SOP sinks mining protesters

BY NIKKI PENDER AND PAM MCMILLAN

THE GOVERNMENT APPEARS TO be developing a practice of using post-Select Committee supplementary order papers (SOPs) as a portal through which to rush controversial law changes.

In February this year, the Corrections Minister used an unrelated Bill as the means of resuscitating her gasping prison smoking policy (see *Bill validates prison smoking ban*, *LawTalk* 814, 15 March 2013). And this month, the Minister of Energy and Resources, Simon Bridges, has leveraged off the nearly-enacted Crown Minerals (Permitting and Crown Land) Bill (Crown Minerals Bill) to introduce new maritime offences aimed at curbing offshore protests.

This article considers the ramifications of such fast-track lawmaking in the context of the latter example.

SOP 205

On 9 April, Mr Bridges tabled SOP 205 as an amendment to the Crown Minerals Bill, which itself amends the Crown Minerals Act 1991. SOP 205 inserts new ss101A to 101C which would, among other things:

- create a new offence of intentional damage or interference with mining structures, ships or activities in offshore areas within the territorial sea or exclusive economic zone (punishable by maximum 12 months imprisonment or fine of $50,000 for individuals or maximum fine of $100,000 for body corporates);
- create a new strict liability offence for any ship or person entering into a specified non-interference zone without reasonable excuse (punishable by maximum $10,000 fine); and
- give the Police and Defence Force powers to detain and arrest, board ships or otherwise prevent people and ships from entering the non-interference zone, without warrant.

During the Committee stage on 10 April, SOP 205 was approved 61-59. Before getting a third and final reading, the bill was divided into five amendment bills: the Crown Minerals Amendment Bill, Conservation Amendment Bill (no 2), Continental Shelf Amendment Bill, Reserves Amendment Bill, and Wildlife Amendment Bill. All five bills were read for a third time on 16 April and were narrowly approved by 61-60.

The minister justified the changes in SOP 205 as necessary to plug gaps in the law highlighted by a recent case, *R v Teddy* District Court, Tauranga CRI-2011-070-002669 and *Police v Elvis Teddy* [2013] NZHC 432.

To recap, Mr Teddy had been charged under s65(1)(a) of the Maritime Transport Act 1994 with operating a vessel in a manner causing unnecessary risk after he sailed his fishing boat within 20 metres of a vessel in the Raukumara Basin. The vessel was operated by Petrobras, a foreign mining company which had a permit to prospect for oil in the area. The incident occurred outside New Zealand's 12-mile limit.

The District Court dismissed the charges, finding no extra-territorial jurisdiction, but the High Court disagreed. Justice Woolford found that as the purpose of the Maritime Transport Act was maritime regulation and as its objective was to ensure that New Zealand met relevant international obligations, the legislation had to be read in the context of the international laws of the sea – including the principle of flag-State jurisdiction. The Maritime Transport Act covered New Zealand ships on the high seas and by necessary implication, Mr Terry could be charged with an offence under s65(1)(a).

A group opposed to SOP 205, including environmental and human rights groups, Sir Geoffrey Palmer QC, Peter Williams QC, Dame Anne Salmond and Sir Ngatata Love, has released a legal opinion from international law specialist Duncan Currie, who concluded that the proposed amendments breached New Zealand's international law obligations and was inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA). The legal opinion is available at *www.greenpeace.org/new-zealand/en/press/Government-Bid-to-Criminalise-Sea-Protests-Slammed/*.

It is not our intention to delve into the merits of the policy underpinning SOP 205 nor do we offer a critique of the Currie opinion. Our concern is that by introducing the changes at a late stage and by way of SOP, the Government has bypassed important quality control checks which aim to produce good laws and ensure compliance with fundamental legal principles.

What the Currie opinion shows is that it is at least arguable that the new offences engage important legal principles and that had they been introduced in a new bill, these issues would have been more closely scrutinised by officials, MPs and the general public.

Short-cutting quality controls

The introduction of significant law changes by way of SOP bypasses the normal vetting processes and increases the risk of sloppy lawmaking.

Government legislation is subject to comprehensive vetting before being introduced. These processes are set out in the Standing Orders of the House of Representatives, the Cabinet Manual 2008 and related Guide to Cabinet and Cabinet Committee Processes (CabGuide) and in guidelines produced by the independent Legislation Advisory Committee (LAC). There is particularly high sensitivity afforded to new laws which may impinge on fundamental legal principles including rights and freedoms protected by the NZBORA; or international law obligations.

Before bills enter the Government's legislative programme, ministers must forewarn of any implications for these fundamental legal principles *(Cabinet Manual, para 7.60)*. The Cabinet Legislation Committee then requires confirmation that these principles have been complied with before it will approve a bill for introduction *(Cabinet Manual, para 7.61)*. The Attorney-General is required to report independently on any inconsistencies

with the NZBORA *(s7 NZBORA; SO 262; Cabinet Manual, para 7.62).*

The CabGuide also requires that most prospective laws be subjected to a "robust regulatory impact assessment" – an evidence-based approach which weighs up potential costs and benefits.

Before being passed, bills are debated and voted on in Parliament during three readings, and a committee stage. After the first reading, most bills are referred to a select committee for further scrutiny and, importantly, public consultation.

Guarding against SOP misuse

There are some safeguards against the risk of controversial laws being slipped through Parliament's back door by way of SOP:

- the Speakers' Rulings provide that an amendment must be within the scope of purview of the bill, as defined by the contents as originally introduced *(Chapter 5, no. 3: Legislative Procedures);*
- the Cabinet Manual requires all SOPs that are outside the scope of a bill or that make substantive changes to a bill to be first approved by the Cabinet Legislation Committee *(para 7.72);*
- the LAC guidelines also warn officials to be alert for the same issues that may arise with an introductory bill, including consistency with legal principles like the NZBORA *(Chapter 4);*
- the Attorney-General, who is Parliament's watchdog on NZBORA issues is obliged under s7 NZBORA to report any inconsistencies to the House when a bill is introduced; while there is no corresponding duty to report inconsistencies in subsequent amendments, there is no impediment preventing the AG from doing so either; and
- where an SOP contains amendments to a bill that are out of scope, the House technically needs to issue an instruction before the committee can consider it *(LAC Guidelines chapter 17.3.2).*

It is not obvious that these safeguards have been effective here.

When SOP 205 was being debated, the current Attorney-General, Chris Finlayson QC, responded in part to the Duncan Currie opinion. He disagreed that the new offence of damaging or interfering with an offshore ship or structure had civil rights implications, but he did not proffer any opinion on the offence of entering a non-interference zone nor measure the law against international law obligations. When asked by an opposition MP to table a legal opinion, the Attorney-General declined.

Another opposition MP sought leave to have the Crown Minerals Bill resubmitted to the Select Committee for public consultation on SOP 205, but was unsuccessful. It does not appear that an instruction to the House was considered necessary in this case.

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Legislative mismatch

The LAC Guidelines require legislative drafters to "*consider [the proposed new law's] place within the wider law and the principles by which it will be interpreted*"

Had the new provisions in SOP 205 been introduced as a standalone bill it is unlikely that they would have ended up as part of the Crown Minerals Act. That Act, as its title suggests, primarily regulates mining operations on Crown land, whether onshore or off.

If, as the Minister has explained, the changes arise from the *Teddy* case, then the new provisions more fittingly belong in the Maritime Transport Act. The Crown Minerals and Maritime Transport Acts are not interdependent and are administered by different departments (MOBIE and NZTA). The Acts will not necessarily be interpreted the same way. For example, the courts may find it difficult to read the international laws of the sea into the Crown Minerals Act in the way the High Court did in the *Teddy* case. In short, the new offences are not likely to sit comfortably in their nominated statutory environment and interpretation of the law may produce perverse outcomes.

Conclusion

This is not the first Government to pass controversial laws by way of a hasty SOP insertion. Last decade, the Court of Appeal was less than impressed with a late change to criminal legislation which created retrospective liability and penalties for home invaders (*R* v *Poumako* [2000] 2 NZLR 695 ; *R* v *Pora* [2001] NZLR 37). After circumventing Parliament's legislative quality control processes, this Government cannot later complain if the courts feel compelled to slap the new protester law with (to paraphrase the late Lord Cooke of Thorndon in *Temese* v *Police* (1992) 9 CRNZ 425) an intrusive or gratuitously critical advisory opinion, aka a declaration of inconsistency.

Nikki Pender is a consultant and Pam McMillan is a senior solicitor at Franks & Ogilvie, a Wellington public and commercial law firm.