



Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act 1990
on the Misuse of Drugs (Medicinal Cannabis)
Amendment Bill (No. 2)

Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 269 of the Standing Orders of the House of
Representatives

1. I have considered whether the Misuse of Drugs (Medicinal Cannabis) Amendment Bill (No. 2) (“the Bill”) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”).
2. I have concluded that the Bill is inconsistent with the right to freedom of association affirmed in s 17 of the Bill of Rights Act.
3. As required by s 7 of the Bill of Rights Act and Standing Order 269, I draw this to the attention of the House of Representatives.

The Bill

4. The purpose of the Bill is to amend the Misuse of Drugs Act 1975 to provide for the implementation of a medicinal cannabis scheme (“the scheme”) that will:
 - a. license and regulate domestic medicinal cannabis production;
 - b. regulate health practitioner-controlled access to medicinal cannabis; and
 - c. facilitate pharmacist dispensing of medicinal cannabis products.

Section 17 of the Bill of Rights Act (freedom of association)

5. 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.
6. The right to freedom of association can be limited in a number of different ways, including where legislation treats people differently on the basis of their membership of an association, or prohibits or creates disincentives towards membership.
7. Clause 14 of new Schedule 7 of the Bill requires a licensed producer to take all reasonable steps not to employ a person who:
 - a. is under 18;
 - b. has a conviction for an offence under the principal Act or any other drug-related offence, a dishonesty offence, an offence punishable by over two years’ imprisonment, or an equivalent overseas offence;
 - c. is addicted or habituated to the use of a controlled drug, prescription medicine, or restricted medicine; or
 - d. is a member of a gang as defined in s 4 of the Prohibition of Gang Insignia in Government Premises Act 2013.
7. The prohibition on employment of gang members requires producers to make a distinction in employment processes based on a person’s association with a gang, which *prima facie* limits s 17 of the Bill of Rights Act.

Is the limitation justified under s 5 of the Bill of Rights Act?

8. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:¹
- a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

Does the limit serve a sufficiently important objective?

9. The cl 14 restrictions on the persons licensed producers may employ appear to aim to ensure that only those with suitable character and maturity may be involved in the production of medicinal cannabis. I interpret the cl 14(d) prohibition on the employment of gang members as aiming to minimise the risk of misuse or diversion of supply of medicinal cannabis into the illegal market. I consider this objective to be sufficiently important to justify some limitation on the freedom of association.

Is the limit on the right rationally connected to the objective?

10. The available empirical evidence provides some support for viewing gang membership as a proxy for the risk of diversion of supply of medicinal cannabis into the illegal market. Gang members have been shown to be significantly more likely to be involved in the supply of illegal drugs than the general population.² Although gang members are less intensively involved in the supply of cannabis than that of Class A and B drugs,³ partly due to widespread domestic cultivation of cannabis and a strong tradition of social supply,⁴ there is evidence to suggest that gang

¹ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

² New Zealand Police reporting indicates that while gang members make up 0.1% of the New Zealand population they were responsible for 34% of charges related to Class A and B drugs in 2014: Whole-of-Government Action Plan to Reduce the Harms Caused by New Zealand Adult Gangs and Transnational Crime Groups, Paper to Cabinet Social Wellbeing Committee, para 15.

³ Cannabis is a Class C drug, per Schedule 3 of the Misuse of Drugs Act 1975

⁴ Police surveys in 2014 found that only 34% of cannabis users had purchased cannabis in the last year from a gang member, while 75% of users had purchased cannabis from friends, evidencing a strong social supply of cannabis within society unconnected to gang networks. This compared to 50% of methamphetamine users in the same survey who purchased this drug from a gang member: Recent trends in illegal drug markets in New Zealand, 2006-2014, SHORE & Te Ropu Whariki, Massey University (November 2015), p 23.

involvement in cultivating and selling cannabis is substantial and increasing.⁵ Between 2009 and 2014, the proportion of frequent drug users who reported purchasing cannabis from a ‘gang member or gang associate’ increased from 19 percent to 34 percent.⁶

11. On this basis, I am prepared to accept that the employment of those with strong gang associations in the medicinal cannabis industry would give rise to increased risk of diversion of supply. It is clear that removing a source of the risk is rationally connected to minimising that risk.

Is the limit on the right minimally impairing of the right to freedom of association?

12. The question of whether the right is impaired no more than reasonably necessary involves consideration of whether the objective could be sufficiently achieved by another method involving less cost to the right to freedom of association.⁷ I have previously commented that it may be more appropriate to place limits on the right to freedom of association in the context of gangs.⁸
13. However, in considering whether the limit on the right is minimally impairing in this context, the complete bar on the employment of gang members by licensed producers can be usefully contrasted with the approach taken to association when assessing the eligibility and suitability of persons to hold licences under the scheme.
14. Under cl 4(1)(b) and (c) of new Schedule 7, an individual is ineligible to hold a licence for the production of medicinal cannabis if, amongst other things, they have one of the same convictions that would make a person ineligible to be employed by a licensed producer (see paragraph 22(a) above) or have, at any time, been addicted or habituated to the use of a controlled drug or prescription or restricted medicine. By contrast, whether an eligible individual has “connections or associations ... with other persons who may have the ability to influence [their] conduct” is one of a number of discretionary factors to be taken into account by the Director-General of Health when determining their suitability to hold a licence (cl 4(2)(a)). Almost identical criteria apply to every director and the nominated “responsible person” of a body corporate licensee (cls 5 and 6).
15. In my view, this approach appropriately recognises that relevant convictions or addictions are likely to represent stronger proxies for the risk of misusing or diverting medicinal cannabis than gang membership alone. It supports a rigorous and individualised assessment of a person’s risk without mandating differential treatment on the basis of their membership of a gang.

⁵ The Cannabis black market and the case for legalisation of cannabis in New Zealand, Social Policy Journal of New Zealand Te Puna Whakaaro, Issue 18 June 2002.

⁶ Recent trends in illegal drug markets in New Zealand, 2006-2014, above n 8, p 193.

⁷ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [126].

⁸ Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Arms (Firearms Prohibition Orders) Amendment Bill (No 2).

16. I consider that the extension of such a discretionary approach to the employment of persons by producers would be as capable of minimising the risk of misuse or diversion of supply of medicinal cannabis into the illegal market, and more consistent with the right to freedom of association.
17. As such, I consider that the Bill's restriction on the right to freedom of association cannot be viewed as minimally impairing of the right to freedom of association.

Is the limit in due proportion to the importance of the objective?

18. For the same reasons outlined above, I do not consider that the limit on the right can be viewed as in due proportion to the importance of the objective.
19. I therefore consider that the Bill is inconsistent with the right to freedom of association.

Conclusion

20. For the reasons outlined above, I have concluded the Bill appears to limit section 17 of the Bill of Rights Act and cannot be justified under s 5 of that Act.



Hon David Parker
Attorney-General