NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Brokering (Weapons and Related Items) Controls Bill

13/02/2018

Submission on the Brokering (Weapons and Related Items) Controls Bill

1. Introduction

1.1. The Brokering (Weapons and Related Items) Controls Bill (Bill) is directed at the implementation of New Zealand's obligations under the Arms Trade Treaty (ATT) to regulate brokering of conventional arms. The ATT is a significant and widely ratified international agreement that has sought to address longstanding and serious problems arising from the global arms trade.

1.2. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Bill. This submission addresses the following issues in the Bill:

a. the sequencing of treaty ratification and implementing legislation (paragraph 2);

b. the extraterritorial scope of the Bill (paragraph 3); and

c. a number of technical and drafting matters, discussed in the order of the relevant clauses (paragraphs 4 – 12).

1.3. The Law Society would appreciate the opportunity to appear before the Committee.

2. Sequencing of treaty action and implementing legislation

2.1. The explanatory note and departmental background materials record that while much of the ATT can already be given effect through existing legislation, the Bill is understood to be required because the ATT requires that New Zealand, as a state party, "take measures, pursuant to its national laws, to regulate brokering" in relation to conventional arms, and there is no current legal provision to regulate international brokering.[1]

2.2. It is extremely unusual for legislation implementing New Zealand's obligations under an international treaty – even in part – to be introduced to the House after New Zealand has ratified the treaty in question. There is a long standing constitutional practice that, as a matter of principle, New Zealand will ensure it has all necessary measures in place to fully comply with the requirements of a treaty before it becomes party to it.[2]

2.3. That practice ensures that:

a. New Zealand will not be placed in a position where it is unable to comply with its international obligations, which take effect upon ratification and – at international law – without regard for whether legislation is in place; and

b. Parliament is not presented with a *fait accompli* when implementing legislation is introduced: that is, that Parliament should not be put in the position of deciding upon legislation necessary for an international obligation when the executive government has already acted to apply that obligation to New Zealand.

2.4. While that practice has not always been followed, at least in other similar countries, these risks are significant.[3]

2.5. It appears that this practice was not followed in this case at least partly to enable New Zealand to ratify the ATT as a matter of urgency in order to attend the first meeting of ATT States Parties in

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1 The relevant provision is Article 10 of the ATT.

2 See, for example, LAC Guidelines at Chapter 8 at http://www.ldac.org.nz/assets/documents/8.-Treaties-and-international-obligations.pdf.

3 See, for example, A Aust *Modern Treaty Law and Practice* (3ed: Cambridge, 2013) 95 (describing such actions as "inherently risky").

early 2015 and so take part in potentially significant decisions to be made at that meeting. Parliament's Foreign Affairs, Defence and Trade Committee recommended that the Treaty be ratified urgently and implementing legislation introduced later in light of these imperatives and based on the view that a voluntary registration regime would meet the requirements of the Treaty for the purpose of ratification.[4]

2.6. These considerations are acknowledged, but the long-established practice of implementing legislation prior to becoming party to a treaty is important. Deferred legislative implementation should be avoided, and this Bill should not establish a precedent.

3. Territorial scope of the Bill

3.1. As noted above, Article 10 of the ATT requires New Zealand to "take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction" and notes that such measures may include registration or authorisation requirements.

3.2. The United Nations' commentary on the ATT notes that there are three kinds of transnational brokering: (1) import/export/transit (where the arms pass through New Zealand); (2) third-party/third-country brokering (where the broker is based in New Zealand but arranges for arms to be transferred between one foreign country and another foreign country); and (3) extraterritorial broking (where a citizen or resident of New Zealand travels outside New Zealand and conducts broking in that foreign country).[5] The explanatory note to the Bill notes that category (1) (import, export and transit) is covered by existing legislation; the Bill is required to regulate categories (2) and (3).

3.3. While Article 10 does not expressly require the Bill to have extraterritorial application, this is necessary to properly regulate categories (2) and (3). Arms brokering activity can involve discrete steps taken in several different jurisdictions. Extraterritorial jurisdiction over those steps reduces the risk that brokering activity may be conducted to avoid effective regulation. This may include involving countries not party to the ATT or that have less effectual enforcement or by breaking transactions into parts to avoid the jurisdiction of any one country. Extraterritorial jurisdiction therefore contributes to the ATT's objective of establishing the highest possible international standards in the regulation of the international trade in conventional arms and avoiding recognised problems in effective policing of arms brokering.[6] Currently extraterritorial application is achieved through clause 33, the offence provision.

3.4. The jurisdictional scope of the legislation is appropriate, but could be refined in three ways:

a. The territorial scope of the Bill should be defined upfront in Part 1 of the legislation, so that the reach of all of its provisions (including the registration requirements) is made clear;

b. It may not be appropriate to extend the Act to persons who are not New Zealanders, who are not ordinarily resident here, and who have not conducted any brokering activities here; and

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4 *Report of the Foreign Affairs Defence and Trade Committee: International Treaty Examination of the Arms Trade Treaty* (3 July 2014) at pp 2 and 4. It is possible that that position reflects the terms of the relevant provision of the ATT, which commentators have acknowledged may be limited: see S Parker "Article 10: Brokering" in A Clapham, S Casey-Maslen, G Giacca & S Parker *The Arms Trade Treaty: A Commentary* (Oxford, 2016) 330, 340.

5 United Nations Office of Disarmament Affairs *Arms Trade Treaty Implementation Toolkit: Module 9 Brokering* (available on: www.un.org/Disarmament/ATT) at p.5.

6 See Article 1 of the ATT and Parker, above n 4, 10.33 citing UNIDIR *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons—Scope and Implications* (2007) that some extraterritorial jurisdiction is essential for meaningful controls.

c. The exemption for employees should be tightened to prevent abuse.

How the Bill's territorial scope is defined

3.5. Clause 33 provides that the offences in the Bill will have extraterritorial application to:

a. New Zealand citizens (clause 33(1)(a)(i));

b. persons "ordinarily resident" in New Zealand (clause 33(1)(a)(ii));

c. persons "found in New Zealand" who have not been extradited (clause 33(1)(a)(iii));

d. entities incorporated or registered under the law of New Zealand (clause 33(1)(a)(iv)); and

e. acts or omissions committed on New Zealand ships or aircraft (clause 33(2)).

3.6. Most legislation and, in particular, most regulatory and criminal offence provisions, apply only within New Zealand. Under international law New Zealand is permitted to exercise extraterritorial criminal jurisdiction in certain limited circumstances. This may include where the offender is a New Zealand citizen or resident; jurisdiction is necessary to protect the security of New Zealand or its citizens from the offending; or such jurisdiction is provided for under treaty or customary international law (for example in relation to international crimes or crimes committed outside New Zealand jurisdiction).[7]

3.7. The LAC Guidelines similarly provide that offences should have extraterritorial application only in "exceptional circumstances":[8]

> "There must be a clear case for New Zealand law to apply, and it must be reasonable to expect the people to whom the legislation will apply to comply with New Zealand law (because of their links with New Zealand) or any international standards reflected in New Zealand law."

3.8. Clause 33 is based on section 7A of the Crimes Act 1961, which gives the Crimes Act extraterritorial application in respect of certain crimes (such as people trafficking). However, unlike the Crimes Act, the Bill does more than simply criminalise certain conduct; it requires brokers to register and obtain permits before undertaking brokering. The Bill does not state *who* must be registered, and so this must be inferred from clause 33. As it stands, people who are potentially affected by the Bill must turn to the Miscellaneous Provisions part of the Bill to determine whether the regime applies to them in the first place.

3.9. To improve clarity and avoid uncertainty, a new provision should be included in Part 1 that specifies the territorial scope of the regime, similar to the approach taken in clause 4 of the Autonomous Sanctions Bill 2017 (259–1). (The new provision could be based on clause 33, with the amendments suggested in paragraphs 3.10 – 3.12 below.)

Territorial scope – application to persons not ordinarily resident in NZ

3.10. Article 10 of the ATT requires each state party to institute regulation of brokering "under its jurisdiction" and the Bill creates New Zealand regulatory and offence provisions to that end. The explanatory note records that the Bill is intended to regulate brokering by New Zealanders and New Zealand entities where existing regulation does not apply.[9] Two points are noted.

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7 See, for example, the discussion in Shaw *International Law* (6th ed, Cambridge University Press, 2008) at pp. 652ff.

8 Above n 2 at 9.5.

9 See paragraph 3.2 above.

3.11. First, unlike section 5 of the Crimes Act 1961, the Bill does not state expressly that it applies to any conduct in New Zealand (even by persons who are not New Zealand citizens or ordinarily resident here). While this is implicit, the Bill would be clearer if it were made explicit.

3.12. Second, clause 33(1)(a)(iii) extends the scope of the Bill to persons not ordinarily resident in New Zealand who have engaged in conduct entirely outside New Zealand but who are "found here". Such provision is appropriate in relation to crimes of universal jurisdiction, such as crimes against humanity or terrorism, but may not be appropriate here:

a. Brokering in itself is not a crime of universal jurisdiction and is not subject, either under customary international law or under the ATT, to an obligation to prosecute or extradite.[10] This distinguishes it from most of the recently enacted crimes to which the parallel provision in section 7A(1)(a)(iii) of the Crimes Act applies.

b. Noting the LAC Guidelines standard of reasonable expectation (referred to in paragraph 3.7 above), it does not seem reasonable that a person who has no connection to New Zealand by way of citizenship or residency and does not conduct any brokering activities while in New Zealand should be subject to New Zealand's criminal jurisdiction, simply because he or she happens to be in New Zealand at a particular time (for example on holiday). Such a person cannot realistically be expected to register and obtain a permit from New Zealand as required by clause 9 of the Bill.

c. The Law Society accordingly recommends that the Committee should seek advice on the intent and effect of the extension of jurisdiction in clause 33(1)(a)(iii) and whether it is justified. The equivalent Canadian implementing legislation only applies to acts committed outside Canada by: Canadian citizens, permanent residents, and corporations.[11]

Apparent regulatory gap in clause 9(4)(a) relating to employees

3.13. Under clause 9(1), which is the core offence and enforcement provision of the Bill, brokering is unlawful unless the person is both registered and holds a permit for the particular activity. Clause 9(4)(a) provides that that prohibition does not apply to acts done by a person as an employee on behalf of his or her employer.

3.14. It is understandable that an individual employee should not be required to meet the registration and permitting requirements that are properly to be met by his or her employer. However, the practical effect of clause 9(4)(a) as drafted appears to be that if:

a. the employer is not registered or permitted (whether that is or is not known to the employee),

b. the employer is beyond New Zealand jurisdiction, and/or

c. the employer is otherwise beyond effective enforcement measures (for example is unable to be located or, in the case of a company or other entity, is insolvent or has ceased to exist):

clause 9(1) would not function.

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10 *Cf*, for example, Article 15 of the ATT and the "prosecute or extradite" obligations contained in Articles 42 and 44 of the UN Convention Against Corruption which underpins several of the offences to which section 7A of the Crimes Act 1961 applies.

11 The Canadian Bill C-47 (An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)), clause 13 provides that where a Canadian citizen, permanent resident or corporation commits acts outside Canada, they are deemed to be committed inside Canada.

3.15. Instead, brokering activity by an employee in New Zealand or subject to New Zealand jurisdiction would not be caught by the Bill (including its criminal or regulatory sanctions), since:

a. the employee would not be caught at all, because the clause 9(1) prohibition is disapplied by clause 9(4)(a); and

b. their employer would not be subject to any effective enforcement activity: the employee would not be liable and the employer could not be prosecuted or penalised, even if they were technically liable.

3.16. The disapplication of clause 9(1) in such circumstances effectively bypasses the relevant regulatory and civil enforcement mechanisms in the Bill. While this result might be appropriate in some circumstances (if the employer is genuinely established in an overseas country it may not be appropriate for New Zealand to regulate it), this has the potential to create a substantial loophole and thus compromise the effectiveness of the regime, which is intended to regulate the conduct of New Zealanders in relation to overseas movement of arms. Such a loophole could be easily exploited, for example by a New Zealand broker arranging to be employed by a company incorporated in a country that does not effectively regulate brokering.

3.17. This provision should be reconsidered: one possibility would be to condition the exemption of employees upon the employer having the necessary registration and permit and, so as to protect against sham employers, the employee otherwise acting in good faith. This would mean that a New Zealander employed by a foreign company would be liable (and so would have an incentive to obtain necessary authorisations) unless the employer obtained the necessary registration or permit.

Other matters

4. Meaning of "brokering activity" and ancillary legal services – clause 5(c)

4.1. Legal services that facilitate a brokering transaction would appear to qualify as an "ancillary service" for the purposes of clause 5(c) but are not expressly included in the list of examples given ("(for example, the provision of administrative, customs broking, or financial services …)"). For the avoidance of doubt, legal services should be added to the list of examples in clause 5(c).

5. Identification of an "equivalent overseas regime" – clauses 6 and 9(3)(b)

5.1. Clause 9(3)(b) exempts brokering activities from the registration and permit requirements of clause 9 if they are conducted outside New Zealand by a person who complies with an "equivalent overseas regime".

5.2. It is not sufficient – for example – that the person complies with the law of another state that is party to the ATT: that other state's law must be assessed by the Secretary of Foreign Affairs and Trade to be "substantially the same as" as or "sufficiently equivalent" to the regime under the Bill.

5.3. It is not clear from the definition of "equivalent overseas regime" in clause 6 and the departmental background material to the Bill whether the Secretary will identify these regimes proactively, or whether the Secretary will only determine the question if clause 9(3)(b) is relied upon in a particular case.

5.4. The meaning and intended application of the Bill should be as transparent as possible, in light of the reach of the Bill, the potential difficulty of ascertaining equivalence in terms of clause 6 and the penal consequences of getting that wrong. Because an equivalence assessment effectively determines whether a broker can lawfully operate from New Zealand, a right of appeal should be

available, so that the final decision on equivalence can be made by the courts.[12] This would be accomplished by three additional provisions:

a. The Secretary should be required to make publicly available (e.g. on the Ministry's website) a list of overseas regimes that the Secretary is satisfied are "equivalent overseas regimes";

b. To the extent that the Secretary does not or has not determined that an overseas regime is equivalent, the Bill should include a mechanism by which those engaged in or proposing to engage in brokering from that overseas place can obtain a determination of equivalence from the Secretary; and

c. That determination should be added to clause 37 as one of the decisions against which an applicant has a right of appeal.

5.5. These amendments would significantly assist compliance with, and fair enforcement of, the registration and permit requirements in clause 9.

6. Exceptions to registration and permit requirements and onus of proof – clause 9(5)

6.1. Clauses 9(2), (3) and (4) create a series of exceptions to the registration and permit requirement contained in clause 9(1). These provisions will act as defences to the offence in clause 10.

6.2. Clause 9(5) provides that it may be presumed, in the absence of any evidence to the contrary, that an exception in clauses 9(2), (3) or (4) does not apply. A defendant wishing to rely on an exception in clauses 9(2), (3) or (4) will therefore have to produce some evidence to establish that the exception applies. Likewise, clauses 13 and 22 both provide that an offence will be committed if done "without reasonable excuse".

6.3. It appears that the intention of these provisions is not to place the burden of proof on a defendant to prove his or her defence, which would be contrary to the presumption of innocence guaranteed under section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA), but only to require the provision of some evidential basis for the claimed exception (with the prosecuting agency having the burden of proving the absence of the defence). This is consistent with the Ministry of Justice's NZBORA analysis of clauses 13 and 22.[13] It is noteworthy that the Military Justice Legislation Amendment Bill currently before the House proposes to abolish a provision in the Armed Forces Discipline Act 1971 that forces an accused to prove their defence, which reinforces that such provisions are inappropriate.[14]

6.4. The particular wording used in clause 9(5) appears unique and, while similar drafting is used in a few other statutory provisions, those appear to apply in much narrower contexts relating to particular technical knowledge or intent.[15]

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12 In the absence of a right of appeal, an applicant would be required to apply for judicial review of the decision. Judicial review is not generally an appropriate mechanism for the resolution of the kind of factual disputes that are likely to arise in this context.

13 Ministry of Justice *Consistency with the New Zealand Bill of Rights Act 1990: Brokering (Weapons and Related Items) Controls Bill* (12 June 2017) at [11]-[15].

14 Military Justice Legislation Amendment Bill (299–1), cl 4, repealing Armed Forces Discipline Act 1971, s 3(2), which provides that "Where an accused charged with an offence against this Act relies for his defence on any excuse, exception, exemption, or qualification contained in the provision creating the offence… the accused shall, in order to establish the defence, prove the excuse, exception, exemption, or qualification on a balance of probabilities".

15 See, for example, s 53A(5) of the Civil Aviation Act (presumption, absent evidence, against ignorance of a direction given by a foreign government to an aircraft once proven by the prosecution that a direction was given and not complied with).

6.5. The Law Society recommends that the Committee consider rewording clause 9(5), to make it clear that it only requires a defendant to provide some evidential basis for the exception and does not reverse the burden of proof.

7. Applicant's right to receive "any other information and evidence" relied on by the Secretary – clauses 15(2)(f) and 24(2)

7.1. Clause 15(2)(f) provides that the Secretary may take into account "any other information or evidence (including in relation to any associate of the person) that may be relevant" when considering whether an applicant for registration is a fit and proper person. Clause 24(2) similarly provides that the Secretary may "seek and receive any information" he or she thinks fit and consider information "obtained from any source" when considering applications for a brokering permit.

7.2. Under the principles of natural justice, also known as procedural fairness, guaranteed at common law and affirmed in section 27(1) of NZBORA, applicants are entitled to due opportunity to review and respond to any potentially adverse information proposed to be relied upon by the Secretary in relation to an application. That is particularly true where, as here, those who currently engage, or have in the past engaged, in brokering activities are now required to comply with new regulatory requirements or cease such business.

7.3. In the context of this Bill, that may conceivably include information provided to the Secretary by the Police or other agencies, including intelligence agencies, in New Zealand and overseas. This raises the question of how classified or other sensitive information will be dealt with in this context. It is likely that the Secretary may seek to withhold such information and, further, that any request for such information under the Official Information Act 1982 or the Privacy Act 1993 would be declined on the grounds of prejudice to New Zealand's international relations or its security and defence.[16]

7.4. The question of how to deal fairly with such information is not straightforward and may, absent clear legislative provision, entail either unjust outcomes for applicants or protracted litigation.[17] This point is not addressed in the Bill or the departmental background materials, but has been extensively considered in the Law Commission's December 2015 report *The Crown in Court: A review of the Crown Proceedings Act and national security information in proceedings*.[18]

7.5. The Law Society recommends that further consideration be given to this point. Provision should be made for applicants, or their representatives, to have necessary protections, including access to information provided to the Secretary under clauses 15(2)(f) and 24(2). Specific procedures should be established for appropriate access to classified information.

8. Applicant's access to reasons for refusal of application – clauses 16 and 25

8.1. Clauses 16 and 25 provide that the Secretary must give an applicant notice of a decision to refuse an application for registration or a permit.

8.2. However, in order for that notice to be meaningful and for the applicant to be able to consider whether and, if so, how to exercise the statutory rights of appeal, it is necessary for the Secretary to give reasons. An obligation to provide reasons increases public confidence in, and the legitimacy

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16 Sections 6(a) and (b) Official Information Act 1982; section 27 Privacy Act 1993.

17 See, for example, the decision of the United Kingdom Supreme Court in *Bank Mellat v Her Majesty's Treasury (No. 1)* [2014] 1 AC 700 at [6].

18 NZLC R135.

of, administrative processes, promoting real consideration of the issues and discouraging the decision-maker from merely going through the motions.[19] Provision for reasons will also need to address the questions of sensitive information noted above.

8.3. For these reasons, the Law Society recommends that clauses 16 and 25 be amended to require the Secretary to provide the applicant with written reasons for his or her decision.

9. Imposition of *ex post facto* conditions – clauses 18(2) and 27(2)

9.1. Clauses 18(2) and 27(2) permit the Secretary to impose conditions on registration or on a brokering permit at any time.

9.2. For the avoidance of doubt, any such conditions should be prospective only. Any conditions imposed after a broker has been registered or a permit has been issued should be communicated to the broker in writing before they take effect.

10. Attorney-General's consent – clause 34

10.1. Clause 34 requires the Attorney-General's consent to any charges in relation to the offences under the Bill. This provision appears to have been based on section 7B of the Crimes Act 1961, which requires the Attorney-General's consent to any prosecution relying on the extraterritorial jurisdiction of the Act.

10.2. The explanatory note states only that a requirement for the Attorney's consent "is often the position for legislation that has an international dimension".[20] No further explanation is provided in the departmental background documents supporting the Bill.

10.3. As above, it is apparent from the Bill that prosecutions may sometimes relate in whole or in part to conduct that is also within the jurisdiction of another country and so Attorney-General consent may provide a useful means of avoiding overlapping prosecutions or other assertions of jurisdiction. However, the Bill is also in substantial part concerned with compliance by New Zealanders with conventional New Zealand regulatory requirements. On its current wording the Bill would require Attorney-General consent even where the acts underlying the prosecution were committed entirely within New Zealand, which may not be appropriate.

10.4. To the extent that Parliament is concerned with the risk of overlapping prosecutions in different countries (for example, where a New Zealander who conducted arms brokering activity in the United Kingdom is prosecuted in both countries), existing mechanisms such as the power to apply for a stay of prosecution may be available. An alternative could be to follow the proposed Canadian approach which would allow a defendant who has already been tried overseas to plead that prosecution as a bar to prosecution for the same offending in Canada.[21]

10.5. While the requirement for Attorney-General consent may be appropriate, it would be helpful for the reason for this position to be clearly articulated so that it can be assessed by the Committee on its merits and, if need be, refined or otherwise altered.

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19 *Re Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme* [2003] HCA 56, (2003) 216 CLR 212 at [105].

20 At p.7.

21 The Canadian Bill C-47 (An Act to amend the Export and Import Permits Act and the Criminal Code (amendments permitting the accession to the Arms Trade Treaty and other amendments)), clause 13 (inserting new section 14.2).

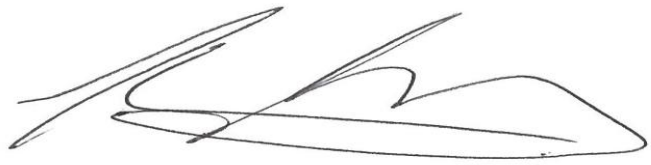
11. Regulation-making in respect of permit criteria – clause 38

11.1. Clause 38(1)(d) provides for the making of regulations to prescribe matters to be considered by the Secretary in permit decisions.

11.2. It is not clear why the criteria for permit decisions cannot be comprehensively set out in the Bill itself, rather than leaving what appears to be policy content to be set by regulation. The Law Society recommends that consideration be given to clarifying what sort of criteria may be envisaged and whether these criteria can be set out in the Bill.

12. Access to the Treaty

12.1. The LAC Guidelines suggest that legislation implementing a treaty should provide easy access to the treaty itself.[22] This could be achieved by including a copy of the Treaty in a schedule to the Bill, or by providing information about where a copy of the Treaty can be accessed.



Kathryn Beck
President
13/02/2018

[22] Above n2 at Chapter 8, Part 3.