

Misuse of Drugs Amendment Bill (No3)

Supplementary Order Paper

27 October 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
SUPPLEMENTARY ORDER PAPER MISUSE OF DRUGS AMENDMENT BILL
(NO3)

INTRODUCTION

1. We have considered whether the proposed Supplementary Order Paper ("the SOP") (PCO version 5726a/10) to the Misuse of Drugs Amendment Bill (No 3) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the Associate Minister of Health has sought your views on the SOP and in particular on the proposal to authorise the making of Regulations and Orders in Council that override the Bill of Rights Act.
2. As the SOP has been ruled by the Office of the Clerk as outside the scope of the Misuse of Drugs Amendment (No 3) Bill, the Associate Minister is seeking to circulate the SOP to all parties on the House Business Committee as soon as possible prior to party caucuses on 2 November, in order to secure agreement for the SOP to be referred to the Health Committee. If agreement is not obtained, a debatable motion would need to be put to the House on the SOP.

THE SOP

3. The SOP will amend the Misuse of Drugs Act 1975 (the "principal Act") by inserting a new schedule into the principal Act. This schedule will allow substances which, although they have been deemed to be low risk to individuals and society by the Expert Advisory Committee on Drugs ("EACD"), require some form of control and regulation to limit the potential harm able to be caused by such substances. Substances that are added to the schedule are subject to Order in Council and regulations:
 - regulating activities relating to restricted substances;
 - setting out a procedure for classifying restricted substances;
 - applying the "affirmative resolution" process of Order in Council to the scheduling of restricted substances; and
 - requiring restrictions on sale or supply of a substance that may be related to matters of age, advertising, and labelling.

After any Order in Council has been approved by resolution of the House of Representatives, a commencement order may be made bringing the Order in Council into force.

4. New sections 47 and 65 of the SOP authorise the making of Orders in Council and regulations that are inconsistent with the right to freedom of expression (section 14 of the Bill of Rights Act) and the right to be free from discrimination on the grounds of age (section 19(1) of the Bill of Rights Act).
5. We have provided you with this advice based on the SOP and our understanding that certain provisions are subject to change. If any subsequent amendments give rise to further Bill of Rights Act issues we will advise you immediately.
6. The Crown Law Office has seen this opinion and agrees with our conclusions.

THE BILL OF RIGHTS ACT ISSUES RAISED BY THE SOP

7. New section 47 authorises the making of Orders in Council. New section 47(1) provides that the Governor-General may, in accordance with a recommendation of the Minister, amend the schedule by adding or removing the name or description of any substance in order that it become a restricted substance, and specifying what type of restriction or requirement, if any, applies to a substance added to the schedule. Restrictions or requirements include age restrictions, advertising restrictions, labelling restrictions and signage requirements. Breaches of these restrictions or requirements are punishable by fines ranging from \$2,000 for failing to comply with age restrictions to \$5,000 for an individual and \$10,000 for a body corporate for failing to comply with labelling or signage restrictions. We also note that new section 47(3) provides that section 5 to 10 of the Regulations (Disallowance) Act 1989 will not apply (see also new section 65(1)(q)).
8. New section 49(2) sets out a wide range of matters to which the Minister must have regard to before recommending to the Governor-General an Order in Council under new section 47. These matters include:
 - the extent to which the substance is used for any lawful purpose;
 - the purpose for which the substance is currently advertised;
 - the positive or negative impact that any restriction or requirement imposed on the substance might have on any lawful commercial enterprise or on the public;
 - the practicalities of imposing restrictions or requirements on the substance; and
 - the risk of increasing the substance's abuse due to increased awareness of the substance's abuse potential.
9. We note that the powers provided for in new sections 47 and 65 are cast in broad terms, for example, we note that new sections 65(1)(c) and 65(1)(e) allow for a complete prohibition on advertising and labelling. New sections 65(1)(a) and 65(1)(b) allow for unspecified age restrictions to be applied to the sale and supply of restricted substances.
10. We understand that the scope of the regulation-making power is considered necessary to accommodate the broad range of recreational drugs and household products that may be potentially subject to this regime and the

extensive amount of policy work that is still to be completed by Health officials. In normal circumstances such a regulation-making power would be interpreted consistently with the Bill of Rights Act (as required by section 6 of the Bill of Rights Act) to authorise the making of regulations that provided underlying reasonable limits on any right or freedom protected by the Bill of Rights Act.

11. New sections 47(4) and 65(2) provide that Orders in Council and Regulations may limit the Bill of Rights Act in terms of section 14, the right to freedom of expression, and section 19(1) in relation to age discrimination. Although it may be possible to read new sections 47(4) and 65(2) as only referring to "reasonable limits" being placed on the rights, we consider that there is a real likelihood that the courts would read "limits" as including "unreasonable limits" in the sense that they would not be able to be justified in terms of section 5 of the Bill of Rights Act. We have come to this view because otherwise sections 47(4) and 65(2) would serve no purpose; the courts would ordinarily need to read the Order in Council or Regulation to be consistent with the Bill of Rights Act. There is a strong likelihood that the courts, recognising that Parliament would not enact a provision that had no purpose, would take an interpretation that placed "additional limits" on the usual application of the Bill of Rights Act.
12. We therefore consider that new sections 47(4) and 65(2) authorise the making of Orders in Council and Regulations that are "unreasonable" and therefore inconsistent with the Bill of Rights Act.

FURTHER CONSIDERATIONS

13. We also note that these provisions would appear to be inconsistent with New Zealand's obligations in respect of articles 19 (freedom of expression) and 26 (prohibition against discrimination) of the International Covenant on Civil and Political Rights ("the ICCPR"). Although Article 19 of the ICCPR allows for restrictions to be placed on the right to freedom of expression for the protection of public health, such restrictions are only permissible where they are shown to be necessary. We consider that such restrictions would only be "necessary" where it could be shown they were reasonable in terms of section 5 of the Bill of Rights Act
14. We understand that the rationale for including provisions in the SOP that override the Bill of Rights Act is to avoid the risk that certain regulations or orders in council will be struck down as being *ultra vires* as a consequence of the Court of Appeal decision in *Drew v Attorney General* [2002] 1 NZLR 58.
15. However, we note the scope of section 49 of the SOP (see paragraph 8 above), and the range of factors the Minister must have regard to before making recommendations. We consider that the nature of the issues that the Minister and EACD must have regard to are no more significant than the fundamental rights and freedoms provided for under the Bill of Rights Act. Accordingly the presence of clause 49 results in a high risk of any Order in Council being challenged as being *ultra vires* because of the failure to take appropriate new section 49 considerations into account, regardless of any potential Bill of Rights Act issues.

16. We therefore consider that the Ministry of Health concerns regarding the policy underpinning the SOP being made unworkable because of challenges under the Bill of Rights Act are misstated. In our view the SOP could adequately address these concerns without any limitation of the Bill of Rights Act. We consider that the section 5 test provided for under the Bill of Rights Act is sufficiently flexible to ensure that restrictions and requirements attached to individual substances or classes of substances can meet objectives of protecting public health, while ensuring that the rights of individuals are not unreasonably limited.

Conclusion

17. We note that new sections 47 and 65 provide that Regulations and Orders in Council can be made which provide for unreasonable limits on the right to freedom from age discrimination and freedom of expression as affirmed by sections 14 and 19(1) of the Bill of Rights Act.

18. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. We also attach copies for referral to the Prime Minister, Deputy Prime Minister and Associate Minister of Health, if you agree.

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cc

Prime Minister

Deputy Prime Minister

Minister of Justice

Associate Minister of Health

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