

8 February 2019

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Misuse of Drugs Amendment Bill

Purpose

1. We have considered whether the Misuse of Drugs Amendment Bill ('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. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21797/1.5). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 25(c) (the right to be presumed innocent until proved guilty according to law). Our analysis is set out below.

The Bill

4. The Bill amends the Misuse of Drugs Act 1975 ('the Act') to:
 - a. allow the Minister of Health to issue temporary drug notices, classifying new substances as Class C controlled drugs, that have effect for up to a year;
 - b. provide a clear statutory basis for Police discretion not to prosecute for offences of simple possession and use of controlled drugs, and
 - c. classify the synthetic cannabinoids 5F-ADB and AMB-FUBNACA as Class A controlled drugs.
5. The purpose of the Bill is to enable temporary drug orders to be issued for the immediate classification of emerging and potentially harmful substances while the Minister of Health undertakes the scheduling processes in the Act. The Bill also provides a statutory basis for Police discretion to decide not to prosecute in particular cases, which is consistent with a health-based approach to the possession and use of controlled drugs.

Consistency of the Bill with the Bill of Rights Act

Section 25(c) – the right to be proved innocent until proved guilty according to law

6. Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires the Crown to prove an accused person's guilt beyond reasonable doubt. In general, a provision which requires an accused person to disprove on the balance of

probabilities the existence of a presumed fact, that fact being an important element of the offense in question, would violate the presumption of innocence.¹

7. Section 6(6) of the Act states:

For the purposes of [the offence of possession for supply], a person is presumed until the contrary is proved to be in possession of a controlled drug for [the purpose of supply] if he or she is in possession of the controlled drug in an amount, level, or quantity at or over which the controlled drug is presumed to be for supply.

8. This presumption reverses the onus of proof so that, to avoid a conviction for supply, a defendant who is in possession of the fixed quantity of the drug in question must prove on the balance of probabilities that he or she was not in possession of the drug for supply.

9. If the Act does not specify a quantity for the presumption of supply in respect of a particular controlled drug, the default level of 56 grams or more applies. This is significantly higher than any of the specified levels for particular drugs in the Act. The temporary drug order provisions in the Bill make no provision for the Minister of Health to specify a quantity level for presumed supply, which means the default quantity of 56 grams will apply to drugs listed in these orders.

10. The Bill therefore creates a presumption that the possession of 56 grams or more of a drug named in a temporary drug order is for the purpose of supply. This presumption creates a *prima facie* breach of s 25(c) of the Bill of Rights Act because it imposes an obligation on an accused to prove on the balance of probabilities that he or she did not intend to supply that drug.

11. We note that on two previous occasions, Bills adding new drugs to the Schedules of the Act have been found to unjustifiably breach this section of the Bill of Rights Act. On both occasions, the reason was that the quantity for presumed supply was identified as too low and could potentially capture those merely stockpiling the drug for personal use, rather than those with an intention to supply.

Section 5 justified limitation

12. Where a Bill is found to be *prima facie* inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under s 5 of the Act. The inquiry under s 5 is essentially two-fold:²

- 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?

¹ *R v Oakes* (1986) 26 DLR (4th) 200 (Canadian Supreme Court); *S v Bhulwana*; *S v Gwadiso* (1995) 2 SACR 748 (South African Constitutional Court) and *R v Sin Yau-Ming* [1992] LRC (Const) 547 (Hong Kong Court of Appeal).

² *Hansen v R* [2007] NZSC 7 at [123].

iii. is the limit in due proportion to the importance of the objective?

Is the objective sufficiently important?

13. The objective of the temporary drug order provisions is to enable a response to a rapidly adapting synthetic drug market that poses a high risk to public health. New, and potentially harmful, products are swiftly produced and current classification processes, which occur via legislative amendment, are unable to keep pace. By way of example, the two drugs being scheduled in this Bill have been provisionally linked to approximately 50-55 deaths in New Zealand since mid-2017, when information on them began to be collected.
14. Temporary drug classification presents a faster means than legislative amendment to provide immediate control of potentially harmful emerging drugs. A temporary drug order would allow the Minister to classify harmful drugs as they emerge, while seeking advice and beginning the process of full legislative classification. Without this agility, the response to such drugs may not be as effective as the market quickly moves to new substances not yet scheduled under the Act.
15. As noted in *Hansen*, as well as previous advice to the Attorney-General on amendments to this Act, the control of supply of harmful drugs is a significant and important objective. We have concluded that the purpose of this amendment is a significant and important objective.

Is there a rational connection between the limit and the objective?

16. By differentiating between a lesser possession offence and more serious supply offence, the Act seeks to control harmful drugs by focusing on persons intending to distribute them. The Law Commission has suggested that the main reason for the presumption for supply in s 6(6) is that if there was no presumption, it would sometimes be difficult for the prosecution to prove that the accused was in possession of the drug with intent to supply it. The prosecution would potentially have to call expert evidence about the ordinary patterns of use of the drug in order to demonstrate that the accused possessed more of the drug than would usually be possessed by a high user. This would be time-consuming and expensive.³ The presumption may also result in more successful convictions of persons who intentionally supply classified drugs and create a strong deterrent for people contemplating supplying these substances.
17. The same regime will apply to substances classified under a temporary drug order, assisting in the prosecution of suppliers of newly classified drugs. We have concluded that there is a rational connection between the limit on the right under s 25(c) of the Bill of Rights Act and the Bill's objective of controlling new and harmful drugs.

Is the impairment of the right greater than reasonably necessary?

18. In *obiter dictum* statements the Court in *Hansen* suggested that a reverse onus might be justified under s 5 if it were set at a high enough level to reduce or avoid the possibility of wrongful convictions resulting from operation of the presumption. Tipping J stated:⁴

“...it becomes crucial at what quantity of the drug the presumption is fixed. It matters whether the trigger amount is set on the basis that possession of such an amount raises a bare probability that the purpose of the possession is supply, a high probability that such is the accused's purpose, or a near certainty. The higher the probability of supply deriving

³ Law Commission *Controlling and Regulating Drugs* (NZLC IP16, 2010).

⁴ *R v Hansen* [2007] NZSC 7 at [143].

from possession of the trigger amount, the more justifiable will be a presumption of supply. The lower the degree of probability, the more problematic such a presumption becomes.”

19. Following *Hansen*, previous advice on amendments to the Act has taken the position that the threshold must be so high as to make it highly probable or nearly certain that the purpose of possession is for supply.⁵ A threshold which is too low will impair the right greater than reasonably necessary, and risks breaking the rational link between the limit and the objective.
20. As noted above, the temporary drug orders permitted by this Bill will set the quantity for presumed supply at the default level of 56 grams or more. By way of comparison the next highest threshold, cannabis plant, is set at 28 grams (or 100 cigarettes containing the drug). While the Bill does not limit the type of drug which may be classified under a temporary drug order, the type of harmful synthetic substance contemplated to be addressed by the Bill is significantly more potent and harmful than the cannabis plant and would typically require a smaller quantity for a single dose. Accordingly, 56 grams or more would represent a significant amount unlikely to be held solely for personal use.
21. Because the temporary drug orders made under the Bill are contemplated to be matters of urgency to prevent public harm, it is not reasonably practicable for each product to be consulted on and an individual quantity limit set for each drug. This process can be engaged in under the existing provisions of the Act when the Minister progresses to full legislative classification. Setting the quantity for presumed supply at the default level supports the prosecution of supply offences, while raising the threshold to the highest quantity currently listed within the Act.

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

22. As outlined above, the control of supply of harmful drugs is considered a significant and important objective. In addition to this, steps have been taken in the Bill to limit the impact of the Minister’s ability to issue temporary drug orders:
 - a. the Minister of Health must not make an order unless satisfied that the named drug poses or may pose a risk of harm to individuals or to society;⁶
 - b. such orders last for a maximum of one year, and may be renewed only once;⁷
 - c. orders are disallowable instruments which must be presented before the House of Representatives and may be voted down;⁸ and
 - d. following the issue of a temporary drug order, the Minister must begin the classification process for the appropriate scheduling of the drugs, including seeking advice from the advisory committee on the appropriate limit for the drug.
23. The above steps have been taken to limit the temporary drug order provisions to what is reasonably necessary in order for them to fulfil their objective under the Bill.

⁵ See, for example, Hon Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs Amendment Bill* (Ministry of Justice, 2010)

⁶ Clause 5, new section 4C(3).

⁷ Clause 5, new section 4F.

⁸ Clause 5, new section 4G.

Conclusion

24. As the temporary drug order provisions impose the highest limit specified in the Act for supply, the drugs anticipated to be caught by the Bill are those that pose a risk of public harm, and there are sufficient limits on the provisions to ensure they limit the right only as reasonably necessary, we consider these provisions are consistent with the right to be presumed innocent until proved guilty affirmed by s 25(c) of the Bill of Rights Act.

Newly classified synthetic cannabinoids

25. We also note that the Bill will classify the synthetic cannabinoids 5F-ADB and AMB-FUBNACA as Class A drugs under the Act. The Bill does not specify the quantity for presumed supply of these drugs, which means the default quantity of 56 grams will apply. For the reasons discussed above, we consider that the inclusion of these drugs engages the right under s 25(c) of the Bill of Rights Act but is a justified limitation on that right.

Conclusion

26. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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