law, that are demonstrably justified in a free and democratic society.

27. A limitation on a particular right may be justified where the objective serves a purpose sufficiently important to justify some limitation, and the limitation:

(a) is rationally connected with the objective,

(b) impairs the right or freedom no more than is reasonably necessary for sufficient achievement of the objective, and

(c) is in due proportion to the importance of the objective.

28. We note that similar conclusive presumptions contained in the Land Transport Act 1998 were brought to the attention of the House under s 7 of the Bill of Rights Act. The then Attorney-General concluded that the right could have been less-impaired by allowing the presumption to be displaced by proof or evidence to the contrary.\[4\]

29. However, the Supreme Court has subsequently addressed this presumption in *Aylwin v Police.*\[5\] The Court observed that “The right of election to have a blood test and the right to be advised of that right, conferred by section 70(A), must be regarded as providing effective protection against the consequences of an error in a breath-screening test or an evidential breath test”.\[6\] Furthermore, the Court stated: “The legislature has evidently acted on the view that a blood test, taken by a registered medical practitioner with the result scientifically analysed, is the motorist’s ultimate protection and a reliable basis for a conviction”.\[7\] Given the consideration of this issue by the Supreme Court, and the conclusion reached in that case, we consider it appropriate to reconsider whether the limit on s 25(c) of the Bill of Rights Act can in fact be justified under s 5 of that Act.
30. The objective of the conclusive presumption set out in new s 40R serves a pressing need to control and prevent maritime accidents caused by the consumption of alcohol. The presumption is rationally connected with the objective as it prevents offenders from escaping conviction by drinking after the accident or apprehension and before being tested.[8] and raising technical defences.

31. The limitation impairs the right no more than is reasonably necessary and is in due proportion to the importance of the objective, as the prosecution would still be required to produce a certified copy of a certificate of compliance for the evidential breath-testing device, or a certificate confirming compliance with the blood specimen collecting procedure. The defendant can challenge the admissibility of the certificate in proceedings on the grounds set out in new s 40S.

32. In light of the above reasons, including the decision of the Supreme Court in Aylwin, we consider that a limitation on s 25(c) appears to be justified.

**Strict Liability Offences**

33. Strict liability offences appear to limit the presumption of innocence because the prosecution is not required to prove that the accused intended to commit the offence. The prosecution must prove only that the accused committed the act in question. The accused is then required to prove, on the balance of probabilities, a defence to escape liability. Where an accused is unable to prove the defence, he or she could still be convicted even though a reasonable doubt exists as to his or her guilt.

**Strict Liability Offences in the Bill**

34. New ss 33F(4), 33O(4), 33P(6) and 33Q(5) amend the MTA and state that a person who, without reasonable excuse, fails to comply with a direction or requirement given by an enforcement officer in exercise of the powers conferred by the Bill, is liable to imprisonment for a term not exceeding 12 months or a fine not exceeding $10,000 or both.

35. New ss 124 to 126 amend the EEZ Act and provide for strict liability offences, defences and penalties for prohibited activities including those relating to the discharge and dumping of toxic substances in the EEZ or in or on the continental shelf. New section 126H states that a non-natural person who commits an offence against the Act is liable on conviction to a fine not exceeding $10 million.

36. In considering whether a strict liability offence is justified, we normally consider: the nature of the offence (whether it is regulatory in nature or a truly criminal offence); the ease with which the accused can make out the defence (in some cases it may be a very simple matter for the accused to make out the defence but very difficult for the Crown to prove the opposite); and the penalty level (strict liability offences are generally more suitable for offences carrying a low penalty).

37. We are satisfied that the offences described in the Bill are in the nature of regulatory offences and that the information to make out the defences is particularly
within the realm of the individual’s knowledge. However, we note that the maximum penalty of 12 months imprisonment for offences in the MTA Act is the upper limit of what we would consider reasonable for strict liability offences. The $10 million maximum penalty for non-natural persons for offences in the EEZ Act is also above the normal penalty range for strict liability offences.

Further assessment of the penalties in the Bill

38. In respect of the strict liability offences in the MTA Act, the Ministry of Transport has advised that non-compliance with the requirements or instructions of a harbourmaster could potentially have major adverse environmental consequences. These offences have a safety and environment protection focus and this aggravating factor justifies the imposition of a prison sentence. On balance, we agree that the limitation can be justified in this case.

39. In respect of the strict liability offences in the EEZ Act, the Ministry for the Environment has advised that the $10 million maximum penalty is considered necessary to create an incentive for large multinational corporations to comply with the law. The type and scale of activities in question, the need for effective deterrence, and the potentially serious consequences of offending justifies a high criminal penalty level.

40. We also take into account that $10 million would be the maximum fine, suitable for the most serious cases of offending. These offences include breaching an enforcement order or undertaking a discretionary activity under the Bill, such as mining for minerals or petroleum, without a marine consent. The Courts have flexibility to exercise their discretion in sentencing and may impose fines less than the maximum. We have therefore concluded that the limitation can be justified in this case.

Conclusion

41. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed by the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

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