

# Departmental Disclosure Statement

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Maritime Powers Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Foreign Affairs and Trade.

The Ministry of Foreign Affairs and Trade certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

03 June 2021

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## Part One: General Policy Statement

### *General Policy Statement*

The Maritime Powers Bill provides New Zealand law enforcement agencies with powers to enforce elements of New Zealand's criminal law in international waters. It does this in a manner consistent with our rights and obligations under international law, particularly the United Nations Convention on the Law of the Sea and international human rights obligations. It reflects the fundamental importance of maritime security to New Zealand as an island nation with an extensive maritime domain.

The Bill provides powers to respond to a range of criminal offending in international waters (i.e. in the contiguous zones and exclusive economic zones of New Zealand and other states and on the high seas), including:

- Offences that take place on board a New Zealand-flagged vessel in international waters;
- Offences for which New Zealand has extraterritorial jurisdiction that take place on board a foreign-flagged vessel or stateless vessel in international waters; and
- Situations where an offence has been committed in New Zealand and a suspected offender or evidence of criminal offending is subsequently located on a New Zealand, foreign or stateless vessel in international waters.

Consistent with section 8(2) of the Crimes Act, the Bill does not provide powers that can be used in respect of every offence in New Zealand's criminal law. The powers can only be used when the penalty for the offence is imprisonment for life or two or more years' imprisonment. This threshold reflects that the Bill is intended to respond to serious criminal offending at sea, particularly transnational organised crime.

The Bill provides powers to "enforcement officers" who are defined as Police Constables, Customs Officers, Members of the Armed Forces, Department of Conservation Rangers and Endangered Species Officers. This will enable the powers to be used to address a range of offending, including drugs trafficking and wildlife smuggling.

The powers in the Bill reflect those available under existing legislation, notably the Search and Surveillance Act and the Customs and Excise Act. Enforcement officers may, if certain conditions are met, including flag-state consent when required, board and search the vessel and arrest suspects. The Bill also contains powers to help manage the situation on board the vessel, such as the power to require persons on board to remain in a particular place.

The threshold at which the powers can be used also align with the thresholds under existing legislation: reasonable grounds to suspect or believe that relevant conditions are met. The powers can be exercised without a warrant due to the potentially serious nature of the offending and the reality that these powers will be used at some distance from the shore where safety of life at sea is paramount. Consistent with existing legislation, the Bill requires that enforcement officers report on the use of these powers to the Commissioner of Police or Chief Executive of the relevant agency, and to the Secretary of Foreign Affairs and Trade.

The Bill contains a broad clause that preserves the functions, duties and powers under other Acts. This means that fisheries enforcement in New Zealand waters and on the high seas will remain subject to the Fisheries Act. It also means that the New Zealand Defence Force will continue to participate in international operations without a law enforcement component in reliance on the royal prerogative.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
'Review of the Search and Surveillance Act 2012', Law Commission, 2017.	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
This Bill seeks to give effect to powers that will enable New Zealand to enforce its criminal law in international waters, consistent with international law.	
The key international instruments already ratified and relevant to this Bill are the <a href="#">United Nations Convention on the Law of the Sea</a> (UNCLOS), the <a href="#">United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances</a> (UN Drugs Trafficking Convention) and the <a href="#">United Nations Convention against Transnational Organised Crime and Protocols</a> (UNTOC).	

<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>NO</b>
The implications of taking action in relation to international treaties have been assessed in the Regulatory Impact Assessment (RIA).	

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
Regulatory Impact Analysis: Maritime Powers Legislation, Ministry of Foreign Affairs and Trade, 25 October 2019	
The RIA will be made available online when the Bill is introduced.	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
A multi-agency quality assurance panel (MFAT, MBIE and DPMC) has reviewed the RIA and considers that the information and analysis summarised in the RIA meets the quality assurance criteria.	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>
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### **Extent of impact analysis available**

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
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<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The Legal Division of the Ministry of Foreign Affairs and Trade has led policy development and confirms that the Bill and policy comply with international law.

The Crown Law Office has also been consulted.

### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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The Ministry of Foreign Affairs and Trade has considered the principles of the Treaty of Waitangi as part of policy development.

### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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Advice provided to the Attorney-General is generally expected to be available on the Ministry of Justice's website at introduction of a Bill and can be accessed at:

<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/>

## Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>YES</b>
<p>Clause 34 of the Bill establishes four criminal offences.</p> <p>Clause 34 (1) (a) relates to a person who threatens or intentionally obstructs an enforcement officer in the execution of their powers. The penalty for this offence is imprisonment for a term not exceeding 12 months. This reflects the potential seriousness of offending. A penalty of imprisonment for a term not exceeding 12 months will also enable New Zealand to extradite individuals for serious offending and prosecution, with Attorney-General consent. A penalty of up to 12 months imprisonment is also consistent with equivalent obstruction offences found in other Acts: see Section 376 of the Customs and Excise Act 2018 and Section 10F(2) of the Maritime Crimes Act 1999.</p> <p>Clause 34 (1)(b) creates an offence for a failure to comply without reasonable excuse with requirements imposed by an enforcement officer. The penalty for this offence is a term of imprisonment not exceeding 3 months. This penalty is consistent with equivalent failure to comply offences: see Section 10F(4) of the Maritime Crimes Act 1999.</p> <p>Clause 34(2)(a) creates an offence where, in response to a requirement to do so, a person provides materially false or misleading information to an enforcement officer.</p> <p>Clause 34(2)(b) creates an offence where, in response to a requirement to do so, a person intentionally fails to disclose any material particular.</p> <p>The penalty for both offences under clause 34(2) is a term of imprisonment not exceeding 6 months. This period was informed by the 'Review of the Search and Surveillance Act 2012' authored by the Law Commission in 2017. The Review recommends a term not exceeding 6 months for equivalent offending under the Search and Surveillance Act in urgent situations and situations with heightened health and safety risks, such as those anticipated in the context of this Bill.</p> <p>In all cases the consent of the Attorney-General is required to prosecute, per clause 36.</p>	

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice has been consulted on the penalties drafted in the Bill	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
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Clause 22 provides that an enforcement officer may require a person to produce any document or thing. Such documents or things may contain personal information.

Clause 24(4) provides that an enforcement officer may require a person to supply their legal name, date of birth, residential address and nationality.

Clause 28 provides that enforcement officers can collect biometric information to establish or verify the identity of a person who has been arrested or detained.

Clause 42 provides that an enforcement officer can disclose personal information to a New Zealand public sector agency as if the information had been obtained in New Zealand by the enforcement officer.

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>YES</b>
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The Privacy Commissioner has been consulted on the draft Bill.

The Privacy Commissioner 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 1993 (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.

### External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>No</b>
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### Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
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The Ministry of Foreign Affairs and Trade has consulted with a range of agencies on the policy development and draft Bill.

The agencies set to gain enforcement powers, namely the New Zealand Police, New Zealand Defence Force, New Zealand Customs Service and the New Zealand Department of Conservation, have been extensively consulted to ensure the powers can be successfully operationalised. The Crown Law Office has also been closely engaged.

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, 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 powers.

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.

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>YES</b>
<p>Clause 43 of the Bill provides that a ship is forfeited to the Crown if it arrives in New Zealand under a direction given under clause 23(2)(b)(i) and any of the following apply;</p> <ul style="list-style-type: none"><li>a) a drugs smuggling offence has been, or is being, committed on the ship;</li><li>b) the ship has been, or is, otherwise involved in the commission, or in facilitating the commission, of a drugs smuggling offence;</li><li>c) offences have been or are being committed on a ship relating to piracy, dealing in slaves, dealing in people under 18 for sexual exploitation, removal of body parts, or engagement in forced labour, smuggling and trafficking in people;</li><li>d) an offence relating to the unlawful importation of goods into New Zealand has been, or is being committed on the ship.</li></ul> <p>The inclusion of clause 43 is essential given that the Bill will repeal and replace forfeiture provisions found in Section 267A and Schedule 5A of the Customs and Excise Act 2018. Section 267A and Schedule 5A currently give effect to international obligations deriving from the UN Drugs Trafficking Convention, UNCLOS and UNTOC, which have been ratified by New Zealand.</p> <p>Clause 32 of the Bill provides for the seizure and disposal or delivery of any item an enforcement officer finds on board a ship if the enforcement officer believes on reasonable grounds:</p> <ul style="list-style-type: none"><li>a) possession of the item is unlawful under New Zealand law; or</li><li>b) importation, exportation or trade of the item is unlawful under New Zealand law.</li></ul> <p>Where the item is a wildlife specimen, clause 32 provides for the management of the specimen.</p>	

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>
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### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>
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## Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>

## Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>YES</b>
<p>Clause 38 (1 - 3) provides that any person is immune from criminal or civil liability for good faith actions or omissions in the exercise of the duties, functions or powers under the Act if the act or omission is reasonable and the person believes on reasonable grounds that the preconditions for performance of the relevant duties, functions or powers are satisfied.</p> <p>Clause 39 (1 - 2) provides that if any person is immune from civil liability under clause 38, the Crown is also immune from civil liability in tort in respect of that person's conduct.</p>	

## Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>YES</b>
<p>Further information about how the Bill creates and amends decision-making powers is available in Appendix One.</p>	

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>
<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>NO</b>

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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## Appendix One: Further Information Relating to Part Four

### Significant decision-making powers - question 4.6

#### Provisions that create or amend a decision-making power

The Bill extends a range of powers that are currently available to law enforcement agencies within the New Zealand territorial sea into international waters. These powers include;

- Stopping ships (clause 17)
- Boarding ships (clause 18)
- Requirement to identify (clause 19)
- Searching ships (clause 20)
- Internal search of a person (clause 21)
- Requiring the production of documents or things (clause 22)
- The detention of a ship, including the power to direct (clause 23)
- Power to arrest individuals (clause 25)
- Power to lift a person or thing from the sea (clause 27)
- Requiring biometric information (clause 28)
- The use of reasonable force (clause 29)
- No interference with communication with the flag State (clause 31)

Law enforcement agencies will retain the decision-making authority to engage the proposed powers.

Clause 32 of the Bill creates a disposal of unlawful items power that is different to equivalent powers found in legislation. Clause 32(3) has been drafted to empower enforcement officers to act in situations where the flag-State may not grant consent for New Zealand enforcement officers to use the Bill's full suite of powers or consent to prosecution, but may grant consent to the destruction or disposal of unlawful items. This is particularly targeted at transnational drug offending and ensuring compliance with obligations found in UNCLOS, the UN Drugs Trafficking Convention and the UNTOC, through providing a means to dispose of drugs. Accordingly, Section 160 of the Search and Surveillance Act 2012 has been expressly excluded from the Bill in Clause 20(4) and replaced with Clause 32 of this Bill.

Clause 32(4-7) provides for assessment of unlawful wildlife and wildlife goods by an inspector and enables the delivery of wildlife or endangered, threatened or exploited species to the custody of the Director-General of Conservation. These clauses ensure that enforcement officers can seize and take care of smuggled wildlife, appreciating that the disposal of such items would otherwise be inappropriate.

#### Thresholds

There are two thresholds for exercising these powers; one relates to offending and one relates to evidence of offending, which carries a higher threshold.

Offending threshold;

- Enforcement officer has reasonable grounds to suspect that a person has committed, is committing or will commit an extraterritorial offence and reasonable grounds to believe that the person is on a ship; or
- Enforcement officer has reasonable grounds to suspect that person has committed a specified offence in New Zealand and there are reasonable grounds to believe the person is on the ship.

Evidence of offending threshold;

- reasonable grounds to believe that there is evidence on a ship of the commission of an extraterritorial or specific offence in New Zealand.

### **Decision-making powers have been designed to comply with international law**

Clause 12(1) restricts the ability of law enforcement agencies to exercise powers in respect of foreign-flagged ships. Agencies require flag-State consent to use enforcement powers in relation to foreign-flagged vessels and are subject to any conditions that the flag-State attaches to its consent. Clauses 12(2-5) explicitly explains the situations in which consent is not required.

Clause 14 restricts the ability of law enforcement agencies to exercise powers in foreign waters. Powers utilised in foreign waters must be with the consent of the coastal State, in whose waters the powers would be exercised, and if the ship is foreign-flagged, flag-State consent and any conditions attached to its consent.

Clause 37 requires law enforcement agencies to seek authorisation from the Secretary of Foreign Affairs and Trade prior to the exercise of enforcement powers when clauses 12 and 14 apply. The Secretary of Foreign Affairs and Trade is responsible for seeking flag-State or coastal State consent, any conditions attached to consent and providing a certificate of the terms of an authorisation.