

4 May 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Drug and Substance Checking Legislation Bill (No 2)

Purpose

1. We have considered whether the Drug and Substance Checking Legislation 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. This advice has been prepared in relation to the latest version of the Bill (PCO 23443/6.2). We will provide you with further advice if we receive another version of the Bill that includes amendments affecting 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 coming to that conclusion, we have considered consistency with section 25 of the Bill of Rights Act (minimum standards of criminal procedure) which we have determined is engaged in the same way as it was by the Drug and Substance Checking Legislation Act 2020.

The Bill

4. The Bill is an Omnibus Bill. It amends the Misuse of Drugs Act 1975, the Psychoactive Substances Act 2013 and the Medicines Act 1981 to enable drug and substance checking services to operate legally in New Zealand. It largely replicates and will replace the Drug and Substance Checking Legislation Act 2020 ('the Act'), which was introduced as a temporary solution to enable drug testing in the short-term while a permanent system was developed. Repeal provisions in the Act will take effect 12 months after its date of commencement. The Bill includes transitional provisions to ensure a smooth transition between the Bill and the Act.
5. Similar to the Act, the Bill amends the Misuse of Drugs Act 1975 to:
 - allow members of the public to supply a sample of a controlled drug to a service provider for checking or to surrender it for the purpose of disposal;
 - provide protections for those providing, hosting and using drug and substance checking services;
 - enable the Director-General of Health to issue licences for drug and substance checking service providers to perform specified functions;
 - require the Ministry of Health to publish a list of drug and substance checking service providers; and

- introduce offences for non-licenced persons to provide drug and substance checking and for licenced providers to breach the terms or conditions of their licence.
6. The Bill specifies the functions of drug and substance checking service providers as being:
 - i. to provide information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use;
 - ii. to test any drug or substance, or sample of a drug or substance, (which may be a controlled drug or psychoactive substance) that an individual presents for checking to ascertain the composition and likely identity of the drug or substance;
 - iii. to advise the individual who presented a sample of a drug or substance for checking the outcome of the testing;
 - iv. to return a drug or substance to the individual who presented it for checking;
 - v. to dispose of any sample of a controlled drug or substance used in testing;
 - vi. to dispose of, or arrange for the disposal of, any drug or substance surrendered by any individual for disposal;
 - vii. to arrange for a sample of a drug or substance to be tested by an approved laboratory.
 7. The Bill also amends the Psychoactive Substances Act 2013 and the Medicines Act 1981 to allow service providers to legally possess and test unapproved substances for drug checking purposes and to provide the substances to approved laboratories.

Consistency of the Bill with the Bill of Rights Act

Section 25 – Minimum standards of criminal procedure

Strict liability offences

8. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proven guilty according to law. The right to be presumed innocent requires that an individual must be proven guilty beyond reasonable doubt, and that the State must bear the burden of proof.¹
9. The Bill contains strict liability offences. Strict liability offences prima facie limit s 25(c) of the Bill of Rights Act. This is because a strict liability offence may be proved by a finding that certain facts occurred without proof of *mens rea*. The accused is required to prove a defence (on the balance of probabilities), or disprove a presumption, to avoid liability.
10. The strict liability offences in the Bill cover two areas of conduct. Under clause 35DF, a person must not carry out specified functions of a drug and substance

¹ *R v Wholesale Travel Group* (1992) 84 DLR (4th) 161, 188 citing *R v Oakes* [1986] 1 SCR 103.

checking service provider without being licenced. Under clause 35DE, it is an offence for a service provider to breach any of the terms or conditions of its licence. Both of these clauses provide a defence of 'reasonable excuse' to these offences.

11. We note that there are currently no limitations on the terms and conditions that may be set for a service provider. This may give rise to issues of proportionality, because a breach of these terms and conditions is a criminal offence. Any terms and conditions imposed on a service provider should be reasonable and necessary. If they are not, this could raise issues of inconsistency under the Bill of Rights Act.

Justification

12. Strict liability offences may nevertheless be consistent with the Bill of Rights Act if the limits can be demonstrably justified in a free and democratic society, as per section 5 of that Act. This section 5 inquiry may be approached as follows: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?
 - iii. is the limit in due proportion to the importance of the objective?
13. We consider that the strict liability offences in the Bill appear to be justified. In reaching this conclusion we have taken into account the nature and context of the activity being regulated, the ability of the defendants to exonerate themselves, and the penalty levels.
14. Strict liability offences are more easily justifiable where they are in the category of 'public welfare regulatory offences'. The strict liability offences in the Bill arise in the context of minimising harm. Providing services to protect against the consumption of unknown and potentially dangerous substances is in the public interest, and failure to follow legislative requirements when providing these services undermines this core purpose. We consider that the limit is therefore rationally connected to the objective.
15. The Bill contains the general defence of 'reasonable excuse' for both of the strict liability offences. This defence relies on information that is more likely to be in the service provider's knowledge – e.g. the breach was an accident, was due to some other cause outside the defendant's control, or the defendant took all reasonable precautions and exercised due diligence. The court can also take into account all relevant matters including the likelihood of the hazard or risk concerned, the degree of harm that might result from the hazard or risk, the person's knowledge, and the availability and suitability of ways to eliminate or minimise the risk. Accordingly, we are satisfied that the limit is no more than necessary to achieve the objective of minimising harm.

² *Hansen v R* [2007] NZSC 7 [123].

16. The penalty is the same for both of the offences in the Bill (liable on conviction to a fine not exceeding \$5,000). We note that this is somewhat unusual given that the offences are addressing two different types of conduct. However, these penalties are in line with penalty ranges for other regulatory regimes. This is proportionate to the importance of the Bill's objective which is to minimise drug harm and promote health.
17. For the above reasons, we consider the strict liability offences to be justified in terms of s 25(c) of the Bill of Rights Act.

Conclusion

18. 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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