

14 December 2017

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Misuse of Drugs (Medicinal Cannabis) Amendment Bill**

### **Purpose**

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1. We have considered whether the Misuse of Drugs (Medicinal Cannabis) 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 with the latest version of the Bill (PCO 20792/1.5). We will provide you with further advice if the final version of the Bill 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 19(1) (freedom from discrimination) and s 25(c) (the right to be presumed innocent). Our analysis is set out below.

### **The Bill**

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4. The Bill amends the Misuse of Drugs Act 1975 to provide an exception and statutory defence to certain offences under section 7(1)(a) and section 13(1)(a) of that Act. The exception and defences apply in respect of procurement, possession, consumption, smoking or other use of controlled drugs, and possession of a pipe or needle for the purposes of those offences. The exception and defences are available to people who are terminally ill to enable them to possess and use illicit cannabis.
5. The Bill also introduces a regulation-making power to enable the setting of quality standards for medicinal cannabis products and removes cannabidiol and cannabidiol products from the schedule of controlled drugs.

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

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#### **Section 19(1) – Freedom from discrimination**

6. Section 19(1) of the Bill of Rights Act affirms the right to be free from discrimination on the prohibited grounds set out in the Human Rights Act 1993 ('the Human Rights Act').
7. The key questions in assessing whether there is a limit on the right to freedom from discrimination are:<sup>1</sup>

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<sup>1</sup> See, for example, *Atkinson and others v Minister of Health* [2010] NZHRRT 1; *McAlister v Air New Zealand* [2009] NZSC 78; and *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31.

- a. does the legislation draw a distinction on one of the prohibited grounds of discrimination under the Human Rights Act?
  - b. if so, does the distinction involve disadvantage to one or more classes of individuals?
8. A distinction will arise if the legislation treats two comparable groups of people differently on one or more of the prohibited grounds of discrimination. Whether disadvantage arises is a factual determination.<sup>2</sup>
9. Section 21(1)(h) of the Human Rights Act prohibits discrimination on the basis of disability, which includes physical disability or impairment, physical illness and psychiatric illness. The Bill introduces an exception and a statutory defence for terminally ill people to the offences under section 7(1)(a) (procure, possess, consume, smoke, or otherwise use, any controlled drug) and section 13(1)(a) (possession of any pipe or utensil for the purposes of an offence under 7(1)(a)). Clause 5(5) of the Bill defines terminal illness as an illness from which a person can reasonably be expected to die within 12 months. The Bill does not provide an exception and a statutory defence for other people who might benefit from using medicinal cannabis, such as people with terminal illness who are not reasonably expected to die within 12 months or people with chronic pain. As a result, the Bill could be seen as disadvantaging those with disabilities that do not meet the Bill's definition of terminal illness.
10. Where a provision is found to limit a 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 the Bill of Rights Act. The s 5 inquiry may be approached as follows:<sup>3</sup>
  - 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?
11. The objective of providing the exception and statutory defence is as a compassionate measure to provide reassurance to terminally ill people who have used, or who intend to use, illicit cannabis, that this will not result in a criminal conviction. Currently, lack of accessibility and high cost are a barrier to using the legal pathway available to access cannabis products, for some people with terminal illnesses. This leads some terminally ill people to choose to use illicit cannabis instead. We consider this objective is sufficiently important to justify some limitation on the right to freedom from discrimination on the basis of disability.

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<sup>2</sup> See, for example, *Child Poverty Action Group v Attorney-General* [2008] NZHRRT 31 at [179]; *McAlister v Air New Zealand* [2009] NZSC 78 at [40] per Elias CJ, Blanchard and Wilson JJ.

<sup>3</sup> *Hansen v R* [2007] NZSC 7 at [123].

12. We consider the exception and statutory defence are rationally connected to the objective. The provisions are not intended to encourage the use of illicit cannabis but to provide a compassionate approach to those who can be reasonably expected to die within 12 months and choose to use it to relieve their symptoms.
13. The usual concerns around the product safety, quality and long term risks of illicit cannabis use are different for this group than for other groups such as those with chronic pain. These other groups can still currently access legal cannabis products and the Bill introduces regulation-making powers to increase their affordability and access. The provisions are intended as a temporary measure until affordable quality products are available under a proposed improved medicinal cannabis scheme. The Bill provides for the exception and statutory defence provisions to be reviewed in two years' time to see if they are still necessary.
14. For these reasons, we consider the limitation impairs the right no more than is reasonably necessary to achieve the objective, and that the limitation is therefore in due proportion to the importance of the objective.
15. We therefore consider that the Bill appears to be consistent with the right to be free from discrimination affirmed by s 19(1) of the Bill of Rights Act.

### **Section 25(c) – Right to be presumed innocent until proved guilty**

16. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to the law. The right to be presumed innocent requires the prosecution to prove an accused person's guilt beyond reasonable doubt.
17. Clauses 5(3A) and 6(1B) of the Bill create a new defence in proceedings under sections 7(1)(a) and 13(1)(a) that a defendant may provide evidence that, at the time of the offence, the defendant had been diagnosed by a medical or nurse practitioner as having a terminal illness.
18. As these provisions provide a defence for the offences in section 7(1)(a) and 13(1)(a), and place an evidential burden on the defendant rather than a persuasive burden, 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.

### **Conclusion**

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19. 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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