

13 October 2021

Attorney-General

**Advice under the New Zealand Bill of Rights Act 1990: Criminal Proceeds (Recovery)
(Definition of Significant Criminal Activity) Amendment Bill**
Our Ref: ATT395/347

1. We have considered the Criminal Proceeds (Recovery) (Definition of Significant Criminal Activity) Amendment Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise that the Bill appears to be consistent with the Bill of Rights Act.

Purpose and effect of the Bill

2. The Criminal Proceeds (Recovery) Act 2009 (**the principal Act**) establishes a regime for the forfeiture of property that has been derived directly or indirectly from significant criminal activity. The Bill is a Member's Bill which seeks to amend the principal Act by extending the definition of "significant criminal activity" in s 6. As it stands, "significant criminal activity" means:

an activity engaged in by a person that if proceeded against as a criminal offence would amount to offending –

- (a) that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more; or
- (b) from which property, proceeds, or benefits of a value of \$30,000 or more have, directly or indirectly, been acquired or derived.

3. The Bill would add to that:

an activity engaged in by a person that could be proceeded against as a criminal offence, regardless of any maximum term of imprisonment for that offence, that occurs at a place where –

- (i) there are prohibited firearms or firearms that are possessed unlawfully; and
- (ii) a person is present who is a member of a gang or an organised criminal group.

4. The Explanatory Note records that the aim of the Bill is to increase the power of police to seize assets connected with significant criminal activity. The Bill seeks to ensure a regulatory response that targets those who commit serious crime, who use illegal firearms and who victimise New Zealanders.

Discussion

Section 9: disproportionately severe treatment or punishment

5. The Bill's proposed expansion of the forfeiture regime would remove the thresholds currently required for activity to count as "significant criminal activity" where illegal firearms and a gang member are present. An activity engaged in by a person that if proceeded against as a criminal offence would amount to offending, if occurring in a place where illegal firearms and a gang member are present, would not need to include an offence punishable by at least five years' imprisonment or from which over \$30,000 of value is derived.¹
6. As such, much less serious activity would be captured, such as potentially theft of property under \$1000. Additionally, the only connection the Bill requires between the illegal firearms and the gang member on the one hand, and the potentially criminal activity on the other, is that that they are in the same place. For example, the Bill could extend the forfeiture regime to cover property (worth under \$1000) a person steals from a shop where a gang member and an illegal firearm are present.
7. The extension of the regime in this way could arguably amount to disproportionately severe treatment or punishment, which could engage s 9 of the Bill of Rights Act.
8. Whether s 9 can apply to property, rather than interferences with bodily integrity alone, is not settled in New Zealand law. The law has not progressed significantly since the Bill of Rights Act vet of the principal Act, which explained the issue as follows:

Section 9 appears in the subpart of the BORA entitled "Life and security of the person".² The focus of ss 8 to 11 of the BORA appears to be on interferences with bodily integrity. If that is so, then questions arise as to the proper scope of the terms "treatment" and "punishment" in s 9. For example, do these apply to economic or other non-liberty affecting penalties such as forfeiture of property?

The matter has not been the subject of detailed judicial consideration in New Zealand, although in *Ljall v Solicitor-General*³ the Court of Appeal appears to have proceeded on the assumption that s 9 was applicable to a determination of whether tainted property should be forfeited to the Crown under the Proceeds of Crime Act 1991.⁴

9. Where forfeiture arises as a direct consequence of a conviction for relevant offending, it could be considered a "punishment".
10. In other situations where forfeiture is not connected to a conviction, such as where a person has not been charged or the charge has not yet been determined, it could only be considered "treatment". In this case, the application of s 9 is even more tenuous,

¹ Indeed, it is not clear whether the offence in question would need to be punishable by imprisonment at all.

² The other provisions of this subpart of the BORA deal with the right not to be deprived of life; the right not to be subjected to medical or scientific experimentation; and the right to refuse to undergo medical treatment.

³ *Ljall v Solicitor-General* (1997) 15 CRNZ 1 (CA), 6-7 and 9.

⁴ *Fitzgerald v R* [2021] NZSC 131 at [51] and fn 72, noting that the right not to be deprived of property is a common law right that is not duplicated in the Bill of Rights Act.

given the purely civil nature of the regime and the deliberate exclusion of property rights from the Bill of Rights Act.

11. However, in any event, we do not consider that forfeiture in either situation would reach the very high threshold of “disproportionately severe”. One expression of the test, as reviewed recently by the Supreme Court, is that “disproportionately severe” conduct is “conduct which is so severe as to shock the national conscience”.⁵ While the Bill extends the current regime to include less serious activities in particular circumstances, we do not consider that forfeiture in those cases would meet this test.

Section 17: freedom of association

12. Section 17 of the Bill of Rights Act affirms that everyone has the right to freedom of association. The right recognises that people should be free to enter into consensual arrangements with others and promote the common interests of the group.
13. The freedom of association can be limited in a number of ways, including where legislation treats people differently on the basis of their membership of an association, or prohibits or creates disincentives towards membership. The right to freedom of association is an important building block of a free and democratic society. It may, however, be more justifiable to place limits on s 17 in the context of gangs.
14. The Bill does not extend the forfeiture regime to reduce the thresholds for forfeiture in relation to gang members, but rather extends the definition of significant criminal activity to activity that occurs at a place where a gang member, and unlawfully possessed or prohibited firearms are present. The Bill therefore does not specifically penalise gang members more than non-gang members. On this basis it does not engage s 17, because the s 17 right is directed towards the ability to form or participate in an organisation and act collectively, rather than simply to associate as individuals.⁶
15. Even if s 17 is engaged, we consider any limit to be justifiable. Forfeiture of property that has been obtained through criminal activity is an important objective, including criminal activity that is associated with illegal firearms and gang activity.

Section 21: unreasonable search and seizure

16. Section 21 of the Bill of Rights Act provides for the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.
17. On its face, s 21 is engaged by the forfeiture regime as it involves seizure of property. However, s 21 is primarily concerned with privacy interests rather than property rights. The Court of Appeal has stated that “a touchstone of s 21... is the protection of reasonable expectations of privacy... it is thus only where a person’s privacy interest has been breached that his or her rights under s 21 of the Bill of Rights have

⁵ *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429; affirmed in *Fitzgerald v R* [2021] NZSC 131 at [76]-[79] per Winkelmann CJ, at [161]-[167] per O’Regan and Arnold JJ.

⁶ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142 at [113].

been breached”.⁷ Protection of property rights under s 21 is also inconsistent with the legislative history and the case law arising from the similar Canadian provision.

18. As such we do not consider that the Bill engages s 21 of the Bill of Rights Act. Even if it did, we consider the extension of the forfeiture regime would be reasonable given the ongoing connection between the property forfeited and criminal offending.

Review of this advice

19. In accordance with Crown Law’s policies, this advice has been peer reviewed by Peter Gunn, Crown Counsel.



Vicki McCall
Crown Counsel

Encl.

Noted / Approved /Not Approved

Hon David Parker
Attorney-General
/ /2021

⁷ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [48]. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.