

6 May 2021

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Synthetic Urine (Prohibition on Importation, Supply and Acquisition to Pass a Workplace Drug Test) Bill**

### **Purpose**

---

1. We have considered whether the Synthetic Urine (Prohibition on Importation, Supply and Acquisition to Pass a Workplace Drug Test) Bill (the Bill), a member's Bill in the name of Matt Doocey MP 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 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) (right to be presumed innocent until proven guilty according to law). Our analysis is set out below.

### **The Bill**

---

3. The Bill prohibits the importation, supply and acquisition of synthetic urine except by those persons or class or persons authorised by the Director-General of Health to do so.
4. The Bill creates offences resulting in fines for breaching any of the prohibitions in the Bill and for misleading an authorised supplier that a person is an authorised recipient in order to acquire, or attempt to acquire, synthetic urine.

### **Consistency of the Bill with the Bill of Rights Act**

---

#### **Section 25(c) - Right to be presumed innocent until proved guilty according to law**

5. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has the right to be presumed innocent until proven guilty according to the law. This right requires the prosecution to prove, beyond reasonable doubt, that the accused is guilty.<sup>1</sup>
6. Clause 14 of the Bill creates strict liability offences for importing, supplying and acquiring synthetic urine unless authorised to do so by the Director-General of Health (refer cl 7(1), 8(1) and 9(1) respectively). Clause 14 also creates a strict liability offence for an authorised supplier to supply synthetic urine without having reasonable grounds to believe that the recipient is either (a) an authorised recipient or (b) an authorised supplier acquiring the synthetic urine for the purpose of supply (refer cl 8(2)). This places a reverse onus on the defence to prove that they had reasonable grounds to believe that the recipient is authorised by the Director-General of Health to acquire synthetic urine or

---

<sup>1</sup> *Hansen v R* [2007] NZSC 7 [30], also *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

is authorised by the Director-General of Health to supply synthetic urine and is acquiring it for that purpose.

7. Strict liability offences give rise to a *prima facie* inconsistency with s 25(c) because the accused person is required to prove a defence (on the balance of probabilities) to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
8. Where a provision appears 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 demonstrably justified in a free and democratic society under s 5 of the Bill of Rights Act.
9. Strict liability offences have been considered more justifiable where, as is the case here:
  - a. the offence is in the nature of a public welfare regulatory offence in order to protect the public;
  - b. the offender is in the best position to justify their apparent failure to comply with the law rather than requiring the Crown to prove the opposite; and
  - c. the penalty for the offence, here a fine not exceeding \$5000 for an individual and not exceeding \$25,000 for a body corporate, is proportionate to the importance of the Bill's objective.
10. We consider that the *prima facie* limits to the right affirmed under s 25(c) of the Bill of Rights Act proposed by the Bill are justified. In particular:
  - a. penalising non-compliance with the regulatory regime by way of a strict liability offence is rationally connected to the objective of the Bill which is to prevent the availability of synthetic urine for the purpose of evading a positive workplace drug test. The reliability of those tests is important as employers have obligations under the Health and Safety at Work Act 2015 to keep people safe and prevent workplace accidents and deaths;
  - b. people exercise a choice to engage in the importation, supply or acquisition of synthetic urine without the appropriate authorisation from the Director-General of Health;
  - c. the defendant is best placed to explain their non-compliance with the provisions of the Bill and any steps they had taken to comply, and in the case of cl 8(2) their reasonable grounds for believing that they were complying with the law; and
  - d. the penalties are proportionate and solely financial in nature. No terms of imprisonment can be imposed.
11. Accordingly, we have concluded that the proposed new offences referred to above are justified under s 5 of the Bill of Rights Act.

## Conclusion

---

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



Jeff Orr

**Chief Legal Counsel  
Office of Legal Counsel**