

# Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill

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Hon Christopher Finlayson QC, Attorney-General

## Legal Advice

### Consistency with the New Zealand Bill of Rights Act 1990: Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill

#### Purpose

1. We have considered whether the Drug and Alcohol Testing of Community-based Offenders and Bailees Legislation Bill (PCO 17833/13.0) ('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 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 21 (right to be secure against unreasonable search and seizure) and s 25(c) (right to be presumed innocent). Our analysis is set out below.

#### The Bill

3. This Bill seeks to amend the Bail Act 2000, the Parole Act 2002 and the Sentencing Act 2002 ('the Acts'). Currently there is no explicit legislative authority that permits community-based offenders, parolees or defendants who have been released on bail ('bailees') subject to a condition prohibiting the consumption of drugs and/or alcohol to submit to testing. The amendments establish a legislative basis for testing and monitoring of offenders and bailees with drug or alcohol conditions.
4. The amendments will apply only to individuals released with drug and/or alcohol conditions under the Acts. The Commissioner of Police and the Chief Executive of the Department of Corrections may make rules that set out the details of the regimes, the procedures used for testing and monitoring, and the frequency of testing and monitoring.
5. The Bill creates new offence provisions in the respective Acts. It will be an offence to refuse entry, without reasonable excuse, to a person attaching or removing a monitoring device, installing or removing monitoring equipment, or servicing or inspecting a monitoring device or equipment. It will be an offence to refuse or fail, without reasonable excuse, to undergo a testing procedure, submit to continuous monitoring, accompany an authorised person to undergo testing when required to do so, or to do anything with the intention of diluting a bodily sample or to tamper with a monitoring device.

6. In respect of the Bail Act 2002, a bailee breaches an abstinence condition, if they use a controlled drug or consume alcohol in breach of that condition or refuse or fail, without reasonable excuse, to undergo a testing procedure, submit to continuous monitoring, accompany an authorised person to undergo testing when required to do so; to do anything with the intention of diluting a bodily sample, or to tamper with a monitoring device.

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

### **Section 21 - Right to be secure against unreasonable search and seizure**

#### *Search Powers*

7. Clauses 8, 15 and 30 of the Bill amend the Acts to allow a constable or Corrections officer ('an authorised person') to require liable individuals to:

- Undergo testing via the procedure prescribed in the rules.
- Permit the collection of blood, hair, urine or any other bodily sample as part of prescribed testing.
- Submit to continuous monitoring for compliance with a drug or alcohol condition for a reasonable period. This may require the individual to be connected to an electronic drug or alcohol monitoring device.

8. A judicial officer, registrar or a parole board may not direct, indicate or require the individual to partake in testing or monitoring when imposing a drug or alcohol condition. The judicial officer, registrar or parole board must advise the liable individual that he or she must undergo testing for a controlled drug or alcohol and/or submit to continuous monitoring if required to do so by notice given by an authorised person.

9. An authorised person must exercise the power to require liable individuals to undergo testing and monitoring in accordance with the rules that will be developed post enactment pursuant to the principles set out in the Bill and discussed below.

#### *Reasonableness of Search*

10. Section 21 of the Bill of Rights Act safeguards the right of every individual to be secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise.

11. In order for a given action to constitute a search under s 21, it must entail an intrusion upon reasonable expectations of privacy 1. We consider that the testing and monitoring procedures provided for by the Bill are significant intrusions into the privacy of a person, and thus meet the definition of a search.

12. The key consideration is whether the search under the Bill is reasonable 2. Reasonableness involves the balance between the objective served by the Bill and the public

and private interest of individuals to be left alone<sup>3</sup>. A greater degree of intrusiveness requires more significant justification and safeguards for the search to be reasonable.

13. We understand that the objective of the Bill is to contribute to public safety and reduce crime and reoffending by increasing compliance with abstinence conditions by high risk offenders and bailees in the community. Typically, these individuals would have a history of violent and/or sexual offending, of committing offences that cause harm while using alcohol or other drugs and be more likely to offend when using alcohol or other drugs. However, it is noted that all offenders or bailees with an abstinence condition will be eligible for possible testing.

14. We understand that drug and alcohol misuse is a major driver of crime and that it is expected that the drug and alcohol testing and monitoring provided for in the Bill will increase compliance and act as a deterrent for future offending, and for that reason it is in the public interest to monitor compliance with abstinence conditions.

15. In general, an abstinence condition is imposed where it is reasonably necessary to ensure that the bailee, community-based offender or parolee does not commit an offence whilst on bail, parole or when serving a community-based sentence<sup>4</sup>. There should be a rational link between the abstinence condition and the apprehended risk of offending. The imposition of an abstinence condition is made in a judicial or quasi-judicial context. The drug and alcohol testing or monitoring under the Bill, however, is at the discretion of an authorised person.

16. Whether to impose an abstinence condition is a discretionary decision made by a court or parole board. A consequence of an abstinence condition being imposed is that the individual is exposed to the possibility of a search by way of testing or monitoring. Therefore, when deciding whether to impose the condition, the court or parole board will need to consider any implications under s 21 of the Bill of Rights Act. We consider that this entails sufficient independent oversight of the eligibility for testing and is a reliable safeguard.

17. The entitlement to conduct any search and the manner in which a particular search is conducted will be subject to scrutiny under s 21 of the Bill of Rights Act. The power to make a rule conferring an entitlement to make a search does not authorise searches that would be unreasonable and thus, infringe protected rights<sup>5</sup>. Therefore, Police and Corrections may only exercise the power to conduct testing and monitoring in a manner that is compliant with s 21 and will need to consider the individual's rights when determining whether to search someone and how that search is to be carried out.

18. The Bill provides that the Commissioner of Police and Chief Executive of the Department of Corrections may only make rules governing testing and monitoring if satisfied that the rules:

- prescribe procedures that are no more intrusive than is reasonably necessary to ensure compliance with an alcohol or drug condition;

- allow for testing to occur no more often than is reasonably necessary to ensure compliance with an alcohol or drug condition; and
- ensure individuals liable to testing and monitoring should be afforded as much privacy and dignity as is reasonably practicable.

19. The rules will be publically available and are disallowable instruments that must be presented to the House of Representatives. This provides legislative oversight of the testing regime and the procedures for testing.

20. Rules that do not have regard to the above principles will be unlawful. We also note that the rules will also have to be drafted in a manner that is consistent with the Bill of Rights Act, otherwise they may be open to challenge for being *ultra vires* 6.

21. Finally, the Bill safeguards the rights of liable individuals by limiting how the information obtained from drug and alcohol testing or monitoring may be used. It may be used to monitor compliance with the abstinence condition and must not be used as evidence that the offender or bailee committed an offence other than the offences specified in the Bill. For example, the evidence may not be used as evidence that an individual committed an offence against the Misuse of Drugs Act 1975.

22. We therefore consider that the search and seizure provisions in the Bill are reasonable given the importance of the policy objective and the safeguards in place.

### **Section 25 - Right to be presumed innocent until proven guilty**

23. Clauses 9, 17 and 30 amend the Acts to create a new offence. The Bill makes it an offence for a person who has been required to submit to continuous monitoring to refuse or fail to allow a person servicing or inspecting testing equipment entry to the individual's residential address without reasonable excuse. The penalty is a maximum fine of \$5,000 or 3 months imprisonment.

24. The Bill also makes it an offence (in clauses 16, 19, 24, 25, 28, 29 and 31) to refuse or fail, without reasonable excuse, to (when required):

- undergo testing,
- submit to continuous monitoring, or
- accompany an authorised person to a place where it is likely it will be reasonably practicable to undergo testing.

25. This offence varies in severity of the penalty depending on the circumstance in which the offence occurs. The most severe penalty under the Sentencing Act 2002 is in respect of the offence being committed when the offender is subject to a sentence of home detention. The penalty is a maximum fine of \$2,000 or 1 year imprisonment. The most severe penalty under the Parole Act 2002 is in respect of the offence being committed when

the offender is subject to an extended supervision order. The penalty is a maximum term of 2 years imprisonment.

26. The reasonable excuse provision of these two offences raises a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act. Section 25(c) affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to the law. This reflects the principle that the onus of proof remains throughout on the prosecution and that the prosecution must prove guilt beyond reasonable doubt.

27. Reverse onus offences raise a prima facie issue of inconsistency with s 25(c) of the Bill of Rights Act because, once the prosecution has proven the defendant committed the act in question, the defendant must prove the defence on the balance of probabilities to escape liability.

28. Where a provision is found to impose a limit on 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 terms of s 5 of that Act. We have considered the following factors in assessing whether a departure from s 25(c) can be justified under s 5 of the Bill of Rights Act:

- the nature and context of the conduct to be regulated;
- the ability of the defendant to exonerate themselves and the risk of conviction of an innocent person; and
- the penalty level.

29. We consider that the reasonable excuse provision is a demonstrably justified limitation under s 5 of the Bill of Rights Act. In reaching this conclusion, we have taken into account that:

- It is in the public interest that drug and alcohol conditions are upheld and able to be enforced. The limitation of this right arises directly out of the objective of the Bill to increase compliance with drug and alcohol conditions and thereby increase public safety by reducing reoffending.
- The nature of the conduct to be regulated is limited to specific circumstances and specified individuals to ensure compliance with drug and alcohol conditions imposed on bailees, community-based offenders and parolees.
- The offences are limited to the context of complying with conditions and therefore place the individual in a position of control of the situations that give rise to the offence.
- The prosecutor still has the burden of proving the defendant committed the offence. The scope of reasonable excuses will be within the knowledge of the person concerned and proof of it would not impose an undue burden on the defendant.

- The penalty levels of these offences are commensurate with similar offences in the Acts and are proportional to the gravity of the offences.

30. We note that clauses 8, 15 and 30 add a provision that the court or parole board may, in the absence of evidence that is available to the court or board and that is to the contrary effect, presume that any information that an authorised person has certified in writing was obtained from a prescribed testing procedure or monitoring device is accurate and obtained in a manner required by the Bill. These provisions prima facie infringe s 25(c) of the Bill of Rights Act; however, it is considered that it is a reasonable limit that is demonstrably justified in terms of s 5 of that Act because it is discretionary not mandatory. The court or board may choose not to rely on the presumption and require the prosecution to discharge the evidential burden.

## **Conclusion**

31. 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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## **Footnotes**

1 See, for example, *R v Ngan* [2008] 2 NZLR 48 at [60]; *PF Sugrue Ltd v A-G* [2006] 3 NZLR 464 at [23].

2 *Cropp v Judicial Committee* [2008] 3 NZLR 774 at [33].

3 See, for example, *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA), 407.

4 See: Bail Act 2000 s 30(4)(c); Parole Act 2002 s 15(2)(a); and Sentencing Act s 52(1).

5 *Cropp v Judicial Committee* [2008] 3 NZLR 774.

6 *Drew v Attorney General* [2002] 1 NZLR 58 (CA).

## **Disclaimer**

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