



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Asia-Pacific Economic Cooperation (APEC 2021) Bill

10/02/2020

Submission on the Asia-Pacific Economic Cooperation (APEC 2021) Bill

1. Introduction

- 1.1 The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Asia-Pacific Economic Cooperation (APEC 2021) Bill (**Bill**).

2. Summary

- 2.1 The Law Society expresses no view on the policy content of the Bill but wishes to draw the attention of the Foreign Affairs, Defence and Trade committee (**committee**) to aspects of the Bill that the Law Society considers warrant further consideration:
- (a) **Clause 5** in its present form undermines the constitutional standing of the New Zealand Bill of Rights Act 1990 (**NZBORA**). The Law Society considers clause 5 should include a 'carve out', making it clear that the usual mechanism under that Act (sections 4, 5 and 6) must apply in any case of apparent inconsistency.
 - (b) **Part 2, Subparts 1 and 2:** The Bill grants significant coercive powers to members of the Armed Forces and persons appointed as APEC security staff, and abridges the constitutional principle restricting the use of the Armed Forces in a constabulary role (albeit for a very specific event and for a limited period). The Law Society recommends that appropriate checks and balances are enacted to enable proper public scrutiny of the use of the relevant powers, to the extent consistent with maintaining the personal security of the members of the Armed Forces and APEC security staff.
 - (c) **Part 2, Subpart 3 – Foreign Protection Officers:** The Law Society recommends that the public, through the committee's report, is made aware that, as a consequence of this legislation, it will be lawful for foreign protection officers to be admitted to New Zealand with "prohibited firearms" (for example, semi-automatic weapons) of the type that were banned after the Christchurch mosque attacks. This will essentially put foreign protection officers on the same footing as the Police and Armed Forces.
 - (d) **Implications of armed foreign protection officers:** The armed foreign protection officers will not come under Independent Police Conduct Authority (**IPCA**) supervision and will undoubtedly enjoy sovereign immunity while in New Zealand. Again, it is important the public, through the committee, understands that if a foreign protection officer uses lethal force against a New Zealander on New Zealand territory in claimed defence of his or her Head of Government / Head of State, that will be an Act of State clothed with sovereign immunity. While they can be required to leave the country, they cannot be arrested and will likely never face justice in a New Zealand court (except in the unlikely event that the sending State waives immunity). This is not something that arises directly from the Bill, but it arises from the international legal context within which the Bill sits.
 - (e) **Clause 123:** The IPCA's processes are extended to members of the Armed Forces under the Bill, but not the APEC security staff. This appears to be an oversight and should be rectified.

- (f) **Part 3 – Security areas:** This Part places restrictions on the use of land and water, specifically including marae. It is recommended that the committee considers whether there should be an explicit requirement for decision-makers to take into account the principles of the Treaty of Waitangi. Doing so would have an impact on how the consultation required by the legislation is approached.
- (g) **Part 4 – Immunity and compensation:** In the Law Society’s view, the interplay between clauses 111 and 114 does not strike an appropriate balance between the legitimate requirements of the APEC 2021 security operation and the rights of ordinary citizens. If a person is not immune (i.e. because they have acted unreasonably and not in good faith), then compensation should be available to the injured party. It is therefore recommended that the Bill be amended by omitting clause 114.

2.2 The Law Society would appreciate the opportunity to be heard.

3. Clause 5 – New Zealand Bill of Rights Act

3.1 The Law Society considers that clause 5 in its present form undermines the constitutional standing of the New Zealand Bill of Rights Act 1990.¹

3.2 As McGrath J explained in *R v Hansen*,² the proper approach to the consideration of any apparent inconsistency between the NZBORA and another statute can be reduced to the following sequence of questions:

- (a) Do the circumstances fall within the natural meaning of the statutory provision being applied?
- (b) If so, on that meaning does there appear to be an inconsistency with a protected right?
- (c) If so, is the limit on the right a justifiable one in terms of section 5 of the NZBORA? If the limit is justifiable there is no inconsistency with the NZBORA.
- (d) If the limit is not justifiable, is there another meaning available through which the statute can be read consistently with the right?³
- (e) If there is no such other meaning, the natural meaning must be applied as that is required by section 4 of the NZBORA.

3.3 In contrast with this approach, clause 5 of the Bill provides rather baldly that “[i]f there is any inconsistency between this Act and any other enactment, this Act prevails”. The necessary implication is that, even if a provision of the Bill represents a limit on a right protected by the NZBORA which is not justifiable in terms of section 5 of that Act, there is no requirement to seek a meaning consistent with the right as required by section 6.

¹ Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th edition, 2014) 29.

² [2007] 3 NZLR 1 (SC) at [192].

³ NZBORA s 6.

3.4 The Law Society recommends that clause 5 be amended to read as follows:⁴

- (1) If there is any inconsistency between this Act and any other enactment, *other than the New Zealand Bill of Rights Act 1990*, this Act prevails.
- (2) *The New Zealand Bill of Rights Act 1990 applies as if this section had not been enacted.*

4. Part 2, Subparts 1 and 2 – Policing: Armed Forces and APEC security staff

4.1 Under clauses 11 and 12, the Commissioner of Police is empowered to grant an authority to specified members of the Armed Forces to “assist the Police for the purposes of this Act by performing the functions and exercising the powers of a constable during the leaders’ event period”.

4.2 The current law governing the use by members of the Armed Forces of the powers of a constable in aid of the civil power is provided for in section 9(4) of the Defence Act 1990. It is intentionally tightly circumscribed, for the reasons indicated in the New Zealand Law Commission’s *First Report on Emergencies: Use of the armed forces*:⁵

The primacy that must be accorded to the civil power means that the use of the armed forces to supplement police responsibilities in the enforcement of law and order is a step that should be taken only as a last resort. Indeed, Sir Robert Mark, former Commissioner, Metropolitan Police, London, in advice to the Australian Commonwealth Government, has said:

The over-riding principle governing [military aid to the civil power] is that troops should never, in any circumstances, be used to confront political demonstrators or participants in industrial disputes. Whatever logistical support they render, they must be protected by police who alone must deal with any violence arising from objection to their support. (*Report to the Minister for Administrative Services on the Organisation of Police Resources in the Commonwealth Area and Other Related Matters*, 1978, 15)

Sir Robert recognises that in today’s conditions there is a need to make contingency plans for military aid to deal with terrorist situations in which defensive armour, sophisticated weaponry and specialised training might minimise loss of life (at 57). This need is recognised in New Zealand. The police maintain an anti-terrorist squad which operates in close liaison with the Ministry of Defence to ensure effective co-ordination in the event of a terrorist operation requiring defence support.

The decision to use the armed forces as a last resort to support the police in their law enforcement function is clearly one that should be taken at the highest level under the procedure provided by s 79A (cl 10(3) - (7) of the Defence Bill).⁶

4.3 Under clauses 18 and 19, the Commissioner of Police is also empowered to grant an authority to specified APEC security staff to “assist the Police during the leaders’ event period for the purposes of this Act by exercising specified powers given in this Act”. The persons who may be appointed as APEC security staff are government employees, Australian police officers and

⁴ Amended portion indicated in italics.

⁵ (NZLC R12, 1990) at paragraphs 145 and 146.

⁶ Now section 9, Defence Act 1990.

private security contractors.⁷ The powers exercised by APEC security staff include the powers to prevent a person entering a security area or secure transport route, to remove a person from such an area or route,⁸ and to use reasonable force to achieve that.⁹

4.4 In short, the Bill grants significant coercive powers to members of the Armed Forces and persons appointed as APEC security staff. It abridges the constitutional principle restricting the use of the Armed Forces in a constabulary role, albeit for a very specific event and for a limited period.

4.5 If Parliament considers these provisions necessary for New Zealand to provide adequate security for APEC 2021, the Law Society recommends that appropriate checks and balances are enacted to enable proper public scrutiny of the use of the relevant powers. For example, it is submitted that there should be public access to the authorities to be granted to members of the Armed Forces and the APEC security staff, to the extent that is consistent with maintaining their personal security. While the relevant personnel need to be kept safe from the potential hostile actors who might target them, the public has the right to know what sort of authorities are being given and, in a particular case, independently verify what authority is held by the military or security staff with whom they have interacted. The Law Society submits that this can be achieved by requiring that such authorisations be “publicly disclosed” in accordance with clause 116, either by class (eg “A Company 1st Battalion Royal New Zealand Infantry Regiment”) or unique ID number (see, for example, clause 22(2)(c) in respect of APEC security staff).

5. **Part 2, Subpart 3 – Foreign protection officers**

5.1 The implication of this part of the Bill is that it will be lawful for foreign protection officers to be admitted to New Zealand with “prohibited firearms” (eg semi-automatic weapons) of the type that were banned after the Christchurch mosque attacks in March 2019. This may be necessary from a security perspective and it essentially puts such officers on the same footing as the Police and the Armed Forces, but it is something that ought to be drawn to the attention of the public through the select committee’s report, consistent with the legislature’s role in a free and democratic society that respects the rule of law.

6. **State immunity and foreign protection officers**

6.1 At page 13, the Departmental Disclosure Statement provided by the Ministry of Foreign Affairs and Trade states as follows:

Foreign protection officers will be made aware that they do not have immunity for their actions and that, as with the NZ Police, sections 48 (self-defence and defence of another) and 62 (excess of force) of the Crimes Act 1961 would apply to them should they need to use force or firearms.

6.2 The Law Society considers this to be misleading. While it does not directly impact on any provision of the Bill, the immunity of foreign protection officers under international and New

⁷ Clause 18(2).

⁸ Clause 62.

⁹ Clause 106.

Zealand law provides important context for Part 2, Subpart 3 of the Bill. It is important to the rule of law that Parliament understands the full potential implications of permitting armed foreign protection officers to enter and operate within New Zealand, before passing the relevant provisions.

6.3 As Lord Browne-Wilkinson held in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No 3)*:¹⁰

It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.

6.4 There is now general acceptance that state immunity has more limited scope than it once had. However, as the Court of Appeal held in *Young v Attorney-General*:¹¹

... litigation involving the sovereign or public acts of a foreign state may only occur in the courts of a forum state with the agreement of the relevant state.

6.5 The use of lethal force by a foreign protection officer in actual or purported defence of his or her Head of State or Government will constitute a sovereign act by the relevant State. In permitting armed foreign protection officers to accompany APEC leaders, New Zealand is necessarily consenting to the possibility that such force might be used *in extremis* and that the basic principle of international law referred to above would then apply. In short, if a foreign protection officer did use lethal force at APEC 2021, that officer would be entitled to state immunity and would not face trial in New Zealand, unless the relevant State waived that immunity.

7. Clause 123 – Independent Police Conduct Authority

7.1 This clause extends the processes which apply under the Independent Police Conduct Authority Act 1988 to members of the Armed Forces assisting the Police during APEC 2021, but not the APEC security staff.

7.2 The omission of the APEC security staff from clause 123 appears to be an oversight. The Law Society submits that that should be rectified.

7.3 The Law Society also notes that clause 123, as drafted, would extend the supervision of the IPCA to members of the Armed Forces who are assisting the Police during APEC 2021 but who have not been authorised to exercise the powers of a constable under clauses 11 and 12. This would include, for example, members of the Armed Forces who might be tasked to provide logistic support, drive boats or fly aircraft in support of the Police-led security operation. The Law Society recommends that the committee consider restricting the supervisory role of the IPCA under clause 123 to those members of the Armed Forces holding an authority under clause 11.

¹⁰ [1999] 2 All ER 97 (HL) at 110.

¹¹ [2018] 3 NZLR 827 (CA) at [17].

8. Part 3 – Security areas

8.1 This part places restrictions on the use of land and water, specifically including marae. The Law Society recommends the committee consider whether there should be an explicit requirement for decision-makers to take into account the principles of the Treaty of Waitangi. That would have an impact on how the consultation required by the Bill is approached.

9. Part 4 – Immunity and compensation

9.1 Under clause 111, a person is immune from civil and criminal liability for acts and omissions in pursuance or intended pursuance of that person’s duties, functions or powers under the Bill if:

- (a) The act or omission is reasonable and in good faith; and
- (b) The person believes on reasonable grounds that the preconditions for the performance or exercise of the duty, function, or power have been satisfied.

9.2 Despite this, clause 114(1) provides that, with the exception of limited compensation for property damage, “no person is entitled to compensation or any other remedy for actions and omissions by constables or others acting in accordance with this Act”.

9.3 The implication of these provisions is that, even if a person exercising power under the Bill is not immune (i.e. because they have acted unreasonably and not in good faith), a person whose rights they have infringed is not entitled to compensation. The Law Society submits that this represents an inappropriate balance between the legitimate requirements of the APEC 2021 security operation and the rights of ordinary citizens. The Law Society recommends that the Bill be amended by omitting clause 114.

A handwritten signature in black ink, appearing to read 'Herman Visagie', with a large, sweeping flourish extending to the right.

Herman Visagie
NZLS Vice President

10 February 2020