

Coversheet: Maritime Powers legislation

Advising agencies	<i>MFAT</i>
Decision sought	<i>Establish legislation providing comprehensive maritime law enforcement powers in international waters</i>
Proposing Ministers	<i>Foreign Affairs</i>

Summary: Problem and Proposed Approach

Problem Definition What problem or opportunity does this proposal seek to address? Why is Government intervention required?
<p>New Zealand does not have adequate maritime powers in international waters which limit the ability of the government to respond to maritime security threats and other criminal offending.</p> <p>The proposals in this paper seek to create comprehensive maritime powers to ensure New Zealand is able to enforce its criminal jurisdiction in international waters.</p>
Proposed Approach How will Government intervention work to bring about the desired change? How is this the best option?
<p>Legislation is essential to provide effective maritime powers. s9(2)(h)</p>

Section B: Summary Impacts: Benefits and costs

Who are the main expected beneficiaries and what is the nature of the expected benefit?
<p>The main beneficiaries are government agencies, particularly law enforcement, national security and foreign affairs agencies. The proposals will also benefit the wider population by enabling the government to respond more effectively to maritime crime, particularly transnational organised crime.</p> <p>The main benefits are:</p> <ul style="list-style-type: none">- Clarity to agencies on their enforcement powers;- Enhanced maritime security system – all agencies operating under a single legislative regime;- Greater protection from criminal acts, potential transnational organised crime;- Enabling those responsible for criminal acts to be prosecuted where they have committed an offence against New Zealand law outside New Zealand.

Where do the costs fall?

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.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

Where an enforcement action is taken outside New Zealand, s9(2)(h)

Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

None identified.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

There are inherent challenges exercising powers extraterritorially. We have some specific evidence for drug smuggling, but this is ultimately about providing agencies with the tools to respond to transnational threats.

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

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Interagency Panel (MFAT (Chair), MBIE and DPMC)

Quality Assurance Assessment:

Meets Criteria

Reviewer Comments and Recommendations:

Impact Statement: Enhancing New Zealand's Maritime Powers

Section 1: General information

Purpose
<p>MFAT is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing:</p> <ul style="list-style-type: none">• final decisions to proceed with a policy change to be taken by Cabinet.
Key Limitations or Constraints on Analysis
<ul style="list-style-type: none">• <i>Describe any limitations or constraints, for example: Scoping of the problem</i>• <i>Evidence of the problem</i>• <i>Range of options considered</i>• <i>Criteria used to assess options</i>• <i>Assumptions underpinning impact analysis</i>• <i>Quality of data used for impact analysis</i>• <i>Consultation and testing</i>
<p>This proposal is about creating enforcement powers in respect of offences that New Zealand has already established extraterritorial jurisdiction. It does not seek to expand the jurisdiction of any existing offence, or create new extraterritorial offences. We have not reviewed all the criminal offences across the statute book to determine comprehensively which offences would be covered. Agencies may review their existing offences and consider whether extraterritorial jurisdiction is appropriate where it currently does not exist.</p> <p>Given the potential geographic scope covered by these powers it has not been possible to obtain detailed or reliable information on the sorts of criminal activities that occur in New Zealand's maritime domain. s6(c), s9(2)(h)</p> <p>As the problem is a gap in legislation, policy and non-regulatory options were not considered as they are not able to address the problem identified.</p> <p>s9(2)(h)</p>
Responsible Manager (signature and date):

Andrew Williams

Lead Adviser – General International Law / Environment and Resources Law

Legal Division

Ministry of Foreign Affairs and Trade

25 Oct 2019

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?
<p>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 to ensure we can detect, disrupt and prosecute criminal offending. As noted in the Maritime Security Strategy recently agreed by Cabinet, rapid technological change, increased transnational organised crime activity, regional impacts of climate change, and a more contested regional geopolitical environment are creating an increasingly complex and challenging maritime security environment.</p> <p>s6(c), s9(2)(h)</p> <p>The Government’s 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 in an increasingly complex and challenging security environment.</p> <p><i>Transnational organised crime at sea is of particular concern</i></p> <p>We are seeing increased activities by transnational organised crime networks including:</p> <ul style="list-style-type: none">• 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 has been enhanced, there is a risk of 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)

- offences that take place on board New Zealand vessels 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 offender is believed to be located on a vessel in international waters)

The government has prioritised maritime security and made significant capability investments

The government has developed 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 suspected offenders in international waters

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.

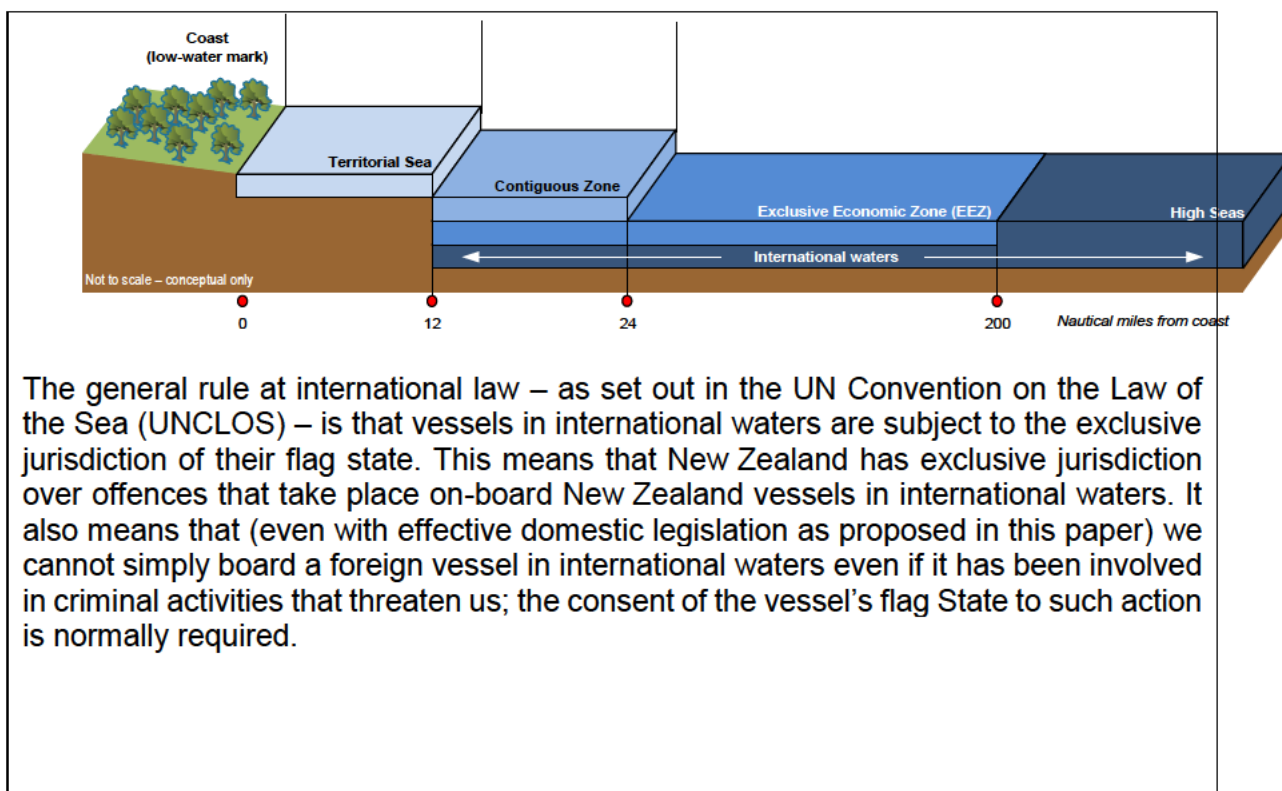
The **Strategic Defence Policy Statement** 2018 underscores that maritime security is fundamental to New Zealand's national security. It highlights rising and formidable challenges in the maritime domain, particularly in relation to climate change, transnational organised crime, resource competition and irregular migration.

The International Legal framework

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.

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



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 (even with effective domestic legislation as proposed in this paper) 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.

2.2 What regulatory system, or systems, are already in place?

s9(2)(h)

While international law provides New Zealand with rights, such as maritime powers, we did not historically consider that we needed domestic implementation (save in respect of fisheries) because maritime powers do not require the Government to meet any particular obligation or to ensure that private individuals act in a particular way.

s9(2)(h)

The Search and Surveillance Act 2012 placed New Zealand’s law enforcement powers across a range of agencies on a clear statutory basis. This Act reflects a change in view that law enforcement powers require a positive empowering legislation because they are intrusive by nature. s9(2)(h)

If foreign vessels or nationals were involved, this could also impact on the bilateral relationship.

Bespoke regimes have been developed for particular offences (drugs trafficking and maritime terrorism).

New Zealand has implemented maritime powers in some domestic legislation, but not others. New Zealand has enacted domestic legislation to implement maritime powers for fisheries (Fisheries Act), maritime terrorism (Maritime Crimes Act 1999) and drugs trafficking (Customs and Excise Act 2017). s6(c), s9(2)(h)

The proliferation of bespoke regimes also creates operational difficulties where a particular operation might require relying on a

range of schemes (for example, if a drug smuggling vessel was interdicted and a significant number of firearms were found).

2.3 What is the policy problem or opportunity?

What is the problem?

New Zealand's maritime powers do not align with our criminal law jurisdiction or our rights and obligations at international law: New Zealand has existing criminal offences with extraterritorial jurisdiction, but in general, enforcement powers are confined to New Zealand territory in domestic legislation.

An absence of legislation limits the options to respond to a maritime security threat and other criminal offending: Despite New Zealand's right at international law to exercise maritime powers outside New Zealand, s6(c), s9(2)(h)

It also means New Zealand is in some cases unable to act or disrupt criminal activity before it reaches our shores.

To date, we have addressed this issue on an ad hoc basis: Maritime powers have been codified for drugs trafficking and maritime terrorism – this approach has exacerbated the problem in other contexts. s6(c)

The underlying cause of the problem

This problem has arisen because the regulatory system has not kept pace with significant developments in other relevant regulatory systems relating to the exercise of law enforcement, search and surveillance powers. The Search and Surveillance Act 2012 and the Intelligence and Security Act 2017 are the most significant examples of this trend but it is also evident in the codification of intrusive powers across the statute book (including the Customs and Excise Act, Maritime Crimes Act, Biosecurity Act).

s9(2)(h)

Criminal Offence: In the event where an offence, such as murder, has been committed on New Zealand soil and the suspect has left on-board a New Zealand flagged vessel for international waters, New Zealand Police would require powers to conduct their investigation. Problems include the preservation of evidence that is believed to be on-board and intended to be disposed of at sea, the ability to board and search the vessel, seize evidence, question, arrest and detain suspects, return suspects on-board to New Zealand for prosecution, and return the vessel to New Zealand so that it can be searched for evidence.

2.4 Are there any constraints on the scope for decision making?

There are no known constraints.

We are not proposing to review the scope of New Zealand's extraterritorial jurisdiction as part of this work.

2.5 What do stakeholders think?

The Security Intelligence Board comprising Chief Executives from DPMC, MFAT, NZSIS, GCSB, MBIE, Customs, Police, Defence, NZDF directed MFAT to prioritise this work as it

s6(c) In addition to SIB agencies, the Ministry of Justice, the Ministry of Transport, the Ministry for Primary Industries and the Crown Law Office have been closely involved in this work.

s6(c)

Section 3: Options identification

3.1 What options are available to address the problem?

We have identified three options to address the problem identified in this paper:

- Status quo
- Develop further specialised regimes (including a regime for immigration)
- Comprehensive reform of maritime powers

Option 1: The status quo

This option would see the existing approach retained which would mean New Zealand would have maritime powers for specific criminal regimes: drugs-trafficking and maritime terrorism only.

Option 2: Develop further specialised regimes (including a regime for immigration)

This option would develop a range of specialised regimes s6(c)

For example, regimes could be developed for:

- Immigration to address migrant-smuggling and human trafficking
- Firearms trafficking
- Wildlife trafficking

This option would see a patchwork of regimes across specific subject matter – see for example Schedule 5A of the Customs and Excise Act 2018.

Option 3: Comprehensive reform of maritime power (preferred option)

This option would repeal existing regimes and create a new maritime powers legislation of general application. The regime would provide powers in the following cases:

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

The regime would be comprehensive as it is not limited to particular subject matter. It would apply to all types of vessels (New Zealand vessels, foreign vessels and stateless vessels). It would include a full suite of powers including:

- powers to stop and board a vessel
- search powers
- enforcement powers

- ancillary powers that recognise the particular challenges of operating in a maritime context

Other factors

As noted at the outset, non-regulatory options are not feasible in the context of the exercise of intrusive powers.

Both Australia and the UK have developed comprehensive maritime powers legislation which provide useful models to consider in the development of legislation.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

We have identified the following four criteria against which to assess the options:

- How effectively does the proposal address s6(c)
- Which regime is most the effective operationally?
- How does the regime impact on other activities which are not covered by the regime?
- How well does the regime give effect to New Zealand's rights and interests under international law?

Criterion 1: How effectively does the proposal address s6(c)

This criterion assesses whether and how the option addresses s6(c) This includes both s6(c) as well whether the regime is future-proofed and able to address risks as yet unknown.

Criterion 2: How does the option ensure the powers are effective operationally?

This criterion considers the clarity and coherence of powers. Does the proposal enable operational agencies to respond to a threat with a clear set of powers and obligations? Does the proposal allow flexibility if in the course of an operation a different threat emerges (for example, while searching for illicit drugs, Customs officer finds a significant volume of illegal firearms or a dead body).

Criterion 3: How does the regime impact on other activities which are not covered by the regime?

This criterion considers the effect of the proposed option on a range of other activities not covered by the regime. This includes the impact on activities not intended to be covered by any of the options (e.g. fisheries and defence deployments, maritime surveillance) as well as the risk of unintended consequences which might limit the ability of the government to respond to a maritime security threat.

Criterion 4: How well does the regime give effect to New Zealand's rights and interests under international law?

This criterion considers whether the proposal enables New Zealand to act on its rights under international law to exercise maritime powers. It also considers the consistency with human rights obligations and obligations to cooperate with other states to combat transnational organised crime.

3.3 What other options have been ruled out of scope, or not considered, and why?

Non-regulatory options were not considered as the issue relates to a gap in our legislation.

Section 4: Impact Analysis Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2? *Add, or subtract, columns and rows as necessary.*

	No action	Further specialised regimes	comprehensive reform of maritime powers
Addresses s6(c)	0	+	++
		s6(c)	addresses all gaps and is future-proofed
Enhances operational effectiveness	0	+	++
		agencies still working under different legislation with different powers	all operational agencies working under single piece of legislation – provides clarity of powers
Impact on other activities - Would the creation of specialised regimes limit the use of powers in other contexts?	0	0	++
		entrenches the existing legal problem restricting the use of powers in other contexts	there are no subject matter gaps so proposal does not impact on other activities
Consistency with New Zealand rights under international law	0	+	++
		enables New Zealand to exercise its rights under the migrant smuggling protocol	gives maximum effect to New Zealand rights under international law
Overall assessment	0	+	++

Key:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred option is Option 3. Option 3 is comprehensive and does not leave subject matter gaps. This means that law enforcement can exercise the powers in respect of complex criminal offending rather than for a single issue. As all agencies would be operating under the same legislation with the same powers, there is greater overall operational efficiency with clear and precise powers. As the option, does not include subject matter gaps, the risk that the proposal impacts on other activities is reduced, and any specific risks can be clearly addressed in the drafting the legislation. Finally, the proposal is future-proofed and enables New Zealand to exercise the full extent of its rights under international law. Stakeholders agree on option 3 as the preferred option.

Given the extent of the proposed reform which may take some time to develop, it may be appropriate to consider whether to implement option 2 as an interim measure for s6(c)

The continued proliferation of bespoke regimes would further entrench the underlying problem and would not allow New Zealand to exercise maritime powers outside of those specialised regimes.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact \$m present value, for monetised impacts; high, medium or low for non-monetised impacts	Evidence certainty (High, medium or low)
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Additional costs of proposed approach, compared to taking no action

Enforcement agencies (NZDF, Police, Customs)	There may be some costs associated with delivering these operations, and maintaining capacity to operate in international waters. The proposals of themselves do not require any particular activity to be undertaken. Joint operations will be organised through National Maritime Coordination Centre and will be based on available resources (noting the existing investments	Low	High
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	the government has made in maritime security capabilities). When faced with criminal offending offshore, law enforcement agencies may have the option to intervene earlier.		
Justice system	There may be additional impacts on the justice system if more individuals are arrested, prosecuted and imprisoned in New Zealand as a result of these operations.	Low	Medium

Expected benefits of proposed approach, compared to taking no action

Organised crime groups	Expanding the effective area for interdiction will make it harder and more expensive for organised crime groups to target New Zealand.	Medium	Medium
New Zealand Communities	Potential to deter and prosecute criminal activity committed against New Zealand law.	Medium	Medium
Exploited migrants	Would enable New Zealand to exercise powers to prosecute and disrupt the migrant-smugglers who place the life and safety of migrants in significant jeopardy.	High	Medium
International partners	Will enhance New Zealand's ability to cooperate effectively with key partners to combat transnational organised crime.	Medium	Medium
Enforcement agencies	Will have a clear set of powers to facilitate effective operations.	Medium	High

5.3 What other impacts is this approach likely to have?

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5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

This proposal is consistent with the Government's Expectations for the design of regulatory systems. The proposal will also be consistent with relevant human rights standards.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

MFAT proposes that these changes be made through stand-alone legislation – a Maritime Powers Bill.

The exercise of these powers will be based on operational decisions once the legislation is in place. The option of using these powers will become part of the Government's toolkit for responding when criminal activity is suspected in international waters. Its use will be considered against other available options, the availability of defence assets, as well as health and safety considerations. It will only be exercised where it is determined to be the most effective tactical approach. There is no expectation that additional resources will be devoted to maritime enforcement except in response to a specific or particular operation.

6.2 What are the implementation risks?

Three implementation risks have been identified:

1. The main risk is where these powers are exercised where there is no offence committed. This risk is mitigated by the proposed threshold, which will limit actions to where there is a reasonable cause to suspect criminal offending.
2. There may be challenges obtaining flag state consent to use these powers in respect of foreign-flagged vessels. Under existing bespoke regimes (including Schedule 5A of the Customs and Excise Act), MFAT has worked with a wide-range of foreign governments to understand their processes and requirements to grant consent for New Zealand authorities to exercise powers. While ultimately, it is a matter of the flag state, MFAT will allocate diplomatic resources to obtaining flag-state consent wherever possible.
3. The extent of the maritime domain covered by these proposals is significant. The powers will need to be used in a targeted fashion in response to a specific threat rather than creating expectations of a significant expansion of law enforcement resources into New Zealand's maritime domain.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?
<p>The arrangements will be monitored through existing mechanisms and infrastructure. This includes existing data collection activities, and assessments of New Zealand's maritime security as part of the Maritime Security and Transnational Organised Crime (TNOOC) Strategy.</p> <p>The ultimate indication of system performance will be the ability of New Zealand to bring a successful prosecution where these proposed powers were exercised.</p>

7.2 When and how will the new arrangements be reviewed?
<p>There are no specific review provisions proposed for legislation.</p> <p>There are three types of review expected:</p> <ul style="list-style-type: none">- operational debriefs following the exercise of these powers- regular review of operational policies and procedures- monitoring and review as part of MFAT's regulatory system. <p>It is expected that these powers will be exercised rarely. MFAT, in coordination with enforcement agencies, will debrief once an operation is completed. The primary purpose of these debriefs will be to identify and address any improvements for future operational activity.</p> <p>Overall performance of the legislation will be assessed by MFAT reporting through the National Security System.</p>