

# **Crimes and Misconduct (Overseas Operations) Bill**

Government Bill

As reported from the Foreign Affairs, Defence and Trade Committee

## **Commentary**

### **Recommendation**

The Foreign Affairs, Defence and Trade Committee has examined the Crimes and Misconduct (Overseas Operations) Bill and recommends that it be passed with the amendments shown. This commentary outlines our consideration of the major issues raised in relation to the bill, and the amendments we recommend.

### **Background**

The Crimes and Misconduct (Overseas Operations) Bill allows New Zealand to exercise criminal jurisdiction over New Zealand police personnel and civilians serving overseas as part of non-United Nations deployments. Under current New Zealand law, criminal jurisdiction can only be exercised for offences committed overseas as part of deployments where those offences are committed by New Zealand Defence Force personnel or by police personnel serving in a United Nations force. The bill will allow New Zealand to exercise jurisdiction over non-armed service personnel participating in the deployment in Solomon Islands, to help restore law and order and functioning Government institutions, in the same way that New Zealand can exercise jurisdiction over New Zealand Defence Force personnel also serving in Solomon Islands. The bill, and the creation of this jurisdiction, also covers any deployments for similar purposes that might be necessary in the future.

### **Presentation of Status of Forces Agreement**

On 12 August 2003 the Minister of Foreign Affairs and Trade presented to Parliament the Agreement Concerning the Operations and Status of the Police and Armed Forces and Other Personnel Deployment to Solomon Islands to Assist in the Restoration of Law and Order and Security, for examination. We considered this agreement separately, and presented a report on 29 August 2003 noting that we had no matters to bring to the attention of the House.

We note the agreement is not of a type that the Minister was required to present to the House under the provisions of Standing Order 384. Nevertheless, given the degree of interest surrounding the deployment and the scale of New Zealand's potential involvement, the Minister decided that the Agreement warranted referral. It was also considered necessary, given the urgency of getting into force as quickly as possible and preferably before New Zealand personnel were deployed to Solomon Islands (so that they could from the outset enjoy its jurisdictional protections), that urgent treaty action be taken by the Government as provided for under the *Cabinet Office Manual*.

We appreciate the opportunity the Minister has given us to directly examine a status of forces type of agreement for the first time since the international treaty examination process was established. Examination of the Agreement is also important in relation to our consideration of the bill. Although the Agreement is not appended to the bill as a schedule, it is attached as an appendix to the committee's report on the treaty examination. We look forward to the Minister presenting important treaties of this kind, where there are particular and distinct features related to the particular deployment for examination in Parliament in the future.

### **Powers of arrest and detention**

We recommend amending clauses 6(2) and 6(4) to clarify that the New Zealand Police will have powers of arrest overseas. It is possible to argue that the bill as drafted gives the New Zealand Police powers to arrest in New Zealand only. This amendment complements New Zealand's assertion of its jurisdiction overseas and is consistent with the provisions of the United Nations (Police) Act 1964, which are intended to allow for an arrest to take place overseas. The amendment will provide for powers of arrest and detention similar to those contained in the Armed Forces Discipline Act 1971

in relation to New Zealand Defence Force personnel serving overseas.

### **Necessity of reference to New Zealand Bill of Rights Act 1990**

We considered whether, in clarifying that the police will have powers of arrest overseas, a reference in the bill is necessary to the provisions in the New Zealand Bill of Rights Act 1990 governing arrest and criminal prosecutions. We do not believe that such a reference is necessary. The inclusion of a specific reference to the Act and the application of its arrest and detention provisions overseas may imply that the Act would not apply in other similar statutory provisions where no specific reference is made, such as the United Nations (Police) Act and the Armed Forces Disciplines Act. The reference in clause 6(3) to the arrest provisions of the Crimes Act 1961 means that anyone arrested under the bill will have rights very similar to those under section 23 of the New Zealand Bill of Rights Act. We note that the saving of jurisdiction provision in clause 8 means that any common law principle, such as the right to silence, would apply to anyone arrested under the bill.

We are advised the bill does not appear to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act. This legal advice on the bills consistency with the Act is available at <http://www.justice.govt.nz/bill-of-rights/bill-list-2003/c-bill/crimes-misconduct.html>.

## **Jurisdiction**

### **Fictional territorial link**

We do not agree with the submitters that the creation of a 'fictional territorial link' in clause 5 is unnecessary. Many countries apply their laws based on nationality as well as territoriality, so that they extend to offences against that country's law even when committed abroad. This is an accepted practice under international law. Generally, this has not been the legal practice in New Zealand, where criminal law jurisdiction has generally been territoriality based. However, the main exceptions have been where, under international treaties New Zealand has concluded, it has been required to assume a wider jurisdiction over a particular form of conduct, such as terrorist acts. The bill does not assert a general extra-territorial jurisdiction over New Zealand nationals, rather, it asserts a limited jurisdiction in respect of some New Zealand nationals only. We note

that this approach is consistent with the United Nations (Police) Act and is also reflected in section 8A of the Crimes Act 1961 in respect of diplomatic and consular relations staff serving overseas with immunity in their host jurisdictions.

### **Prosecution of third country national for offence not an offence under that national's own laws**

We considered the possibility of a third country national serving as part of a New Zealand overseas operation force of the kind covered in the bill and being subject to our criminal jurisdiction. It is likely that such a person would be subject to explicit participation arrangements between his or her own Government and the New Zealand Government that would include the allocation of responsibility and jurisdiction between the two countries.

It seems unlikely that a situation would arise where a particular offence under New Zealand law was not mirrored by a similar offence provision under the law of the third country. We note that in the rare event of such a situation arising, the Attorney-General would still have the option of withholding consent to prosecute. Such persons should be included by the provisions of the bill, and thereby be able to assert jurisdiction over such persons where they are part of a New Zealand operation, so as to avoid the risk of allowing them impunity from prosecution. We believe there is adequate scope for any tensions that might arise between the two Governments to be resolved amicably.

### **Distinction between civilians and police members of operation**

We do not consider that a greater distinction between police and civilian members of an operation is necessary. In essence, members of an operation will be subject to prosecution for the same sorts of offences, regardless of whether they are members of the police or civilian members. Clause 7, relating to misconduct or neglect of duty by a member of the police, is the only provision where a distinction is made. We note that members of the police may have defences available to them, because of their policing role, and that artificially treating civilian members as police personnel could create difficulties because of different consequences that may flow from those provisions.

## **Fair warning of applicable law**

We considered whether the bill is consistent with a process of ‘fair warning’ in that it may not be clear what law applies to an alleged offender until after proceedings are brought against an individual. Submitters recommend that the extent of both local and New Zealand jurisdiction over acts and omissions should be clear before a member is posted overseas, rather than decided on an ad hoc basis.

The purpose of the bill is to provide New Zealand authorities with the ability to prosecute, to ensure that:

- a person does not enjoy impunity if, under bilateral arrangements concluded with the receiving state, that person is immune from prosecution locally, and
- where, as with the agreement with Solomon Islands, there is some level of concurrent jurisdiction, we can exercise it and thereby ensure that prosecution takes place in accordance with New Zealand procedures and standards of justice.

The underlying assumption is that the New Zealand authorities would prosecute where international arrangements allow New Zealand to do so, and that there be little scope for inconsistencies in decisions on where a person might be tried. We are advised that bilateral arrangements will normally be expected to make it clear in advance the manner in which jurisdiction is divided or shared. The practice of the New Zealand Defence Force and the New Zealand Police is to provide information to personnel before departure on the legal basis for the operation, including on issues of jurisdiction, and to advise and provide information on respect for local laws and customs. We believe that the provision of such information on the division of jurisdiction between two countries will address the concerns of the submitters and is appropriate for the purpose of the bill.

## **The need for secondary ‘back-up’ jurisdiction**

We considered the possibility of the host state bringing criminal proceedings against a member of an overseas operation force and New Zealand, under clause 5(2)(b)(ii), not being able to assert jurisdiction in the event that an individual is convicted overseas and the punishment is less lenient than would have received in New Zealand. We do not consider it appropriate for New Zealand to retain the right to prosecute someone a second time, in New Zealand, in those circumstances where a receiving state has the

primary jurisdiction and exercises it in a manner that the Government might consider unsatisfactory. This would be inconsistent with preventing instances of double jeopardy.

It is an important principle of New Zealand law, and many other systems of law, that a person should not be exposed to prosecution a second time for the same offence. This is consistent with Article 14(7) of the International Covenant on Civil and Political Rights (albeit directed at double jeopardy within one jurisdiction) and is embodied in section 26(2) of the New Zealand Bill of Rights Act. There is also express provision in the Armed Forces Discipline Act that a person tried by a court or court martial in another country having jurisdiction shall not be tried again under our Act in New Zealand.

In the unlikely event of a member of an overseas operation force having criminal proceedings brought against him or her, we would expect the New Zealand Government to have negotiated an agreement giving New Zealand the maximum possible level of jurisdiction over its nationals, including exclusive jurisdiction for offences committed in the course of official duties. We note that in this regard Article 10(3) of the Agreement on restoring law and order and security in Solomon Islands, states:

Criminal and disciplinary jurisdiction shall not be exercised over a member of the Visiting Contingent arising out of an action taking place in Solomon Islands if such jurisdiction is asserted over that member in respect of that action by an Assisting Country.

We also note that even when personnel from the New Zealand Police or New Zealand Armed Forces are prosecuted in a receiving state, they would still be subject to their own internal disciplinary and misconduct proceedings.

## **Appendix**

### **Committee process**

The Crimes and Misconduct (Overseas Operations) Bill was referred to the committee on 5 August 2003. The closing date for submissions was 12 September 2003. We received and considered a joint submission from Alberto Costi, Fran Wright and Naresh Perinpanayagam of Victoria University Law School, which was heard. Hearing of evidence took 25 minutes and consideration took 49 minutes.

We received advice from the Ministry of Foreign Affairs and Trade, the New Zealand Defence Force and the New Zealand Police.

### **Committee membership**

Hon Peter Dunne (Chairperson, United Future)

Luamanuvao Winnie Laban (Deputy Chairperson, Labour)

Tim Barnett (Labour)

Martin Gallagher (Labour)

Keith Locke (Green)

Dr Wayne Mapp (National)

Ron Mark (New Zealand First)

Hon Matt Robson (Progressive)

Dr the Hon Lockwood Smith (National)

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Crimes and  
Misconduct (Overseas Operations)

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**Key to symbols used in reprinted bill**

**As reported from a select committee**

**New (unanimous)**

Subject to this Act,

Text inserted unanimously

~~*Subject to this Act,*~~

Words struck out unanimously

Subject to this Act,

Words inserted unanimously

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*Hon Phil Goff*

# **Crimes and Misconduct (Overseas Operations) Bill**

Government Bill

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5	Jurisdiction over police and civilian members of overseas operations force		

**The Parliament of New Zealand enacts as follows:**

### **1 Title**

This Act is the Crimes and Misconduct (Overseas Operations) Act **2003**.

### **Part 1**

#### **Preliminary provisions**

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### **2 Commencement**

This Act is deemed to have come into force on 24 July **2003**.

### **3 Purpose**

The purpose of this Act is to—

- (a) ensure that members of the police and other persons serving in overseas operations involving peacekeeping, the maintenance or restoration of law and order or functioning government institutions, or similar activities, are subject to the jurisdiction of New Zealand Courts for offences against New Zealand law committed overseas, unless there is good reason why they should not be subject to that jurisdiction: 10  
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- (b) ensure that members of the police engaged in such operations are subject to the disciplinary processes that apply to members of the police in New Zealand.

#### 4 Interpretation

In this Act, unless the context otherwise requires,— 5

**member of the police** includes a non-sworn member of the police

**Minister** means the Minister of Police

**overseas operations force**—

- (a) means any group of persons that, before, on, or after the commencement of this Act, is authorised or required by the Government of New Zealand to participate in duties overseas involving peacekeeping, the maintenance or restoration of law and order or functioning government institutions, or similar activities (whether or not in conjunction with personnel from 1 or more other countries); but 10 15
- (b) does not include any member of the police who is part of a United Nations force and to whom the United Nations (Police) Act 1964 applies. 20

### Part 2

#### Jurisdiction over police and civilian members of overseas operations force

##### 5 Jurisdiction over police and civilian members of overseas operations force 25

- (1) This section applies to any member of the police or any other person who is not a member of the armed forces while that member of the police or that other person—
- (a) is a member of an overseas operations force; and
- (b) is outside New Zealand. 30
- (2) If any person to whom this section applies does, or omits to do, any act outside New Zealand (whether or not the act or omission concerned constitutes an offence under the laws in force in the place where it took place) that if done or omitted within New Zealand would constitute an offence, that act or omission is deemed to have taken place within New Zealand unless— 35

- (a) the person is subject to the criminal jurisdiction of the place in which the act or omission took place; and
- (b) the authorities in that place—
  - (i) are not subject to any obligation to cede jurisdiction to the New Zealand authorities in respect of that act or omission; and
  - (ii) bring criminal proceedings against the person in that place.
- (3) No information may be laid against any person over whom jurisdiction is claimed by virtue of **subsection (2)** without the consent of the Attorney-General.

Compare: 1961 No 43, s 8A(2), (3); 1964 No 1 ss 3, 4

## 6 Powers of arrest and detention

- (1) **Subsection (2)** applies to any offence in respect of which the laying of an information requires the consent of the Attorney-General under *(by)* **section 5(3)**.
- (2) If any person is alleged to have committed an offence to which this subsection applies,—
  - (a) the person may be arrested without warrant within or outside New Zealand; or
  - (b) a warrant for the person's arrest may be issued in New Zealand and executed within or outside New Zealand,—  
and the person may be detained in custody within or outside New Zealand or, *(as the case requires,)* if the person is in, or has been taken to, New Zealand, remanded in custody or on bail, even though the consent of the Attorney-General has not been obtained to the laying of an information in respect of that offence; but no further proceedings may be taken until that consent has been obtained.
- (3) The provisions of the Crimes Act 1961 relating to arrest apply in respect of the arrest of any person referred to in **subsection (2)** for any act or omission to which **section 5** applies, in all respects as if the act or omission had occurred in New Zealand.

**New (unanimous)**

- (4) Any person arrested outside New Zealand may be detained in custody outside New Zealand for as long as is reasonably necessary to enable the person to be taken to New Zealand.

Compare: 1961 No 43 s 8A(4), (5); 1964 No 1 s 5(1)

- 7 Misconduct or neglect of duty** 5
- If any member of the police does or omits to do any act, and that act or omission would, if it occurred in New Zealand, be misconduct or neglect of duty for the purposes of the Police Act 1958 or any regulations made under that Act,—
- (a) the member may be investigated and, if appropriate, proceeded against under that Act or those regulations by way of disciplinary action and punished, in the same manner in all respects as if the act or omission had occurred in New Zealand; and 10
- (b) for that purpose, the Police Act 1958 and any regulations made under that Act apply with any necessary modifications. 15

Compare: 1964 No 1 s 6

- 8 Saving of jurisdiction** 20
- Nothing in this Act limits or affects the provision of any enactment or rule of law relating to the liability of persons in respect of acts done or omitted beyond New Zealand.

Compare: 1964 No 1 s 7

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**Legislative history**

29 July 2003  
5 August 2003

Introduction (Bill 68–1)  
First reading and referral to Foreign Affairs, Defence and Trade Committee

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