

Proactive Release

Date: 26 August 2021

The following Cabinet paper and related Cabinet minutes have been proactively released by the Minister of Foreign Affairs:

Title	Reference
Maritime Powers Bill: Approval for Introduction	LEG-21-MIN-0089
Maritime Powers Bill – Departmental Disclosure Statement	LEG-21-SUB-0089
Maritime Powers Bill – Minute of Decision	CAB-19-MIN-0612
Report of the Cabinet Legislation Committee 11 June 2021	CAB-21-MIN-0224
Maritime Powers: Extending Law Enforcement Powers into International Waters	ERS-19-MIN-0035

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it. Key to redaction codes:

- 6(c) to prejudice the maintenance of the law;
- 9(2)h: to maintain legal professional privilege;
- 9(2)(f)(iv): the confidentiality of advice tendered by Ministers of the Crown and officials; and
- 9(2)(h): to maintain legal professional privilege.



Cabinet Legislation Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Maritime Powers Bill: Approval for Introduction

Portfolio Foreign Affairs

On 10 June 2021, the Cabinet Legislation Committee:

- 1 **noted** that the Maritime Powers Bill (the Bill) holds a category 2 (to be passed in 2021) on the 2021 Legislation Programme;
 - 2 **noted** that on 19 November 2019, the Cabinet External Relations and Security Committee (ERS):
 - 2.1 agreed to establish legislation to that ensure that New Zealand's law enforcement agencies have comprehensive maritime powers to enforce New Zealand's criminal law in international waters in a manner that is consistent with international law;
 - 2.2 authorised the Minister of Foreign Affairs to make any policy decisions consistent with the principles agreed by ERS to facilitate the drafting of the legislation;
- [ERS-19-MIN-0035]
- 3 **noted** that the Bill creates a comprehensive framework of clear powers to enforce New Zealand's criminal law in international waters;
 - 4 **noted** that the Minister of Foreign Affairs has agreed that the Bill should:
 - 4.1 set a threshold for the exercise of powers as offences punishable by imprisonment for life or two or more years' imprisonment;
 - 4.2 enable the powers in the Bill to be used in search and rescue situations;
 - 4.3 allow maritime powers to be exercised in the territorial seas of other states with the consent of the relevant coastal state;
 - 4.4 contain a savings clause to ensure that it does not affect the ability to use powers in other Acts;
 - 4.5 make Department of Conservation rangers (under the Wildlife Act 1953), endangered species officers (under the Trade in Endangered Species Act 1989), and warranted officers (under the Conservation Act 1987) enforcement officers;

- 4.6 empower enforcement officers to seize illicit wildlife goods (e.g. drugs, firearms, ivory, rhino horn) and seize and care for live smuggled wildlife (e.g. tuatara) found on board a vessel, even where no further enforcement action is taken;
- 4.7 permit an enforcement officer to require the production of documents;
- 4.8 make it an offence to threaten or obstruct an enforcement officer in the exercise of their powers under the Bill;
- 4.9 make it an offence to fail without reasonable excuse to comply with a requirement imposed by an enforcement officer under the Bill;
- 5 **noted** that, as authorised by ERS, and consistent with the Bill’s policy intent, the Minister of Foreign Affairs has agreed that the Bill should also:
- 5.1 permit enforcement officers to collect “identifying information” (i.e. name, address, date of birth, nationality);
- 5.2 permit information collected under the Bill to be shared with other agencies on the same basis as if the information had been collected in New Zealand;
- 5.3 include a requirement that enforcement officers report on their use of the powers to the relevant Chief Executive and the Secretary of Foreign Affairs and Trade; and
- 5.4 amend the Fisheries Act 1993 to ensure that its definition of ‘hot pursuit’ aligns with the definition in the Bill;
- 5.5 permit enforcement officers to detain a ship;
- 5.6 permit enforcement officers to direct a ship to a country other than New Zealand;
- 6 **approved** for introduction the Maritime Powers Bill [PCO 22650/22.0], subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 7 **agreed** that the Bill be introduced in June 2021;
- 8 **agreed** that the government propose that the Bill be:
- 8.1 referred to the Foreign Affairs, Defence and Trade Committee for consideration, to be reported back to the House in November 2021;
- 8.2 enacted by the end of 2021.

Rebecca Davies
Committee Secretary

Present:

Hon Chris Hipkins (Chair)
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Jan Tinetti
Kieran McAnulty, MP

Officials present from:

Office of the Prime Minister
Officials Committee for LEG



Cabinet

Minute of Decision

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Report of the Cabinet Legislation Committee: Period Ended 11 June 2021

On 14 June 2021, Cabinet made the following decisions on the work of the Cabinet Legislation Committee for the period ended 11 June 2021:

LEG-21-MIN-0089

Maritime Powers Bill: Approval for Introduction
Portfolio: Foreign Affairs

CONFIRMED

Michael Webster
Secretary of the Cabinet

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Office of the Minister of Foreign Affairs

Chair, Cabinet Legislation Committee

Maritime Powers Bill: Approval for Introduction

Proposal

1. This paper seeks approval to introduce the Maritime Powers Bill (the Bill). The Bill ensures that New Zealand has clear powers to enforce its criminal law in international waters, consistent with our rights and obligations under international law.

Policy

2. Maritime security is fundamental to New Zealand as an island nation with an extensive maritime domain. The Maritime Security Strategy agreed by Cabinet (ERS-19-MIN-0032) notes New Zealand is facing a maritime security environment challenged by rapid technological change, increased trans-national organised criminal activity, and a more contested regional geopolitical environment.
3. To meet this challenge, our criminal jurisdiction often extends outside New Zealand into international waters to ensure we can detect, disrupt and prosecute criminal offending. However, in many cases New Zealand ^{s6(c), s9(2)(h)}
4. The Bill would create a comprehensive regime of powers that allow agencies to respond to maritime security threats and to enforce New Zealand's criminal law in international waters.
5. Cabinet's External Relations and Security Committee approved the Bill's policy on 19 November 2019 (ERS-19-MIN-0035 refers). Cabinet approved the ERS minute on 25 November 2019. The Bill has been given *Priority 2: to be passed in 2021* on the Government Legislation Programme.

The purpose of the Bill

6. The Bill contains a purpose clause which states that its purpose is to both:
 - 6.1. Provide clear powers for the enforcement of New Zealand's criminal law in international waters; and
 - 6.2. Uphold New Zealand's rights and obligations under international law, particularly the United Nations Convention on the Law of the Sea and international human rights obligations.
7. The purpose clause ensures that respect for international law, particularly New Zealand's international human rights obligations, is central to the Bill.

Enforcement officers

8. The Bill would confer maritime powers on "enforcement officers". Enforcement officers are defined to include Police Constables, Customs Officers, Members of the Armed Forces, Department of Conservation Rangers and Endangered Species Officers.

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Offences subject to the maritime powers regime

9. Maritime powers would be available for offences where New Zealand has existing criminal jurisdiction, including:
 - 9.1. Offences that take place on-board a New Zealand-flagged vessel in international waters;
 - 9.2. Offences that take place on-board a foreign-flagged vessel or stateless vessel in international waters for which New Zealand has extraterritorial jurisdiction (e.g. migrant smuggling and human trafficking); and
 - 9.3. Situations where an alleged offender or evidence of criminal offending is located on a New Zealand, foreign or stateless vessel in international waters (e.g. where an alleged offender has escaped New Zealand on a vessel or New Zealand-based offending is supported by a vessel in international waters).
10. The Bill permits the use of powers for offences that are punishable by imprisonment for life or 2 or more years' imprisonment. This is consistent with the threshold in the Crimes Act (section 8) for the exercise of criminal jurisdiction on New Zealand ships outside New Zealand.

Stopping, search and enforcement powers

11. To exercise the powers, an enforcement officer must satisfy legal tests including "reasonable grounds to suspect" and "reasonable grounds to believe" which align with well-established criminal procedure standards in New Zealand law – in particular, the Search and Surveillance Act 2012.
12. The Bill also sets out a process for dealing with foreign vessels, including the situations where the consent of a foreign state is required to exercise the powers. Consistent with international law, flag state consent is not required for offences relating to piracy, dealing in slaves and in situations of "hot pursuit" – where a foreign vessel is chased from inside New Zealand jurisdiction to international waters. The Bill takes a modern approach to hot pursuit to reflect evolving technology and to fully utilise New Zealand's rights as a coastal state. The Bill amends the Fisheries Act 1993 to ensure that we can take a similar approach to hot pursuit when combatting illegal fishing. This would reinforce the approach to pursuit taken by Pacific Island countries when cooperating to combat illegal fishing.
13. The Bill would confer interdiction, search and enforcement powers on enforcement officers:
 - 13.1. *Interdiction powers:* The Bill provides an escalating set of powers to an enforcement officer to stop a vessel. An enforcement officer would be able to stop and board the vessel. It also allows an enforcement officer to chase the vessel and as a last resort (and following a warning shot) fire a shot to compel the vessel to stop. This is consistent with existing provisions of the Maritime Crimes Act and international law. It also includes a new explicit requirement on enforcement officers to consider health, safety and the protection of the marine environment before exercising the powers.
 - 13.2. *Search powers:* An enforcement officer has powers to search the vessel, search any person on the vessel, require the production of documents, and obtain identifying particulars and biometric information. These are based on the powers in the Search and Surveillance Act 2012 and other legislation, and include a specific provision protecting the right against self-incrimination.

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- 13.3. *Enforcement powers:* The Bill provides arrest powers if there are reasonable grounds to suspect that a person has committed an offence which is punishable by imprisonment for life or by two or more years imprisonment. An enforcement officer would also be able to seize and, if appropriate, destroy illegal goods (e.g. illicit drugs, firearms, wildlife specimens). The Bill also empowers an enforcement officer to manage other persons on-board a vessel for the purpose of exercising the powers in the Bill, including transferring to another vessel. These powers recognise the reality of an operation at sea where there may be risks to life and safety.

Preserving prerogative powers and powers in other legislation

14. The Bill also contains a savings clause to ensure that it does not impact on the prerogative power of the Crown and powers in other legislation (e.g. Fisheries Act, Intelligence and Security Act). The savings clause means that New Zealand Defence Force will continue to conduct military operations with no domestic law enforcement component based on the prerogative power of the Crown.
15. s9(2)(h)

Additional policy decisions

16. On 25 November 2019, Cabinet authorised the previous Minister to make policy decisions consistent with the Bill's policy intent (CAB-19-MIN-0612 refers). After reviewing the previous Minister's decisions, I have decided that the Bill should:
- 16.1. set a threshold for the exercise of powers as offences punishable by imprisonment for life or 2 or more years' imprisonment – discussed at para 10 above;
 - 16.2. enable the powers in the Bill to be used in search and rescue situations – discussed below at para 17;
 - 16.3. allow maritime powers to be exercised in the territorial seas of other states with the consent of the relevant coastal state – this is consistent with international law and consistent with the approach of United Kingdom and Australian maritime powers legislation;
 - 16.4. contain a savings clause to ensure that it does not affect the ability to use powers in other Acts – discussed at para 14 above;
 - 16.5. make Department of Conservation rangers (under the Wildlife Act 1953), Endangered Species Officers (under the Trade in Endangered Species Act 1989) and warranted officers (under the Conservation Act 1987) enforcement officers – discussed at para 8 above;
 - 16.6. empower enforcement officers to seize illicit wildlife goods (e.g. ivory, rhino horn) and seize and care for live smuggled wildlife (e.g. tuatara) found on board a vessel, even where no further enforcement action is taken;
 - 16.7. permit an enforcement officer to require the production of documents; and

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- 16.8. make it an offence to threaten or obstruct an enforcement officer in the exercise of their powers under the Maritime Powers Bill and make it an offence to fail without reasonable excuse to comply with a requirement imposed by an enforcement officer under the Bill.
17. The Bill should be capable of enabling the powers to be used in search and rescue situations. An incident occurred in late 2019 involving a US fishing vessel which was coming to New Zealand, the *Connie S*, where a crew member seriously wounded another crew member and the Royal New Zealand Navy led a search and rescue response ^{s9(2)(h)}

s6(c)

these provisions will be of broader benefit than search and rescue situations and enable New Zealand to intervene before a vessel arrives in New Zealand.

18. The Bill ensures a robust regime to address wildlife smuggling. While some offences in both the Wildlife Act and the Trade in Endangered Species Act have penalties lower than the threshold for the use of the powers in the Bill, the powers would be available for the key offences in those Acts (i.e. smuggling protected New Zealand wildlife or international endangered or threatened species). ^{s9(2)(f)(iv)}
19. In addition, I seek decisions on the following matters from Cabinet
- 19.1. *Identifying information:* Cabinet agreed that enforcement officers should have the power to collect biometric information for the purpose of establishing identity for law enforcement purposes. It is also appropriate for enforcement officers to have the power to collect “identifying information” (i.e. name, address, date of birth, nationality) for the same purpose.
- 19.2. *Information sharing power:* as enforcement officers have the power to collect identifying and biometric information for law enforcement purposes, it is necessary to provide a clear legal basis which would allow the enforcement officer to share that information as though the information been collected in New Zealand. As detailed below, the Privacy Commissioner has been consulted on these provisions.
- 19.3. *Reporting requirement:* as the powers will be exercised without a warrant, it is appropriate to include a requirement that enforcement officers report on their use of the powers to the relevant Chief Executive and the Secretary of Foreign Affairs and Trade – this is consistent with the requirement in the Search and Surveillance Act where the powers in that Act are exercised without warrant.
- 19.4. *Amendment of the Fisheries Act:* although Cabinet agreed that fisheries enforcement powers should remain covered by the Fisheries Act, an amendment to the Fisheries Act is required to ensure that its definition of “hot pursuit” aligns with the definition in the Bill.
- 19.5. *Detention of Ship:* Cabinet agreed to give enforcement officers the powers to stop, direct and search a vessel. It is also appropriate to enable enforcement officers to detain a ship, as this may be necessary to enable the exercise of such powers.

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- 19.6. *Direction Powers:* Cabinet agreed to give enforcement officers powers to direct ships to New Zealand if evidence of offending is found. It is also appropriate to enable enforcement officers to be able to direct a ship to another country - for example, in an emergency where a ship is some distance from New Zealand.

Potentially contentious aspects of the Bill

20. Legislation which confers powers on law enforcement has the potential to be controversial. The powers are also warrantless. In my view, this approach is justified and consistent with the situations domestically where powers can be exercised without warrant.
21. As noted in the ERS paper (ERS-19-SUB-0035 refers), the practical realities of exercising powers in a maritime context including weather, sea conditions, and confinement to the vessel create a number of challenges. Those not suspected of criminal offending on board a vessel are effectively detained during the exercise of those powers – such persons may be transferred to a different vessel, questioned and required to provide identifying particulars to facilitate their entry into New Zealand.
22. The Bill provides a number of safeguards:
- 22.1. Respect for human rights is enshrined in the purpose of the Bill and the Bill is consistent with the standards contained in the New Zealand Bill of Rights Act 1990;
- 22.2. The Bill adopts clear and well-established standards of criminal procedure in New Zealand law;
- 22.3. The Bill is consistent with New Zealand's rights and obligations under international law.
23. The Maritime Powers Extension Bill 2018 amended the Customs and Excise Act 2018 to create a substantially similar maritime powers regime limited to drugs trafficking offences. That legislation was passed unanimously.

Need for a Bill

24. The policy cannot be implemented without legislative change.

Impact analysis

25. A Regulatory Impact Assessment (RIA) was prepared for the original Cabinet decisions. The additional policy decisions are matters of detail which are consistent with and do not alter the analysis in the original RIA.

Compliance

26. The Bill complies with:
- 26.1. the principles of the Treaty of Waitangi;
- 26.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- 26.3. the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
- 26.4. the principles and guidelines set out in the Privacy Act;

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26.5. relevant international standards and obligations;

26.6. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Compliance with New Zealand Bill of Rights Act 1990

27. The NZBORA applies within New Zealand's territory, and to New Zealand ships and aircraft. s9(2)(h)

28. s9(2)(h) as a matter of policy, Cabinet directed that the Bill should meet the standards of the NZBORA (CAB-19-MIN-0612 refers). NZBORA rights and freedoms have accordingly been considered in the Bill's development and the Bill has been vetted by the Ministry of Justice.

29. The Ministry of Foreign Affairs and Trade has analysed and tested the rights implications of the Maritime Powers Bill, and considers any limits on rights under the regime to be demonstrably justified in a free and democratic society. The Bill has been developed with a range of safeguards to ensure that where it limits rights it does so no more than the minimum necessary, and in proportion to the importance of its objectives. These safeguards include:

29.1. Respect for human rights is enshrined in the purpose of the Bill, including New Zealand's international human rights obligations;

29.2. The Bill adopts clear and well-established standards of criminal procedure in New Zealand law, including the safeguards contained in the Search and Surveillance Act 2012;

29.3. The Bill is consistent with New Zealand's rights and obligations under international law.

Privacy Act 1993

30. The Privacy Commissioner considers that the proposal to create an information sharing power (clause 42) is unnecessary as he considers any personal information collected by New Zealand agencies in the course of their duties, whether domestically or internationally is subject to the Privacy Act 2020 (and any other governing legislation) and therefore may be shared in the same way as any personal information held by an enforcement officer. The Privacy Commissioner recommends that clause 42 be removed. I note there is no disagreement on the policy (that information may be shared on the same basis as if it were collected domestically), just whether a clear provision in the Bill is necessary. s9(2)(h)

International standards and obligations

31. The Legal Division of the Ministry of Foreign Affairs and Trade has prepared the Bill and confirms that it complies with relevant international law. The Bill gives effect to New Zealand rights and obligations under the United Nations Convention on the Law of the Sea, international human rights law and other relevant international law including the United Nations Convention against Transnational Organised Crimes and its Protocols. Other jurisdictions (including the UK and Australia) have developed maritime powers legislation which has been considered in the drafting of this Bill.

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Consultation

32. The Crown Law Office, Department of Conservation, Maritime New Zealand, Ministry of Business, Innovation and Employment (Immigration New Zealand, New Zealand Petroleum and Minerals, and Health and Safety Policy), Ministry of Defence, Ministry of Justice, Ministry for Primary Industries (Biosecurity New Zealand and Fisheries New Zealand), Ministry of Transport, New Zealand Police, New Zealand Defence Force, New Zealand Customs Service, and WorkSafe have been consulted throughout the drafting of the Bill and their comments and advice incorporated where appropriate. The Office of the Privacy Commissioner was consulted on the Bill's personal information provisions.
33. Along with the above agencies, the following received a consultation draft of the Bill: the Department of Prime Minister and Cabinet (National Security Policy Directorate and Policy Advisory Group), Government Communications Security Bureau, and New Zealand Security Intelligence Service.
34. Consultation has occurred with the government caucus and other parties represented in Parliament.

Binding on the Crown

35. On 25 November 2019, Cabinet agreed that the proposed Maritime Powers Act will be binding on the Crown (CAB-19-MIN-0612 refers).

Creating new agencies or amending law relating to existing agencies.

36. The Bill does not create a new agency.

Allocation of decision making powers

37. The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

Associated regulations

38. There are no regulations associated with this Bill.

Other instruments

39. The Bill does not create other legislative instruments.

Definition of Minister/Department

40. The Bill does not contain a new definition of Minister or Department.

Commencement of legislation

41. The Act will come into force on the day after the date on which it receives the Royal assent.

Parliamentary stages

42. I propose that the Bill be introduced to the House and have its first reading before the end of June, subject to the availability of House time.
43. I propose that the Bill be referred to the Foreign Affairs, Defence and Trade Committee for consideration to be reported back to the House in November 2021. A shortened Select

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Committee process would enable the Bill to be passed before the end of 2021. ^{s6(c)}

the powers are available before the summer when the movement of small vessels and risk of maritime criminal activity is at its highest.

Proactive Release

44. I intend to release this paper, the originating policy approval Cabinet paper considered by Cabinet on 25 November 2019 and related Cabinet decisions on the Ministry of Foreign Affairs and Trade's website. This is subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982. The proactive release will occur as soon as possible after the Bill's introduction.

Recommendations

The Minister of Foreign Affairs recommends that the Committee:

1. **note** that the Maritime Powers Bill holds a category 2 (to be passed in 2021) on the 2021 Legislation Programme;
2. **note** that the Maritime Powers Bill creates a comprehensive framework of clear powers to enforce New Zealand's criminal law in international waters;
3. **note** the policy decisions made by the previous Minister of Foreign Affairs, which I have reviewed and adopted, that the Bill should:
 - 3.1. set a threshold for the exercise of powers as offences punishable by imprisonment for life or 2 or more years' imprisonment;
 - 3.2. enable the powers in the Bill to be used in search and rescue situations;
 - 3.3. allow maritime powers to be exercised in the territorial seas of other states with the consent of the relevant coastal state;
 - 3.4. contain a savings clause to ensure that it does not affect the ability to use powers in other Acts;
 - 3.5. make Department of Conservation rangers (under the Wildlife Act 1953), endangered species officers (under the Trade in Endangered Species Act 1989) and warranted officers (under the Conservation Act 1987) enforcement officers;
 - 3.6. empower enforcement officers to seize illicit wildlife goods (e.g. drugs, firearms, ivory, rhino horn) and seize and care for live smuggled wildlife (e.g. tuatara) found on board a vessel, even where no further enforcement action is taken;
 - 3.7. permit an enforcement officer to require the production of documents;
 - 3.8. make it an offence to threaten or obstruct an enforcement officer in the exercise of their powers under the Maritime Powers Bill; and
 - 3.9. make it an offence to fail without reasonable excuse to comply with a requirement imposed by an enforcement officer under the Bill;
4. **agree** that the Bill should also:

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- 4.1. permit enforcement officers to collect “identifying information” (i.e. name, address, date of birth, nationality);
- 4.2. permit information collected under the Bill to be shared with other agencies on the same basis as if the information had been collected in New Zealand;
- 4.3. include a requirement that enforcement officers report on their use of the powers to the relevant Chief Executive and the Secretary of Foreign Affairs and Trade; and
- 4.4. amend the Fisheries Act 1993 to ensure that its definition of ‘hot pursuit’ aligns with the definition in the Bill;
- 4.5. permit enforcement officers to detain a ship;
- 4.6. permit enforcement officers to direct a ship to a country other than New Zealand;
5. **approve** the Maritime Powers Bill for introduction;
6. **agree** that the Maritime Powers Bill be introduced in June;
7. **agree** that the government propose that the Maritime Powers Bill be referred to the Foreign Affairs, Defence and Trade Committee for consideration, to be reported back to the House in November 2021;
8. **agree** that the Bill be enacted by the end of 2021.

Authorised for lodgement

Hon Nanaia Mahuta
Minister of Foreign Affairs



Cabinet

Minute of Decision

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Report of the Cabinet External Relations and Security Committee: Period Ended 22 November 2019

On 25 November 2019, Cabinet made the following decisions on the work of the Cabinet External Relations and Security Committee for the period ended 22 November 2019:

ERS-19-MIN-0035 **Maritime Powers: Extending Law Enforcement
Powers into International Waters**
Portfolio: Foreign Affairs

CONFIRMED

Michael Webster
Secretary of the Cabinet

Hard-copy distribution:
Cabinet External Relations and Security Committee

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Office of the Minister of Foreign Affairs

Chair, Cabinet External Relations and Security Committee

MARITIME POWERS – EXTENDING LAW ENFORCEMENT POWERS INTO INTERNATIONAL WATERS

Proposal

1. This paper proposes to establish legislation that ensures New Zealand's law enforcement agencies have comprehensive "maritime powers" to enforce New Zealand's criminal law in "international waters" in a manner that is consistent with international law.

Executive Summary

2. New Zealand does not have adequate law enforcement powers in "international waters" (explained at paragraphs 8-20). ^{s6(c)}

3. ^{s6(c), s9(2)(h)}

This situation is not satisfactory given New Zealand's extensive maritime domain and the threats posed by transnational organised crime.

4. Enforcement powers should correspond to our criminal jurisdiction – where we have jurisdiction in international waters (e.g. offences on NZ-flagged vessels and certain extraterritorial offences on foreign and stateless vessels) we should have corresponding enforcement powers. ^{s6(c)}
5. New Zealand has established maritime powers in an ad hoc manner with respect to maritime terrorism and drugs trafficking. I consider however that it is now necessary to take a more comprehensive approach – a law enforcement regime that applies irrespective of subject matter, and one which replaces the current, dispersed provisions with a single, comprehensive regime.
6. I propose a regime that sets out comprehensive maritime powers to ensure we can detect, interdict, search, and detain vessels and suspected offenders in international waters. The regime will need to take into account the particular challenges of exercising powers in international waters including respect for international law as well as preserving safety of life at sea.
7. ^{s6(c)} I propose that this be treated as a matter of legislative priority by the government with legislation to be passed if possible before the election.

Background

8. Maritime security is fundamental to New Zealand as an island nation with an extensive maritime domain. As a result, our criminal jurisdiction often extends outside New Zealand into that domain to ensure we can detect, disrupt and prosecute criminal offending. As noted

in the Maritime Security Strategy recently agreed by Cabinet (ERS-19-MIN-0032), rapid technological change, increased trans-national organised criminal activity, regional impacts of climate change, and a more contested regional geopolitical environment are creating an increasingly complex and challenging maritime security environment.

9. s6(c), s9(2)(h)

10. s6(c)

We have established subject matter specific regimes for drugs trafficking and maritime terrorism, s6(c)

11. The Maritime Security Strategy underscores the importance of a robust authorising environment to deliver maritime security in New Zealand. The Strategy recognises the need for New Zealand's maritime security arrangements to evolve to match the increasingly complex and challenging security environment.

Transnational organised crime at sea is of particular concern

12. Alongside this paper, the Minister of Police is proposing Cabinet approve a *Transnational Organised Crime Strategy* to enhance New Zealand's ability to combat **transnational organised crime** (TNOc). The strategy includes a specific focus on ensuring that policy and legislative settings are well aligned and fit-for purpose to ensure there are no loopholes or gaps that can be exploited to conduct unlawful activity, including in international waters. The TNOc strategy highlights the importance of reform of maritime powers.

13. The proposed strategy provides detail on the types of TNOc targeting New Zealand, for example:

- The smuggling of goods especially **illicit drugs** via the sea, threaten our communities, health and wellbeing.
- **Migrant smuggling** and **human trafficking** ventures by sea are often organised for profit by smugglers who exploit the vulnerability of irregular migrants. The government invested significantly in preventing this form of organised crime as part of Budget 2019, s9(2)(f)(iv)
- **Firearms trafficking** is an emerging threat. As the domestic regulation of firearms is enhanced by this government, there is a risk that there is an increase in the illicit traffic of firearms. The Arms Legislation Bill includes several new criminal offences which apply extraterritorially to address this concern.
- **Wildlife smuggling** is an emerging threat to New Zealand's biodiversity as part of a lucrative global market that is estimated to be worth up to US\$23 billion worldwide.

s6(c)

14. s6(c)

- where an offence takes place on board a New Zealand vessel in international waters (e.g. were a murder to occur on a New Zealand yacht in international waters)
- where an offence occurs in New Zealand but the alleged offender has left New Zealand (e.g. where a murder occurs in New Zealand and alleged offender is believed to be located on a vessel in international waters)

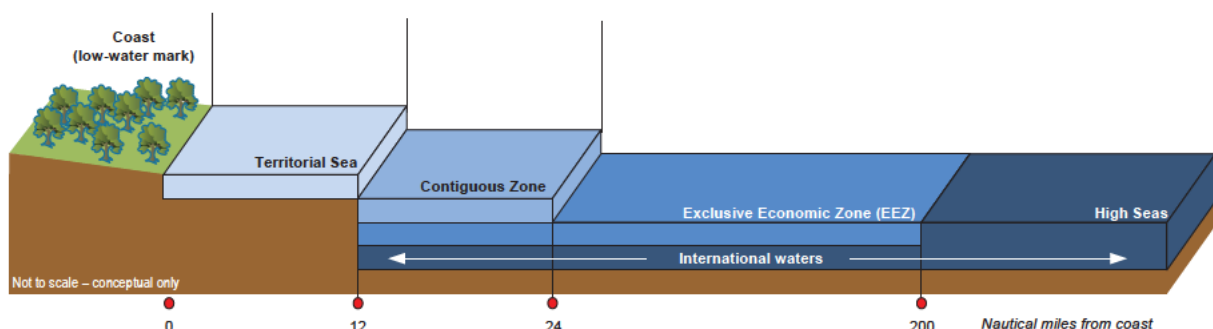
The government has prioritised maritime security and made significant capability investments

15. As noted above, Cabinet has agreed a **Maritime Security Strategy** that provides a framework to deliver a comprehensive approach to maritime security. The Strategy conveys the importance of a robust authorising environment. It underscores that effective maritime security responses depend on access to a range of lawful options to detect, interdict, search, and detain vessels and alleged offenders in international waters
16. The Maritime Security Strategy provides policy guidance that will help ensure best use is made of Government's significant investments in maritime security capability, including four P-8A Poseidon maritime patrol aircraft and the Enhanced Maritime Awareness Capability. A robust maritime powers framework will support these policy efforts and investment decisions and ensure we have the powers necessary to make the most of our enhanced maritime capabilities.
17. The **Strategic Defence Policy Statement 2018** underscores that maritime security is fundamental to New Zealand's national security. It highlights rising and formidable challenges in the maritime domain, particularly in relation to climate change, transnational organised crime, resource competition and irregular migration.

The international legal framework

18. "Maritime powers" means the exercise of law enforcement powers (e.g. interdiction, search, arrest and detention) in respect of both foreign and domestic vessels in international waters.
19. The right to use maritime powers is established by international law. International law provides States with different rights and obligations in different maritime zones. As illustrated below, "international waters" start at 12 nautical miles from the shore and encompass the contiguous zone, exclusive economic zone (EEZ) and the high seas.

Maritime Zones



20. The general rule at international law – as set out in the UN Convention on the Law of the Sea (UNCLOS) – is that vessels in international waters are subject to the exclusive jurisdiction of their flag state. This means that New Zealand has exclusive jurisdiction over offences that take place on-board New Zealand vessels in international waters. It also means that we cannot simply board a foreign vessel in international waters even if it has been involved in criminal activities that threaten us; the consent of the vessel's flag State to such action is normally required.

What is the problem?

21. **New Zealand's maritime powers do not align with our criminal law jurisdiction or our rights and obligations at international law:** ^{s6(c)}
22. ^{s9(2)(h), s6(c)}
23. **An absence of legislation limits the options to respond to a maritime security threat and other criminal offending:** ^{s9(2)(h)}
24. **To date, we have addressed this issue on an ad hoc basis:** Maritime powers have been codified for drugs trafficking and maritime terrorism – ^{s6(c), s9(2)(h)}
^{s6(c)}
25. **A comprehensive approach is needed:** While we have already addressed specific issues on an ad hoc basis (fisheries, maritime terrorism and drugs trafficking – ^{s9(2)(f)(iv)} it is now necessary to consider a comprehensive approach which provides appropriate maritime powers wherever New Zealand has extraterritorial jurisdiction (as Australia and the United Kingdom have done).

Proposal: Comprehensive maritime powers legislation

26. I propose enacting legislation that provides law enforcement agencies with maritime powers to enforce New Zealand's criminal law in international waters. ^{s6(c)}
- offences that take place on board New Zealand vessels in international waters;
 - offences that take place on board foreign vessels in international waters where New Zealand exercises extraterritorial jurisdiction (e.g. migrant smuggling and human trafficking); and
 - situations where an alleged offender or evidence of criminal offending is located on a New Zealand, foreign or stateless vessel in international waters (e.g. where an alleged offender has escaped New Zealand on a vessel or New Zealand-based offending is supported by a vessel in international waters).

27. I propose that maritime powers legislation that meets the following objectives would best contribute to New Zealand's maritime security:
- The legislation is **comprehensive**. Maritime powers can be used for the full range of offences over which New Zealand has established jurisdiction. There are no gaps based on the subject-matter of the offending. Powers in respect of **stateless vessels** and the right of **hot pursuit** are covered.
 - The legislation is **operationally effective**. Law enforcement agencies have a comprehensive suite of powers to deal with alleged offenders and offending at sea that recognise the particular challenges of operating in a maritime environment.
 - The legislation enables New Zealand to maximise its ability to exercise its rights at international law in a manner that is **consistent with international law**, including UNCLOS and our international human rights obligations.
 - The legislation does not limit New Zealand's ability to conduct military operations/deployments or carry out maritime surveillance in other contexts.
28. A comprehensive regime has a number of advantages. It would enable law enforcement agencies to respond to a range of offending on a single vessel (e.g. the smuggling of both drugs and weapons). It will mean that law enforcement agencies can take the initiative to act with the greatest effect^{s6(c)}

It would also be future-proofed because it would provide maritime powers that could be used to respond to criminal activities that are currently unforeseen, or for which a new international convention is agreed.

The maritime context

29. The proposed powers will be used in a context that poses unique challenges and is fundamentally different to the situation on land. Operations are likely to take place a considerable distance from shore in rough seas and bad weather. The maritime environment and the behaviour of the persons on-board the vessel are more likely to be unpredictable. Safety of life at sea will be a particularly important consideration. This context also provides greater opportunity for evidence to be destroyed and for persons to escape than exist on land. Individuals on board will not have entered New Zealand, and will not have completed customs, immigration, biosecurity and health requirements. Given this context, departure from some of the requirements that would usually be expected in legislation governing land-based operations will be appropriate.

Scope of the Bill

Purpose of the legislation

30. I recommend that the Bill contain a purpose which addresses the following points:
- 30.1. provides clear maritime powers for the enforcement of New Zealand's criminal law in international waters;
 - 30.2. upholds New Zealand's rights and obligations under international law, particularly the United Nations Convention on the Law of the Sea; and

- 30.3. ensures that the conduct of activities is consistent with applicable human rights standards including international human rights obligations recognised by New Zealand law.

The Bill will not change the existing scope any criminal offence or create any new offences

31. I am not seeking to expand the jurisdiction of any offence or create any new offences as part of this work. This proposal is about creating enforcement powers for where New Zealand already has established extraterritorial jurisdiction. The proposal would have the advantage of being future-proofed as it would apply to offences where New Zealand established extraterritorial jurisdiction in the future.

The Bill should apply to all types of vessels

32. I recommend that the proposed legislation should apply to different types of vessels – i.e. New Zealand vessels, foreign vessels and stateless vessels. In order to be consistent with international law, the consent of the foreign flag state would be a prerequisite for the exercise of the powers against a foreign vessel where this is required by international law.

Where can the powers be exercised?

33. I recommend that the powers in the Bill can be exercised in “international waters” i.e. in New Zealand’s EEZ, the EEZs of other states and on the high seas.¹
34. I propose that the powers in the Bill will generally not apply in the **territorial sea**. The territorial sea is essentially an extension of New Zealand’s sovereignty and the Search and Surveillance Act already provides the necessary powers in this maritime zone, including in respect of foreign vessels without the consent of the flag state. However, it may necessary to apply some of the powers in the territorial sea as vessels will need to transit through the territorial sea to a port. Officials will provide further advice to Ministers on what if any powers might be appropriate to provide in the territorial sea, including the territorial seas of other states with their consent.
35. However, the powers in the Bill would apply in the **contiguous zone** as this maritime zone only provides powers in respect of breaches of New Zealand’s customs, fiscal, immigration and sanitary laws. New Zealand can take action against foreign vessels in the contiguous zone without the consent of the flag state for these limited purposes. The Bill would preserve existing and future statutory powers in New Zealand’s contiguous zone.

Powers

Preserving existing surveillance powers

36. New Zealand’s ability to undertake surveillance of our maritime domain using aerial and naval patrols as well as satellite technology is important for detecting and deterring maritime security threats as well as general maritime domain awareness. I am conscious that in clarifying law enforcement powers that we do not by implication limit the Government’s power to carry out surveillance of international waters through the exercise of the prerogative. I will instruct officials to work with PCO to ensure this concern is addressed.

¹ The distinction between the EEZ and the high seas is not relevant in this context because international law does not distinguish between the EEZ and the high seas for the purposes of criminal law enforcement.

Power to stop and board vessel

37. I propose that the Bill will provide a power to stop and board the vessel in question. The threshold for exercising this power will be that there are reasonable grounds to suspect that an offence of a particular severity has been or is about to be committed; and (in respect of search powers) reasonable grounds to believe that evidence of an offence is on-board the vessel. This is the same test as currently applied in respect of various powers under the Search and Surveillance Act.
38. I have instructed my officials to develop an appropriate threshold for severity of offences covered by this proposal. I note that section 8 of the Crimes Act 1961 provides criminal jurisdiction on New Zealand ships and aircraft for any offence punishable by more than two years imprisonment. If Cabinet agrees, I will consider advice from officials on where the threshold should be set and seek confirmation when the Bill is considered by Cabinet Legislation Committee.
39. As already provided in the Maritime Crimes Act 1999, I propose including powers to chase the vessel if it refuses to stop, to fire warning shots, and to fire on the ship to compel it to stop as a last resort. These powers would be consistent with international law. If adopted as part of this Bill, the relevant provisions of the Maritime Crimes Act could be repealed.
40. Given the objective of establishing a comprehensive regime, I propose that the powers can be used following a “hot pursuit”² of the vessel, which can be exercised against a foreign vessel without the need for the consent of the flag State. I also propose including a power to stop and search a vessel that is reasonably suspected of being stateless in order to verify its nationality.

Search powers

41. I propose that the powers that may be used once the vessel has been stopped and boarded correspond to those that apply in New Zealand under the Part IV Search and Surveillance Act (with any necessary modifications especially given the maritime operational context). These powers include the power to search the vessel, search and question the persons on-board (including to search people for concealed weapons), secure evidence and seize items.

Enforcement powers

42. I propose that the Bill contain powers to allow the arrest or detention of suspects without warrant and to direct the vessel, including the persons on-board, to New Zealand. Any provisions on arrest should be consistent with the standards set out in section 315 of the Crimes Act. It may be necessary to allow for the arrest of suspects and detention of other persons where:
 - to do so is necessary to facilitate the conduct of the search;
 - evidence of criminal offending is found on board;
 - a suspected offender wanted in New Zealand has been found on board the vessel; and
 - there is a risk to the safety of any person (including enforcement officers) as well as persons on board the vessel; and

² The doctrine of hot pursuit in international law recognizes the right of a State to pursue a vessel belonging to a foreign State which has violated any law within its territorial boundaries and jurisdiction.

Additional ancillary powers and use of force

43. I propose that the Bill contain a number of ancillary powers to support the exercise of the primary enforcement powers. It is important there are appropriate powers and process to manage and transition persons on-board a vessel, including those that are not suspected of criminal offending. These powers include requiring the persons on board to disembark to another vessel at sea and the use of reasonable force in the exercise of the powers. Where persons on board are detained and directed to port in New Zealand, enforcement officers should be able to collect biometric information for the purpose of establishing their identity for law enforcement and safety/administrative purposes. These powers will be important when dealing with a large number of people where it is necessary to transfer them to a NZDF vessel.

Powers to be warrantless

44. Consistent with the existing approach in the Maritime Crimes Act and Schedule 5A of the Customs and Excise Act, I propose that the powers not be subject to a warrant. There are good reasons why these powers should not be subject to a warrant:
- The powers will be exercised at considerable distance from shore, law enforcement agencies may need to be act quickly to respond to a risk to safety of life at sea.
 - There is a significant risk that evidence may be destroyed (e.g. evidence being thrown overboard).
 - Where the suspect is alleged to have committed an offence in New Zealand, that suspect has already attempted to avoid New Zealand's jurisdiction by fleeing to international waters.
 - The offending vessel may not be able to be specifically identified until an operation is under way meaning that there is little time to both obtain flag-state consent (if required) and then to seek a warrant specifically in relation to that vessel.

Powers continue until arrival in port in New Zealand

45. Once the vessel and/or alleged offenders arrive in New Zealand at a port, I propose that the powers in the Bill cease and subsequent law enforcement activities, such as further detention of the suspects, be subject to the Search and Surveillance Act and other relevant legislation. A vessel or individual would still be subject to the powers in this Bill while transiting the territorial sea.

Who should be able to exercise the powers?

46. Similar to the approach taken in the Search and Surveillance Act, I propose that the Bill allows the powers to be exercised by a "maritime enforcement officer". The Bill would define that term to include a Constable, Customs Officer, or member of the armed forces.
47. As with the Search and Surveillance Act, I propose that the powers can be used by persons called on to assist with the exercise of a power in the Bill.

International law considerations

Flag state consent

48. As noted above, the consent of the foreign flag state would be a prerequisite for the exercise of the powers against a foreign vessel where this is required by international law. I propose the Bill set out a process which authorises the Secretary of Foreign Affairs and Trade to seek flag state consent from another state. A certificate from the Secretary that another state has given their consent to the exercise of maritime powers should be conclusive evidence that the requirement for flag state consent has been satisfied. This is similar to the process provided in the Fisheries Act.

Other maritime powers regimes

Powers for maritime terrorism and drugs trafficking should be covered by this legislation

49. Given that the purpose of this Bill is to create a comprehensive maritime powers regime, I recommend that the existing provision for maritime powers in domestic legislation be revoked; i.e. the powers for maritime terrorism (Maritime Crimes Act, sections 10A-G) and drugs trafficking (Schedule 5A Customs and Excise Act) be revoked. The powers in this Bill would be able to be used for the situations covered by these existing regimes.

Exemptions from the proposed legislation

50. I consider that the following maritime security-related regimes be excluded from this proposal. The nature of the specific international legal regimes that these statutes implement means that the broad and comprehensive powers proposed in this paper would not be appropriate. For the same reason, excluding these regimes would not impact on the objective of creating a comprehensive maritime powers regime. I propose that the legislation not apply as follows:
- **Fisheries:** given the specialised international legal regime for fisheries, including the primary responsibility placed on flag States for ensuring that their vessels comply with international fisheries rules, fisheries enforcement powers should continue to be covered by the Fisheries Act.
 - **Marine pollution in the EEZ** is covered by specific legal regimes under UNCLOS and the rules agreed by the International Maritime Organisation, which should continue to be implemented into New Zealand's domestic law by the Maritime Transport Act and the Biosecurity Act.
 - **Interference with offshore mining activities** over which New Zealand has sovereign rights in the EEZ and Continental Shelf should continue to be addressed by the Crown Minerals Act and the Continental Shelf Act.
 - **Intelligence and security agencies** – all activities by the NZSIS and GCSB would continue to be governed the comprehensive specialised regime set out in the Intelligence and Security Act 2017 and other relevant legislation.
51. I also consider that **NZDF participation in international operations** where there is no domestic law enforcement component (e.g. maritime security operations) should continue to be based on the exercise of the Crown's prerogative powers for defence matters.

52. As for statutory powers in New Zealand's **contiguous zone**, I propose that the Bill makes it clear that our statutory regimes for the enforcement of New Zealand's customs, fiscal, immigration and sanitary laws in this maritime zone are not affected.

Application to the Realm (Cook Islands, Niue and Tokelau)

53. I do not propose to extend these powers to enable New Zealand to enforce the criminal law of the Cook Islands, Niue or Tokelau.
54. Where New Zealand has extraterritorial jurisdiction, it will be possible use these powers on the high seas and in the exclusive economic zones of realm states to enforce New Zealand's criminal law. This is particularly relevant in the case of migrant-smuggling as it will enable New Zealand to exercise these powers to interdict a migrant-smuggling vessel which has a realm state as its destination.
55. The maritime terrorism powers in the Maritime Crimes Act apply to Tokelau as New Zealand's accession to the international convention that that Act implements (SUA Protocol) extends to Tokelau. It will be necessary to ensure this remains the case given New Zealand's international obligations in respect of Tokelau.

Other issues for consideration

What are the risks?

56. The purpose of this proposal is to provide law enforcement agencies with clarity in law to use appropriate maritime powers: whether to use the powers will be an operational decision in the circumstances of each case. There may be cases where it is not in New Zealand's interest to exercise these powers.
57. The requirement for flag State consent may be a significant limitation on our ability to use maritime powers. Consent may not always be forthcoming, may be delayed so that the window to use the powers has passed, or may be given subject to conditions that make effective exercise of the powers difficult. However, the existence of such powers in our domestic legislation is a necessary prerequisite for being able to act and will play a role in deterring the conduct in question.

Protections for maritime enforcement officers

58. I propose that maritime enforcement officers have the necessary immunities, protections and justifications required to conduct operations under this proposal (for example under Part 3 of the Crimes Act).

Consultation

59. The following departments have been consulted: Department of the Prime Minister and Cabinet (National Security Group), Department of Conservation, Maritime New Zealand, Ministry of Business, Innovation and Employment (Immigration), Ministry of Defence and New Zealand Defence Force, Ministry of Justice, Ministry for Primary Industries, Ministry of Transport, the New Zealand Customs Service and the New Zealand Police.
60. MBIE is particularly supportive of the proposed Bill. ^{s6(c)}

s6(c)

61. s6(c)

s6(c), s9(2)(h)

Financial Implications

62. There are no significant or immediate costs associated with this proposal. The powers will provide agencies with the ability to act in a wider range of circumstances, but do not require them to do so. The proposal does not envisage a significant new maritime presence or capability, or a significant shift of law enforcement resources to the maritime domain. Any costs associated with a particular operation will, in principle, be met from existing agency budgets, although some (such as addressing a large scale mass arrival of irregular migrants) may incur additional costs to a range of Votes.

Legislative Implications

63. I recommend a standalone bill, the “Maritime Powers Bill”, be enacted.

64. I recommend that this Bill should be passed in 2020 (Category 3 priority). This will ensure that the powers are available at the start of the summer, when international movements of small vessels are at their highest.

65. Given that the purpose of the proposed Maritime Powers Bill is to provide law enforcement powers to the Crown, I recommend that the Bill binds the Crown. An exemption from the Arms Act 1983 (similar to section 3(2)(ab)) may be necessary.

Impact Analysis

66. A regulatory impact statement (RIS) has been prepared and is attached.

67. A multi-agency quality assurance panel (MFAT, MBIE and DPMC) has reviewed the RIS and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Human Rights

68. s9(2)(h)

69. s9(2)(h) as a matter of policy I consider it appropriate that the Bill meets the standards of the human rights protections set out in NZBORA. Substantive human rights issues which are raised by this proposal include the:

69.1. freedom to be secure against unreasonable search and seizure

69.2. right to be free from arbitrary arrest and detention.

70. I consider that the proposed powers do not provide for unreasonable search or seizure, especially in the operational maritime context where there are significant safety of life at sea concerns. Further, I do not consider that the proposed powers could give rise to arbitrary arrest or detention, as arrests and detentions will only be permitted where reasonably necessary for the enforcement of the law, and proportional to that purpose. People detained through the proposed powers will be entitled to the usual rights and safeguards inherent in our criminal justice system, with only reasonable modifications to allow for the exigencies of carrying out law enforcement at sea.

71. Any impacts on human rights will be mitigated by:

71.1. establishing a clear threshold of “reasonable cause to suspect” before any actions are taken;

71.2. ensuring that the powers are consistent with international law, which includes New Zealand’s human rights obligations; and

71.3. ensuring existing law enforcement regimes ^{s9(2)(h)} apply once a vessel or person arrives in port in New Zealand.

Gender Implications

72. This proposal will not have any gender implications.

Disability Perspective

73. This proposal will not have any disability implications.

Publicity

74. This paper and the accompanying Regulatory Impact Statement will be published at the time that the Bill is introduced to the House. Some material may be withheld in accordance with the provisions of the Official Information Act 1982.

Proactive Release

75. I intend to delay the release of this Cabinet paper beyond 30 business days until the Bill is introduced to the House. Some material may be withheld in accordance with the provisions of the Official Information Act 1982.

Recommendations

The Minister of Foreign Affairs recommends that the Committee:

1. ^{s6(c)}

2. ^{s6(c)}

3. **note** this situation is not satisfactory given New Zealand’s extensive maritime domain and the threats posed by transnational organised crime

4. **note** the recently agreed Maritime Security Strategy provides a framework to deliver a comprehensive approach to maritime security
5. **note** that maritime powers are necessary to make the most of the Government's significant investments (including Enhanced Maritime Awareness Capability) in maritime security

A comprehensive maritime regime for maritime powers

6. **agree** that New Zealand should develop a comprehensive statutory regime for maritime powers
7. **agree** that law enforcement agencies should have statutory powers in the following situations:
 - 7.1. offences that take place on board New Zealand vessels in international waters;
 - 7.2. offences that take place on board foreign and stateless vessels in international waters where New Zealand has the right to exercise extraterritorial jurisdiction (e.g. migrant smuggling and human trafficking); and
 - 7.3. situations where an alleged offender or evidence of criminal offending is located on a New Zealand, foreign or stateless vessel in international waters (e.g. where an suspected offender has escaped New Zealand on a vessel or New Zealand-based offending is supported by a vessel in international waters)
8. **agree** that the regime should be comprehensive, operationally effective and consistent with our rights and obligations under international law
9. **note** that exercising powers at seas may require some departure from process and requirements that would be expected in legislation governing land-based law enforcement operations
10. **agree** that the Bill should:
 - 10.1. provide clear maritime powers for the enforcement of New Zealand's criminal law in international waters;
 - 10.2. uphold New Zealand's rights and obligations under international law, particularly the United Nations Convention on the Law of the Sea; and
 - 10.3. ensure that the conduct of activities is consistent with applicable human rights standards including international human rights obligations recognised by New Zealand law
11. **note** that this proposal does not seek to change to existing extraterritorial scope of any criminal offence, or create any new extraterritorial offences
12. **agree** that the legislation should apply to New Zealand vessels, foreign vessels and stateless vessels, with the exercise of the powers against foreign vessels being subject to the consent of the foreign flag state where this is required by international law
13. **agree** that the powers can be exercised in international waters; i.e. in New Zealand's EEZ (including the contiguous zone), the EEZ (including the contiguous zone) of other states and the high seas

14. **note** it may be necessary to provide for some powers in the territorial sea (including the territorial sea of other states) to ensure the regime operates effectively

Powers

15. **agree** that the Bill preserve New Zealand's ability to undertake maritime surveillance in international waters pursuant to the prerogative powers and the Defence Act 1990
16. **agree** that the Bill provide the power to stop and board vessels in international waters
17. **agree** that the powers can be used following a "hot pursuit" of the vessel, which can be exercised against a foreign vessel without the need for the consent of the flag State, consistent with international law
18. **agree** that the Bill contain a power to stop and search a vessel that is reasonably suspected of being stateless in order to verify its nationality
19. **agree** that the Bill provide powers that may be used once the vessel has been stopped and boarded that correspond to those that apply in New Zealand under Part IV of the Search and Surveillance Act (with any necessary modifications)
20. **agree** that the Bill provides powers to arrest any suspects and detain any other persons, to transfer people between vessels, and to direct the vessel, including the persons on-board, to New Zealand if evidence of offending is found
21. **agree** that the Bill provides a number of ancillary powers to support the exercise of the primary enforcement powers, including the use of reasonable force in the exercise of the powers
22. **agree** that enforcement officers should be able to collect biometric information for the purpose of establishing identity for law enforcement purposes, to support potential future prosecutions of individuals who may be organisers or crew
23. **agree** that the powers do not require a warrant in order to be used
24. **note** the regime will need to set a threshold or thresholds (e.g. number of years imprisonment) for the use of these powers
25. **direct** officials to provide advice to the Minister of Foreign Affairs on the setting of an appropriate threshold
26. **agree** that the powers in the Maritime Powers Bill will cease once the vessel and/or alleged offenders have arrived in a New Zealand port and that law enforcement activities thereafter will be conducted under the Search and Surveillance Act and any other relevant legislation
27. **agree** that the powers can be exercised by "maritime enforcement officers" who will be Constables, Customs Officers, and members of the armed forces
28. **agree** that maritime enforcement officers should have appropriate immunities and protections (including those equivalent to Part 3 of the Crimes Act 1961)

International law considerations – flag state consent

29. **note** the consent of the flag state of a foreign vessel will usually be required to exercise the powers proposed consistently with international law
30. **agree** the Secretary of Foreign Affairs and Trade should have the responsibility for seeking flag state consent
31. **agree** that a certificate from the Secretary of Foreign and Trade should be conclusive evidence that the requirement for flag state consent has been met

Other maritime powers regimes

32. **agree** to repeal sections 10A-G of the Maritime Crimes Act and Schedule 5A of the Customs and Excise Act
33. **agree** that the legislation should not apply to the following situations:
 - 33.1. **Fisheries** enforcement powers, which will continue to be covered by the Fisheries Act;
 - 33.2. **Marine pollution in the EEZ**, which will continue to be covered by the Maritime Transport Act and the Biosecurity Act; and
 - 33.3. **Interference with offshore mining activities**, which will continue to be covered by the Crown Minerals Act and the Continental Shelf Act
 - 33.4. **NZDF participation in international operations** where there is no domestic law enforcement component, which will continue to be based on the exercise of the Crown's prerogative powers for defence matters

Application to the Realm of New Zealand

34. **agree** that the regime should not apply to enforce the separate criminal laws of Tokelau, Niue and the Cook Islands
35. **note** that where New Zealand has extraterritorial jurisdiction (e.g. migrant smuggling), it may be possible to use powers to enforce New Zealand's criminal law in a way that benefits the Cook Islands, Niue and Tokelau
36. **note** the maritime terrorism powers in the Maritime Crimes Act 1999 apply to Tokelau and that it will be necessary to ensure New Zealand complies with its international obligations which extend to Tokelau

Next steps

37. **invite** the Minister of Foreign Affairs to issue drafting instructions to Parliamentary Counsel to implement the proposals set out in these recommendations
38. **authorise** the Minister of Foreign Affairs to make any policy decisions consistent with the principles set out in this paper to facilitate the drafting of legislation
39. **note** the Minister of Foreign Affairs is seeking to include a Maritime Powers Bill on the government's 2020 legislation programme with priority 2 – must be passed in 2020
40. s6(c) legislation should be enacted and in force before the end of 2020

41. **invite** the Minister of Foreign Affairs to report back to the Cabinet Legislation Committee by 31 March 2020 with a draft Bill to seek approval to introduce it to the House

Authorised for lodgement

Rt Hon Winston Peters

Minister of Foreign Affairs



Cabinet External Relations and Security Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Maritime Powers: Extending Law Enforcement Powers into International Waters

Portfolio Foreign Affairs

On 19 November 2019, the Cabinet External Relations and Security Committee:

Background

1 s6(c)

2 s6(c)

3 **noted** that this situation is not satisfactory given New Zealand's extensive maritime domain and the threats posed by transnational organised crime;

4 **noted** that the recently agreed Maritime Security Strategy [CAB-19-MIN-0555.01] provides a framework to deliver a comprehensive approach to maritime security;

5 **noted** that maritime powers are necessary to make the most of the government's significant investments (including Enhanced Maritime Awareness Capability) in maritime security;

A comprehensive maritime regime for maritime powers

6 **agreed** that New Zealand develop a comprehensive statutory regime for maritime powers;

7 **agreed** that law enforcement agencies should have statutory powers in the following situations:

7.1 offences that take place on board New Zealand vessels in international waters;

7.2 offences that take place on board foreign and stateless vessels in international waters where New Zealand has the right to exercise extraterritorial jurisdiction (e.g. migrant smuggling and human trafficking);

7.3 situations where an alleged offender or evidence of criminal offending is located on a New Zealand, foreign or stateless vessel in international waters (e.g. where a suspected offender has escaped New Zealand on a vessel or New Zealand-based offending is supported by a vessel in international waters);

- 8 **agreed** that the regime be comprehensive, operationally effective and consistent with New Zealand's rights and obligations under international law;
- 9 **noted** that exercising powers at seas may require some departure from process and requirements that would be expected in legislation governing land-based law enforcement operations;
- 10 **agreed** that the Bill:
- 10.1 provide clear maritime powers for the enforcement of New Zealand's criminal law in international waters;
 - 10.2 uphold New Zealand's rights and obligations under international law, particularly the United Nations Convention on the Law of the Sea;
 - 10.3 ensure that the conduct of activities is consistent with applicable human rights standards, including international human rights obligations recognised by New Zealand law;
- 11 **noted** that this proposal does not seek to change to existing extraterritorial scope of any criminal offence, or create any new extraterritorial offences;
- 12 **agreed** that the legislation apply to New Zealand vessels, foreign vessels and stateless vessels, with the exercise of the powers against foreign vessels being subject to the consent of the foreign flag State where this is required by international law;
- 13 **agreed** that the powers can be exercised in international waters; i.e. in New Zealand's exclusive economic zone (EEZ) (including the contiguous zone), and the EEZ (including the contiguous zone) of other States and the high seas;
- 14 **noted** that it may be necessary to provide for some powers in the territorial sea (including the territorial sea of other States) to ensure the regime operates effectively;

Powers

- 15 **agreed** that the proposed Maritime Powers Bill (the Bill) preserve New Zealand's ability to undertake maritime surveillance in international waters pursuant to the prerogative powers and the Defence Act 1990;
- 16 **agreed** that the Bill provide the power to stop and board vessels in international waters;
- 17 **agreed** that the powers can be used following a 'hot pursuit' of the vessel, which can be exercised against a foreign vessel without the need for the consent of the flag State, consistent with international law;
- 18 **agreed** that the Bill contain a power to stop and search a vessel that is reasonably suspected of being stateless in order to verify its nationality;
- 19 **agreed** that the Bill provide powers that may be used once the vessel has been stopped and boarded that correspond to those that apply in New Zealand under Part IV of the Search and Surveillance Act 2012 (with any necessary modifications);
- 20 **agreed** that the Bill provide powers to arrest any suspects and detain any other persons, to transfer people between vessels, and to direct the vessel, including the persons on-board, to New Zealand if evidence of offending is found;

- 21 **agreed** that the Bill provide a number of ancillary powers to support the exercise of the primary enforcement powers, including the use of reasonable force in the exercise of the powers;
- 22 **agreed** that enforcement officers be able to collect biometric information for the purpose of establishing identity for law enforcement purposes, to support potential future prosecutions of individuals who may be organisers or crew;
- 23 **agreed** that the powers do not require a warrant in order to be used;
- 24 **noted** that the regime will need to set a threshold or thresholds (e.g. number of years imprisonment) for the use of these powers;
- 25 **directed** officials to provide advice to the Minister of Foreign Affairs on the setting of an appropriate threshold;
- 26 **agreed** that the powers in the Bill will cease once the vessel and/or alleged offenders have arrived in a New Zealand port, and that law enforcement activities thereafter will be conducted under the Search and Surveillance Act and any other relevant legislation;
- 27 **agreed** that the powers can be exercised by ‘maritime enforcement officers’, who will be Constables, Customs Officers, and members of the armed forces;
- 28 **agreed** that maritime enforcement officers have appropriate immunities and protections (including those equivalent to Part 3 of the Crimes Act 1961);

International law considerations: flag State consent

- 29 **noted** that the consent of the flag State of a foreign vessel will usually be required to exercise the powers proposed consistently with international law;
- 30 **agreed** the Secretary of Foreign Affairs and Trade have the responsibility for seeking flag State consent;
- 31 **agreed** that a certificate from the Secretary of Foreign and Trade be conclusive evidence that the requirement for flag State consent has been met;

Other maritime powers regimes

- 32 **agreed** to repeal sections 10A-G of the Maritime Crimes Act 1999 and Schedule 5A of the Customs and Excise Act 2018;
- 33 **agreed** that the legislation not apply to the following situations:
- 33.1 fisheries enforcement powers, which will continue to be covered by the Fisheries Act 1996;
 - 33.2 marine pollution in the EEZ, which will continue to be covered by the Maritime Transport Act 1994 and the Biosecurity Act 1993;
 - 33.3 interference with offshore mining activities, which will continue to be covered by the Crown Minerals Act 1991 and the Continental Shelf Act 1964;
 - 33.4 New Zealand Defence Force participation in international operations where there is no domestic law enforcement component, which will continue to be based on the exercise of the Crown’s prerogative powers for defence matters;

Application to the Realm of New Zealand

- 34 **agreed** that the regime not apply to enforce the separate criminal laws of Tokelau, Niue and the Cook Islands;
- 35 **noted** that where New Zealand has extraterritorial jurisdiction (e.g. migrant smuggling), it may be possible to use powers to enforce New Zealand's criminal law in a way that benefits the Cook Islands, Niue and Tokelau;
- 36 **noted** that the maritime terrorism powers in the Maritime Crimes Act 1999 apply to Tokelau, and that it will be necessary to ensure New Zealand complies with its international obligations which extend to Tokelau;

Next steps

- 37 **invited** the Minister of Foreign Affairs to issue drafting instructions to the Parliamentary Counsel Office to implement the above proposals;
- 38 **authorised** the Minister of Foreign Affairs to make any policy decisions consistent with the principles set out in the paper under ERS-19-SUB-0035 to facilitate the drafting of the legislation;
- 39 **noted** that the Minister of Foreign Affairs is seeking to include a Maritime Powers Bill on the 2020 Legislation Programme with a category 2 priority (must be passed in 2020);
- 40 s6(c) the legislation should be enacted and in force before the end of 2020;
- 41 **invited** the Minister of Foreign Affairs to report back to the Cabinet Legislation Committee by 31 March 2020 with a draft Bill to seek approval to introduce it to the House.

Janine Harvey
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Rt Hon Winston Peters (Chair)
Hon Grant Robertson
Hon Andrew Little
Hon David Parker
Hon Stuart Nash

Officials present from:

Office of the Prime Minister
Department of the Prime Minister and Cabinet
Ministry of Foreign Affairs and Trade

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Minister of Foreign Affairs