New Zealand Law Society
Te Kāhui Ture o Aotearoa

Maritime Powers Bill 2021

20/08/2021

Submission on the Maritime Powers Bill 2021

1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Maritime Powers Bill 2021 (the **Bill**).

1.2 The Bill seeks to provide powers for the enforcement of New Zealand's criminal law in international waters (i.e., the contiguous and exclusive economic zones of New Zealand and other States, as well as the high seas) and uphold New Zealand's rights and obligations under international law, including the United Nations Convention on the Law of the Sea (**UNCLOS**) and international human rights law.

1.3 The Law Society supports the Bill but considers that several aspects, addressed in this submission, need to be clarified.

1.4 The Law Society wishes to be heard in relation to this submission.

2 Summary and recommendations

2.1 In summary, the Law Society makes the following recommendations:

(a) The definition of "extraterritorial offence" is amended to provide clarity on the "act or omission" referred to in clause 5(1)(a).

(b) It is made explicit that nothing in the Act is intended to expand the jurisdiction of any existing offence, or create new extraterritorial offences, to mirror the description of the Bill's policy objective in its Regulatory Impact Statement.[1]

(c) Further consideration is given to the practical implications of the proposed penalty threshold (being offences punishable by 2 or more years of imprisonment) in clause 4.

(d) In respect of clause 3, the 'purposes' provision, either:

(i) The phrase '"international human rights law" is deleted from the purpose statement in the Bill (since nothing in the Bill appears to serve this purpose); or

(ii) The phrase is retained, and the substantive provisions of the Bill are amended to clarify which particular international human rights standards or instruments apply.

(e) Clause 16(4) is deleted; and for each of the powers conferred on enforcement officers in the Bill, consideration is given to whether (and in what circumstances) obtaining a warrant may be appropriate.

2.2 The remainder of this submission sets out the basis for these recommendations.

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[1] At page 3.

3 Definition of 'extraterritorial offence' and the extent of New Zealand's jurisdiction

Definition of 'extraterritorial offence'

3.1 Clause 5(1) defines an "extraterritorial offence", in relation to a person as:

(a) an act or omission done by the person outside New Zealand or in any particular place outside New Zealand for which the person is liable on conviction under New Zealand law to imprisonment for life or to 2 or more years' imprisonment; or

(b) an offence against New Zealand law for which the person is liable on conviction to imprisonment for life or to 2 or more years' imprisonment because of an enactment providing that an act or omission of the person or any other person that occurred outside New Zealand is deemed to have occurred in New Zealand.

3.2 The Law Society considers that the definition of "extraterritorial offence" is insufficiently clear given the range of circumstances in which the enforcement of New Zealand's criminal jurisdiction can arise. Clause 5(1)(a) is, in effect, a cross-reference to all offences under New Zealand criminal law, arising from acts or omissions done by a person outside New Zealand which carry a penalty of 2 or more years' imprisonment. This is too imprecise in the context of a Bill relating to the enforcement of New Zealand criminal law outside the territory of New Zealand, including on board foreign ships on the high seas.

3.3 The starting point should be the presumption that jurisdiction (in all its forms) may not be exercised extraterritorially without a specific basis in international law.[2] Brownlie's Public International Law summarises the position as follows:[3]

> *…the two generally recognized bases for prescriptive jurisdiction of all types are the territorial and nationality principles, but their application is complemented by the operation of other principles especially in certain fields. The use of the passive nationality principle in cases of international terrorism appears to be accepted and, over time, opposition to the use of the effects doctrine by the US and EU in the pursuit of certain competition law objectives is diminishing. As a general rule, however, it remains true that if a state wishes to avoid international criticism over its exercise of extra-territorial jurisdiction, it is better to base the prescriptive elements on territoriality or nationality.*

3.4 The difficulty with the approach proposed in the Bill is that the precise scope of "extraterritorial offence" is unknown. The Regulatory Impact Statement confirms that no attempt has been made to determine all offences that would be covered by this definition.[4] A greater degree of specificity is required to avoid the risk that enforcement officers may purport to exercise enforcement jurisdiction in situations where there is no basis for doing so under international law. This need is heightened by the fact that the actions of those officers will engage New Zealand's responsibility under international law (regardless of any immunity enjoyed by individuals and/or the Crown under New Zealand law).

3.5 Clarity as to the basis under international law on which New Zealand is exercising its jurisdiction in respect of the "act or omission" referred to in clause 5(1)(a) could be achieved by specifying that "extraterritorial offences" applies to acts and omissions:

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[2] James Crawford, Brownlie's Public International Law (9th ed, Oxford University Press, 2019), at p 440.

[3] *Ibid*, at page 469.

[4] At page 3.

(a) by a New Zealand national (i.e., jurisdiction on the basis of active nationality);

(b) against a New Zealand national (i.e., jurisdiction on the basis of passive nationality);

(c) on a New Zealand-flagged ship (i.e., in respect of which New Zealand has exclusive jurisdiction under Article 92 of UNCLOS); and

(d) in respect of offences on a foreign ship not involving a New Zealand national, only in respect of specified offences. This could be achieved by identifying the relevant offences in regulations to be made by Order-in-Council.

3.6 A useful example of similar drafting in respect of (d), above, can be found in section 7A of the Crimes Act 1961. Section 7A provides that proceedings may be brought in New Zealand for any offence against the Crimes Act 1961 in the course of carrying out a terrorist act or an offence against certain specified offences under New Zealand law, even if the acts or omissions said to constitute an offence occurred outside New Zealand. This general statement is qualified by sub-sections 7A(1)(a)-(d), which identify the basis for New Zealand's exercise of jurisdiction over the relevant offence.

3.7 The Law Society therefore recommends the definition of "extraterritorial offence" is amended so that the basis under international law on which New Zealand is exercising its jurisdiction in respect of the "act or omission" referred in clause 5(1)(a) is clear.

Extent of New Zealand's extraterritorial jurisdiction – not intended to expand

3.8 The Regulatory Impact Statement explains that the enforcement powers under the Bill will apply in respect of offences against New Zealand law for which "New Zealand has already established extraterritorial jurisdiction" and that the Bill will not "expand jurisdiction of any existing offence or create new extraterritorial offences".

3.9 The Law Society considers that an unequivocal statement that New Zealand is not exercising its prescriptive jurisdiction (i.e., a state's power to make laws, decisions or rules) inconsistently with international law is necessary.[5] It is particularly important in the context of a Bill that has upholding New Zealand's obligations under UNCLOS as one of its purposes. In the *M/V "Norstar" Case* (Panama v. Italy), the International Tribunal for the Law of the Sea explained in relation to Article 87 of UNCLOS relating to the freedom of the high seas that:[6]

> *…if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties. This would be so, even if the State refrained from enforcing those laws on the high seas.*

3.10 The Law Society therefore recommends inclusion of an explicit provision, to the effect that nothing in the Act is intended to expand the jurisdiction of any existing offence or to create new extraterritorial offences.

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5 The Law Society notes that a review of the scope of New Zealand's claims to extraterritorial jurisdiction was beyond the scope of the work undertaken for the purposes of the Bill (Regulatory Impact Statement, p 9).

6 M/V "Norstar" (Panama v. Italy), Case No. 25, Judgment of 10 April 2019 (https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf), at [225].

4 Proposed penalty threshold for 'specified offence'

4.1 Clause 4 defines a "specified offence" as "an offence against New Zealand law punishable by imprisonment for life or by 2 or more years' imprisonment."

4.2 The Law Society considers that this definition requires revision. For example, it would exclude the offences in ss 101A-C of the Crown Minerals Act 1991 regarding interference with structures or operations connected to mining activity in an offshore area, including the exclusive economic zone (the EEZ) or above the continental shelf because they do not, upon conviction, result in imprisonment of 2 or more years. In contrast, the offence of damaging a fixed platform in a manner that endangers the safety of the platform under section 5 of the Maritime Crimes Act 1999 would be caught by the threshold.

4.3 As a result, the more extensive powers given to enforcement officers under the Bill would be available where a person has damaged a platform in the EEZ in a manner that endangered the platform's safety, but a more limited set of powers would be available to an enforcement officer under the Crown Minerals Act 1991 where a person simply damaged a platform without endangering safety. This is likely to be a difficult distinction for an enforcement officer to draw in practice.

4.4 The Law Society recommends further consideration is given to the practical implications of the proposed threshold.

5 Reference to 'international human rights law' in Clause 3

5.1 The purposes of the Bill include upholding New Zealand's rights and obligations under international law, including "particularly … international human rights law" (clause 3(b)).

5.2 As currently drafted, the Bill does not contain any express reference to the obligations under international human rights law that are said to apply. This is likely to lead to uncertainty about which international human rights standards are intended to apply and when.

5.3 New Zealand has ratified a number of international human rights instruments and some international human rights have attained customary status under international law. For example, New Zealand has ratified seven of the nine core United Nations human rights treaties:

(a) International Covenant on Civil and Political Rights;

(b) International Covenant on Economic, Social and Cultural Rights;

(c) Convention on the Elimination of All Forms of Racial Discrimination;

(d) Convention on the Elimination of All Forms of Discrimination Against Women;

(e) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(f) Convention on the Rights of the Child; and

(g) Convention on the Rights of Persons with Disabilities.

5.4 In the context of this Bill, New Zealand's obligations under international human rights law arguably extend to additional instruments such as:

(a) The Convention against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air.

(b) UNCLOS, which imposes obligations with a human rights dimension such as the duty to render assistance under Article 98, and the prohibition on the transport of slaves under Article 99.

5.5 As currently drafted, it is unclear what is meant by 'international human rights law,' and how the Bill is intended to uphold those unspecified rights. To the extent that New Zealand's international human rights obligations may become relevant in any case, those obligations do not rely upon inclusion of this reference in clause 3.

5.6 The New Zealand Bill of Rights Act 1990 (the Bill of Rights) will also apply to the acts and omissions of New Zealand enforcement officers acting in their official capacities, even if they are outside the territory of New Zealand. It may also be useful for the Bill to clarify that where New Zealand's criminal laws are exercised outside New Zealand by enforcement officers, this is with the benefit of the rights and freedoms guaranteed by the Bill of Rights.

5.7 The Law Society recommends either:

(a) the phrase "international human rights law" is deleted from the purpose statement in the Bill (since nothing in the Bill appears to deliver on this purpose); or

(b) the phrase is retained, and the substantive provisions of the Bill are amended to clarify which particular international human rights standards or instruments apply.

6 <u>The importance of providing safeguards before the exercise of enforcement powers</u>

6.1 As currently drafted, the Bill provides for the exercise of powers to enforce New Zealand's criminal jurisdiction potentially anywhere, with limited independent oversight of how the powers are exercised by enforcement officers.

6.2 The main safeguards in the Bill are:

(a) Clause 37 ('Secretary of Foreign Affairs and Trade responsible for seeking consent'); and

(b) Clause 44 ('Reporting of exercise of powers under this Act').

6.3 In respect of an enforcement officer's power to search a ship, clause 20(4) provides that "Subparts 1 and 4 (except section 121) and subparts 5 and 6 (except section 160) of Part 4 of the Search and Surveillance Act 2012 apply." However, the general position in the Bill is set out in clause 16(4), which provides that an enforcement officer does not require a warrant to exercise the powers in Part 2 of the Bill.

6.4 The Departmental Disclosure Statement suggests that the reason for including this provision is “the potentially serious nature of offending” and “the reality that these powers will be used at some distance from the shore where safety of life at sea is paramount.”[7]

6.5 The Law Society does not agree that these reasons justify clause 16(4). It does not follow from those practical concerns that enforcement officers should always be able to enforce the powers under the Bill without a warrant.

6.6 A warrant provides an important safeguard, in that an independent person has been satisfied to the requisite standard that it is necessary to exercise the relevant powers in the circumstances. As the New Zealand Law Commission observed in its report on Search and Surveillance Powers, the requirement to obtain a warrant is to ensure a search complies “with human rights norms”.[8] Those norms include the right to be secure from unreasonable search and seizure under section 21 of the Bill of Rights. The need to obtain a warrant can be seen as particularly important because there is no independent oversight provided for in the Bill (with the exception of clause 20).

6.7 It seems unlikely that it will always be impractical to obtain a warrant before exercising powers under the Bill. The “reasonable grounds” that an enforcement officer must have will not always arise at sea or in a situation of urgency. For example, the exercise of the powers may be undertaken pursuant to investigations into transnational criminal activity conducted over a sustained period of time. A warrant can be obtained before a ship departs from port or through communications between the ship and an independent person. It would be reasonable and prudent to require obtaining a warrant in those circumstances.

6.8 Indeed, the Bill itself contemplates situations where the exercise of the powers is contingent on action by officials in New Zealand. For instance, under clause 12, before an enforcement officer can exercise powers in relation to a foreign ship (and assuming none of the relevant exceptions in sub clauses 12(2)(a) (e) applies), the Secretary of Foreign Affairs must seek consent of the flag State. It is difficult to see how this is possible, but obtaining a warrant is not.

6.9 The paramountcy of safety of life at sea is also not a reason to provide that enforcement officers should be able to exercise powers without a warrant. If an enforcement officer needed to act urgently to protect a person’s life at sea, this could be addressed by the type of provision referred to below. Finally, the fact that some of the offending may be serious is itself not a good rationale for not requiring enforcement officers to obtain a warrant. Police officers exercise powers in respect of serious offending in New Zealand and do so after first obtaining a warrant.

6.10 To the extent that the exercise of certain powers at sea makes obtaining a warrant impractical, it should be possible either to provide for the limited application of the Search and Surveillance Act 2012, with certain provisions disapplied, or to specify a limited exception to the general presumption that a warrant should be required. Such an approach is preferable to the current proposal. Any concern that enforcement officers would not have a statutory basis to act without a warrant if they are exercising powers under this Bill outside New Zealand could be addressed by including a specific provision clarifying the basis for their power to act in certain circumstances.

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[7] At page 3.

[8] NZLC R97 (2007) at [2.64].

6.11 The Law Society recommends that:

(a) clause 16(4) be deleted; and

(b) for each of the powers conferred on enforcement officers in the Bill, consideration be given to whether (and in what circumstances) obtaining a warrant may be appropriate.

7 Additional drafting comments

7.1 The Law Society makes the following additional drafting recommendations.

Clause 6: 'Meaning of pursued without interruption'

7.2 Article 111 of UNCLOS recognises the well-established concept of "hot pursuit" under international law. The Bill introduces a new term, "pursued without interruption", which is defined in clause 6. This is said to be relevant to the operation of clause 12, which makes it clear that flag State consent is not required to exercise powers in relation to a foreign ship "in situations of hot pursuit." Given that the purpose of introducing this phrase is to capture the international law concept of "hot pursuit", it would be preferable to hew as closely as possible to Article 111 of UNCLOS and international law by using the phrase "hot pursuit" rather than introducing a new, domestic term.

Clause 12: 'Restriction on exercise of powers in relation to foreign ship'

7.3 Under Article 60 of UNCLOS, New Zealand is entitled to exercise jurisdiction over artificial islands, installations, and structures in its EEZ. Article 80 is to the same effect for the continental shelf. New Zealand does not require flag State consent to take "appropriate measures" to ensure the safety of both of navigation and the relevant structures. This includes the right of hot pursuit.

7.4 The Law Society recommends that an offence in relation to a fixed platform under section 5 of the Maritime Crimes Act 1999 be added to the exceptions. This will require consequential amendments referring to offences against fixed platforms under the Maritime Crimes Act 1999 in clause 12(2)(b) and (e), as well as new sub-clauses referring to that offence over the continental shelf (clause 12(2)(ba)), providing for hot pursuit of a ship in respect of an offence over the continental shelf (clause 12(2)(f) and (6)).

Clause 6 ('Pursuit with interruption') / Clause 17 ('Stopping') / Clause 18 ('Boarding')

7.5 Clauses 6(1) and 17(2) both refer to a situation where a "requirement is made." A "requirement" in this context is something that is communicated rather than made. The Law Society considers that clause 6(1)(b) should be amended to read: "a requirement is deemed to be communicated by…", with the permissible modes of communication then specified. The statement in clause 18(3) that the requirement "may be made by any reasonable means" should also be amended to refer to "communicated."

Clause 39: 'Immunity of the Crown'

7.6 Sub-clause 39(2) provides that, for the purposes of clause 39, the "Crown" includes "Crown entities". The Explanatory note[9] suggests that these provisions are modelled on those in the

[9] At page 8.

Search and Surveillance Act 2012 (see e.g., section 167 of the Search and Surveillance Act 2012). However, unlike the Search and Surveillance Act, the Bill does not define "Crown entity". The definition of "Crown entities" in section 3 of the Search and Surveillance Act 2012 should be included in clause 4 of the Bill to avoid confusion as to what is intended to be covered.

Clause 44: 'Reporting of exercise of powers under this Act'

7.7 Sub-clause 44(2)(b) refers to the need for an enforcement officer who is not a constable to make a report on the exercise of powers under the Bill to the chief executive of the "relevant agency". This phrase is not sufficiently clear. There are five categories of "enforcement officer" (other than a constable). A definition of "relevant agency" should be included in clause 4 of the Bill, listing the agency to which a report must be made for each category.

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