

24 June 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Hazardous Substances and New Organisms (Assessments) Amendment Bill

Purpose

1. We have considered whether the Hazardous Substances and New Organisms (Assessments) 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. This advice has been prepared in relation to the latest version of the Bill (PCO 21845/1.20). 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). Our analysis is set out below.

The Bill

4. The Bill amends the Hazardous Substances and New Organisms Act 1996 (the principal Act). The purpose of the Bill is to improve the assessment and reassessment of hazardous substances.
5. Under the principal Act, the Environmental Protection Authority (EPA) is the regulator responsible for making decisions on whether to approve new hazardous substances. It sets controls (conditions on how the substance can be used) to manage the risk from, and safeguard people and the environment from, approved hazardous substances. The EPA also reassesses hazardous substances and makes decisions about whether controls need to be updated, or whether the substance should no longer be approved.
6. The assessment and reassessment of hazardous substances in New Zealand can be time-consuming and resource intensive. The Bill amends the principal Act to improve the processes for assessing and reassessing hazardous substances. These amendments allow the EPA to proceed more quickly and efficiently with assessments, rather than having to fully investigate a substance which a comparable, trusted international regulator has already reviewed.
7. The Bill amends the principal Act to:
 - a. enable the EPA to make better use of information from international regulators;

- b. enable the EPA to apply data, information, assessments and decisions from international regulators;
- c. provide a simplified process for the EPA to update hazard classifications of substances and corresponding controls, based on information from international regulators;
- d. enable the EPA to temporarily restrict certain uses of a hazardous substance, subject to specific requirements;
- e. enable the EPA to engage in more targeted consultation during modified reassessments;
- f. require the EPA to develop a publicly available work plan for reassessments;
- g. provide a simplified process for the EPA to update hazard classifications of substances when the EPA has undertaken a recent assessment of a related hazardous substance;
- h. delegate some decision-making power to the EPA's Chief Executive (as opposed to the EPA Board) in certain situations (such as the simplified process for updating hazard controls, if the EPA decides not to consult).

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 introduces a new strict liability offence. 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. Clause 10 inserts a new section (s 64A) which empowers the EPA to temporarily restrict the use of a hazardous substance while it undertakes reassessment of the substance by notice in the Gazette. The restriction can be made by the EPA if:
 - a. a decision that grounds exist to reassess the hazardous substance has been publicly notified; and
 - b. the EPA has not approved or declined a reassessment application relating to the decision or no application for reassessment has been made; and

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

- c. the EPA has reasonable cause to believe that there is actual or likely danger to human health or safety or the environment from the use of the substance; and
 - d. the EPA has consulted the persons who the EPA considers are likely to be directly affected by the restriction of use.
11. A notice under s 64A may prohibit the use of a hazardous substance in specified circumstances or places or by specified classes of persons, but must not prohibit the use of the hazardous substance generally. The notice must also be published by the EPA on the internet.
 12. The new strict liability offence (s 109(1)(e)(vii)) covers a person's failure to comply with any temporary restriction imposed on the use of a hazardous substance under section 64A. Every person who commits this offence is liable on conviction:
 - a. in the case of a natural person, to a fine not exceeding \$50,000;
 - b. in the case of a person other than a natural person, to a fine not exceeding \$100,000.
 13. Section 117 of the principal Act contains several general defences for the strict liability offences in the Act, which would include the new offence created by the Bill.

Justification

14. A strict liability offence 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?
15. We consider that the strict liability offence in the Bill appears to be justified. In reaching this conclusion we have taken into account the nature and context of the activity being regulated, the nature of the defences and the ability of the defendants to prove them, and the penalty levels.
16. Strict liability offences are more easily justifiable where they are in the category of 'public welfare regulatory offences' created in order to protect the public. The strict liability offence in this Bill arises in the context of minimising harm through compliance with EPA restrictions on hazardous substances. Proper regulation of the sector is necessary in the public interest as it will reduce or prevent

² *Hansen v R* [2007] NZSC 7 [123].

environmental harm and health and safety risks. Failure to comply with a temporary restriction on the use of a hazardous substance undermines this core purpose. We consider that the limit of rights under s 25(c) is therefore rationally connected to the objective.

17. The process for imposing the temporary restriction under the new s 64A of the principal Act includes an obligation for targeted consultation with those likely to be directly affected. This obligation, in addition to the requirement for the EPA to issue a notice in the Gazette and publish the notice on the internet, helps mitigate the risk that someone may be unaware of the temporary restriction on the use of a specified substance. We also note that the hazardous substances which could be subject to a notice under s 64A are in many cases likely to already be subject to restrictions prior to a s64A notice being issued. In those instances, people using or dealing with those substances are already doing so in a regulated environment and should be aware they have to comply with restrictions which may be subject to change.
18. We note that s 117 of the principal Act contains several general defences for the relevant strict liability offences which would include the offence created by the Bill. These include situations where failing to comply with the temporary restriction is necessary to save or protect life or health, is due to an event outside the defendant's control such as an environmental disaster or sabotage, or where the event was in the defendant's control but the defendant took all reasonable steps to prevent, mitigate and remedy the failure to comply. We consider the defendant may be in the best position to prove these defences through demonstrating the situation in which they failed to comply with the temporary restriction and the reasonable steps they took to prevent non-compliance and to mitigate or remedy any subsequent effects.
19. The penalty for the offence is a fine not exceeding \$50,000 for a 'natural person' and a fine not exceeding \$100,000 for a 'person other than a natural person'. The basis for imposing a restriction under s 64A is triggered by the EPA having reasonable cause to believe that there is actual or likely danger to human health or safety, or to the environment from the use of the substance. Accordingly, the penalties are high to reflect the potential impacts on human health or the environment that non-compliance could have.
20. These penalties are proportionate to the importance of the Bill's objective, which is to improve the assessment and reassessment of hazardous substances, and the objective of the principal Act, which is protect the environment and the health and safety of people from the adverse effects of hazardous substances.
21. For the above reasons, we consider the strict liability offence to be justified in terms of s 25(c) of the Bill of Rights Act.

Conclusion

22. 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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