

# Misuse of Drugs Amendment Bill 2004

24 August 2004

Attorney-General

## LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Misuse of Drugs Amendment Bill 2004 (PCO 5726/13)

Our Ref: ATT114/1298(2)

1. We have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 ("NZBORA"). We advise that the Bill appears to be consistent with the NZBORA, for the reasons set out fully below.

## Key Provisions of the Bill

2. The Bill amends the Misuse of Drugs Act 1975 ("the 1975 Act") and the Misuse of Drugs Amendment Act 1978 ("the 1978 Act"). In summary, the Bill:

2.1 Fixes the quantity at which a presumption of supply becomes operative ('trigger amount') in respect of methamphetamine at 5g (Sch. 2 to the Bill creating a new Schedule 5 to the 1975 Act).

2.2 Provides that the setting and amending of trigger amounts for controlled drugs will be dealt with in future through the Order in Council procedure (cl. 6).

2.3 Creates two new offences in relation to the import and / or export of precursor substances (i.e. listed substances or chemicals which are used in the manufacture of controlled drugs) (cl. 11). The offences are:

2.3.1 Importing or exporting a precursor substance knowing that the substance will be used to produce a controlled drug (new section 12AB); and

2.3.2 Importing or exporting a precursor substance without reasonable excuse (new section 12AC).

2.4 Creates powers of search and seizure without a warrant for ephedrine and pseudoephedrine, and applies certain powers in the Customs and Excise Act 1996 to ephedrine and pseudoephedrine (cl. 15).

2.5 Allows "controlled deliveries" (where officials track the prohibited substance to its intended destination) under s. 12 of the 1978 Act to be conducted in respect of precursor substances.

2.6 Gives Customs and the police a specific power to conduct searches and to detain individuals during the course of controlled deliveries (clauses 25 – 26).

2.7 Provides Customs and the police with additional search powers regarding individuals who are held under the internal concealment provisions (cl. 27).

2.8 Extends the provisions on laundering the proceeds of drug offences (s. 12B of the 1975 Act) to the offence in new s. 12AB of the Act (importing precursor substances knowing they will be used in the production or manufacture of controlled drugs) (cl. 12).

2.9 Amends s. 12 of the 1975 Act, which relates to offences of possession of needles (cl. 14).

### **Presumption of supply matters**

3. Section 6(1)(f) of the Misuse of Drugs Act creates an offence of having any controlled drug in one's possession for certain proscribed purposes (e.g. to supply, or to administer, or to sell). Section 6(6) provides that for the purposes of s 6(1)(f), if the person is in possession of stipulated quantities of certain controlled drugs he or she shall, *until the contrary is proved*, be deemed to be in possession of a controlled drug for one of the purposes proscribed by s 6(1)(f). The effect of s 6(6) is that in bringing a prosecution under s 6(1)(f) the Crown must prove to the criminal standard of beyond reasonable doubt that the accused person possessed the required quantity of the controlled drug. If so proved, then it is for the defendant to prove to the balance of probabilities that he or she did not possess the drug for a proscribed purpose (*R v Phillips* [1991] 3 NZLR 175).
4. The legislature has prescribed significantly severer sentences for offences of dealing with controlled drugs. Thus in the case of a Class "A" drug, simple possession carries a maximum offence of six months imprisonment with no prescribed minimum, whereas possession for the purpose of supply carries a maximum of life imprisonment together with a presumption of a custodial sentence.
5. This Bill makes two innovations relating to presumption of supply:

5.1 It sets a quantity of 5g as a 'trigger amount in respect of methamphetamine, which is a Class A drug. Methamphetamine was not previously subject to a specific 'trigger amount.'

5.2 It moves the power to set and amend the 'trigger amounts' for presumptions of supply from the body of the Act into a new Schedule 5, and provides that the power is to be exercised through the Order in Council process.

6. The Bill's provisions extending the presumption of supply regime to methamphetamine engage s. 25(c) NZBORA. That section provides as follows:

**"25. Minimum standards of criminal procedure** - Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: ...

(c) The right to be presumed innocent until proved guilty according to law."

## **Methamphetamine**

### *Prima facie breach of s. 25(c) NZBORA*

7. The proposed amendment to the Misuse of Drugs Act in relation to methamphetamine *prima facie* breaches s. 25(c) NZBORA because it creates a presumption that the accused intended to deal or supply drugs to others (a critical element of the offence), and requires the accused to disprove this presumption on the balance of probabilities.
8. There are a number of cases that have held that presumptions of this kind are *prima facie* breaches of the presumption of innocence. Most notably, the cases of *R v Oakes* (1986) 26 DLR (4th) 200 Canadian Supreme Court, *S v Bhulwana*; *S v Gwadiiso* (1995) 2 SACR 748, South African Constitutional Court and *R v Sin Yau-Ming* [1992] LRC (Const) 547, Hong Kong Court of Appeal. We note particularly the comment of the Supreme Court of Canada in *Oakes* that the right to be presumed innocent until proven guilty requires that guilt must be proven beyond reasonable doubt, and that it is the State which must bear the burden of proof. In general, a provision which requires an accused person to disprove to the balance of probabilities the existence of a presumed fact, that fact being an important element of the offence in question, would violate the presumption of innocence.
9. We have taken into account the decision of the New Zealand High Court in *Menzies v the Police*, unreported, HC Dunedin, AP 66/94, 19 July 1994, in which Williamson J found (*obiter*) that s 6(6) of the Misuse of Drugs Act did not breach s 25(c) of the Bill of Rights Act. We note that his Honour appears to have reached that view in the absence of full argument on the question, (it appears that *Oakes* was not cited) and in a factual vacuum. We therefore attach little significance to that decision.
10. The better view is that the extension of the existing reversal of the criminal burden of proof to a new category of persons (possessors of methamphetamine), in relation to an essential element of the offence, is a *prima facie* breach of s. 25(c) NZBORA.

### *Justification under s. 5*

11. Section 5 BORA states that:

"Subject to s 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

12. The current interpretation of s 5 by the New Zealand courts is somewhat uncertain.<sup>[1]</sup> However, we believe an appropriate summary is provided in the following passage from the judgment of Richardson J in *Noort v MOT*:<sup>[2]</sup>

"In the end an abridging inquiry under s 5 is a matter of weighing

(1) the significance in the particular case of the values of the Bill of Rights Act;

(2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;

(3) the limits sought to be placed on the application of the [Bill of Rights] Act provision in the particular case; and

(4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits."

In our view this passage strikes the right note by capturing the nuanced and flexible standards that s 5 will ultimately require.

13. In essence, the inquiry is two-fold: First, whether the provision serves an important and significant objective; and second, whether there is a rational and proportionate connection between that objective and the provision.

#### Cases

14. *R v Oakes* (cited above – Supreme Court of Canada):

14.1 This case involved a statutory reverse onus that was triggered where any quantity of the narcotic was possessed.

14.2 The Court held the presumption of supply served the pressing social objective of protecting society from the grave ills associated with drug trafficking and that this objective was of sufficient importance to warrant overriding a constitutionally protected right or freedom *in certain cases*. On the facts, however, the Court did not accept that the reverse onus clause was rationally related to the objective of curbing drug trafficking, since the presumption of supply could be triggered by possession of a small or negligible quantity of narcotics. The section was thus over-inclusive and could lead to results in certain cases which would defy both rationality and fairness.

15. *Bhulwana* (cited above – Constitutional Court of South Africa):

15.1 On the facts, the Constitutional Court held that there was insufficient rational connection between possession of 115 grams of the drug in question (dagga), and supply. The Court placed the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.

15.2 The Constitutional Court agreed that the need to suppress illicit drug trafficking was an urgent and pressing one. However the Constitutional Court considered that it would not be unexpected for a regular user of dagga to possess 115 grams of the drug. Criminalisation of dagga possession might make it more likely that ordinary users would purchase large quantities because of the risks associated with

purchase. The figure was held to be arbitrary, and the breach of the presumption of innocence unjustifiable.

15.3 In addition the presumption was not needed to ensure adequate sentencing discretion, given that the Court had an adequate range of available sentences for possession (including a maximum period of 15 years imprisonment).

16. *R v Sin Yau-Ming* (cited above - Hong Kong Court of Appeal):

16.1 On the facts (a 'trigger amount' of 0.5g of salts of esters of morphine) the presumption was unjustifiable because the amount was in no way in excess of the average daily consumption of an average addict.

16.2 In order to be compatible with the presumption of innocence, the Crown must show cogently and persuasively that the presumption of supply rationally and realistically follows from the proven possession, and that the presumption is no more than proportionate to what is warranted by the nature of the evil against which society requires protection.

16.3 The Court adverted to the tendency of addicts to buy in bulk to avoid the constant danger of apprehension.

#### *Consideration*

17. On balance we conclude that the provisions in the Bill regarding methamphetamine are a justified limitation under s. 5 and therefore not inconsistent with s. 25(c) NZBORA.

18. The case law has established that control of the use and supply of illicit drugs is a pressing social objective that might in certain circumstances justify limitations on the presumption of innocence. With respect to the question of whether there is a *rational* and *proportionate* connection between this important objective and the imposition of the presumption of supply, the key factor that has led us to conclude that the limitation on the right is reasonably justified under s.5 NZBORA is the strength of the connection between the proven fact (possession) and the presumed fact (purpose to supply).

19. The Police have advised us that 1g of 'cut' methamphetamine has a street value of approximately \$100. However, cut methamphetamine typically contains between 5% and 17% pure methamphetamine. The provisions of the Bill make it clear that the 5g 'trigger amount' relates to the amount of pure methamphetamine contained within a given mixture. Therefore the accused would have to be in possession of 30g or more of 'cut' methamphetamine (at a street value of \$3000) to reach the trigger amount. In our view this is a crucial distinction between these provisions and the provisions impugned in *R v Sin Yau-Ming*.

20. 1g of pure methamphetamine has a street value of between \$700 and \$1000. 5g would have a street value of between \$3500 and \$5000.

21. The information provided to us also indicates that methamphetamine is typically purchased in small quantities (1g for cut methamphetamine and 0.1g for pure methamphetamine).
22. These figures indicate both the high cost of a transaction involving 5g of pure methamphetamine and the fact that it does not fit with the pattern of purchasing for non-supply use. Even bearing in mind the possibility that buyers might buy in bulk to avoid detection, and allowing some leeway for the possibility of group purchases, we consider that it is highly unlikely that a person would purchase the specified amount in one transaction for personal use only and not for supply.
23. We note that the Expert Advisory Committee on Drugs ("the EACD") has recommended that the presumption be set at 5g.
24. We are also satisfied on the basis of the above information that, even taking into account the possibility of changes in market trends in the use and supply of methamphetamine, the triggering amount is set high enough that the possibility of an improper conviction is negligible.
25. While acknowledging the significant penalties attached to dealing offences, on balance we are satisfied that placing a burden on the accused to disprove (on the lower civil standard of *balance of probabilities*) the presumption of supply is rationally and proportionately connected to the important social objective of reducing the distribution of these harmful and addictive drugs. There are particular difficulties for the prosecution proving the purpose of the possession in drug dealing cases, this being a factor which is particularly within the knowledge of the accused. Accordingly, we conclude that the breach of s 25(c) NZBORA is a justified limitation under s. 5 NZBORA.

### **Transfer to the Order in Council regime**

26. As noted above, clause 6 of the Bill provides that future decisions as to the quantities of controlled drugs at or above which a presumption of supply will operate, will be made through the Order in Council process. We consider that the use of this process grants potentially wide powers to the Executive in respect of the presumption of supply; this is all the more the case when one considers that the same process is used to designate substances as controlled drugs. We note that cl. 7 of the Bill stipulates certain matters to which the Minister must have regard before recommending Order in Council, which include advice by the EACD (new s. 4B(4) of the 1975 Act).
27. These provisions are not in breach of the NZBORA, nor do they countenance such a breach. They merely authorize a process of rule-making which can and should be undertaken in a way which is consistent with the NZBORA.
28. However, it is important to note that the consequence of this is that regulations made through the Order in Council procedure under the 1975 Act will themselves need to be consistent with the NZBORA if they are not to be held to be *ultra vires* the 1975 Act (see *Drew v Attorney-General* [2002] 1 NZLR 58 (CA)). As is clear from the above analysis regarding

methamphetamine, it is our view that the reverse onus inherent in a presumption of supply is a *prima facie* breach of s. 25(c) NZBORA. In addition, several search and seizure powers (discussed below) are dependent on the particular classification of a drug or chemical. Therefore, ensuring that future decisions regarding the presumption of supply trigger, and the amounts and classification of drugs, are consistent with the NZBORA, will require clear justifications with reference to the substances concerned, their uses at certain quantities and the risk they pose to society.

### **Offences relating to precursor substances**

29. The 1975 Act already contains certain provisions relating to what are termed 'precursor substances,' namely substances which can be and are used to manufacture controlled drugs. Under the current s. 12A it is an offence to supply, produce or manufacture a precursor substance knowing that the substance is to be used in / for the commission of certain offences.

30. At present the 1975 Act contains no offence relating to the import or export of precursors. The Bill creates two new offences in relation to import or export of precursor substances:

New section 12AB makes it an offence to import or export into or from New Zealand any precursor substance knowing that it will be used to produce or manufacture any controlled drug;

New section 12AC makes it an offence to import or export into or from New Zealand any precursor substance without reasonable excuse.

It should be noted that references to these new offences are included in s.29 of the 1975 Act which removes the defence of lack of knowledge that the substance, preparation, mixture or article in question was a precursor substance (cl 16). In addition, many of these 'precursor substances' are commonly found in many everyday mixtures and preparations (e.g. nail polish remover). Accordingly, the *prima facie* capture of new section 12AC is potentially very broad.

31. It may be argued that new section 12AC is inconsistent with the right to be presumed innocent until proved guilty according to law under s.25(c) NZBORA. This argument would be based on the view that essential elements of criminal culpability, namely knowledge of a precursor substance and intention to make illegal substances, have been removed from the definition of the offence. However, consistently with our previous advice on the Films, Videos and Publications Classification Amendment Bill (14 November 2003) we consider that s. 25(c) NZBORA is a "procedural" right only. It remains within Parliament's discretion to define the substantive *mens rea* requirements of an offence, and provided that the prosecution retains the legal burden of proving all the elements of that offence no *prima facie* breach occurs.

### **Application / extension of entry, seizure and detention powers**

*Ephedrine and pseudoephedrine*

32. Clause 15 of the Bill amends s. 18 of 1975 Act to extend the current Police powers (both warranted and unwarranted) of entry, detention, search and seizure in respect of controlled drugs, to ephedrine and pseudoephedrine.
33. Similarly, clause 19 of the Bill replaces s. 36 of the 1975 Act to extend certain powers under the Customs and Excise Act 1996 ("the 1996 Act"), in relation to prohibited imports and exports to cover ephedrine and pseudoephedrine.

#### *Controlled delivery powers in relation to precursor substances*

34. Clause 25 of the Bill extends the current power to undertake controlled deliveries (in s. 12 of the 1978 Act) to all precursors (i.e. not just ephedrine and pseudoephedrine).
35. The controlled delivery procedure may not be used unless a Customs officer believes on reasonable grounds that there is in or on any craft, package, mail, vehicle or goods any controlled drug or precursor substance that has been imported into New Zealand in contravention of s. 6(1)(a) or new s. 12AB of the 1975 Act. This procedure is not extended to the less serious offence under new s. 12AC of importing or exporting a precursor substance without reasonable excuse.
36. Clause 26 of the Bill provides for the detention and search of persons involved in controlled delivery during course of that delivery. It does this by inserting new ss. 12A-D into the 1978 Act. Under existing law there is no specific power to search and detain during the course of a controlled delivery.
37. For a detention and search to be permissible the searching authority must believe reasonably that the individual concerned is in possession of: (1) controlled drugs; (2) precursor substances (not limited to ephedrine and pseudoephedrine); (3) substances which have been placed by Customs to replace one of the above; or (4) evidence of the commission of an offence under s. 6(1)(a) or s. 12AB (import or export of a precursor substance knowing to be used for production / manufacture of drugs). Reasonable force may be used.

#### *NZBORA analysis*

38. The above provisions of the Bill clearly engage rights under the NZBORA:

38.1 Unreasonable search and seizure (s. 21) which provides: "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise";

38.2 Liberty of the person (s. 22) which provides: "Everyone has the right not to be arbitrarily arrested or detained";

39. We have concluded that the provisions of the Bill do not breach ss. 21 and 22 NZBORA (i.e. search and seizure would not be unreasonable, and accompanying detention would not be arbitrary), for the following reasons:

39.1 The provisions in issue concern activity in relation to border control and border enforcement, where some degree of routine inspection is common. The analysis of s. 21 NZBORA is to a large extent informed by reasonable expectations of privacy. In general Customs activities are premised on a significantly lower expectation in border transactions than in a wholly internal situation. Further, the state's interests in preserving the integrity of the border are substantial.

39.2 It is a prior condition of the exercise of the more significant search, seizure and detention powers that there be reasonable suspicion of an offence under the Act.

39.3 The powers of detention are provided for by law, and are limited to those necessary for the specified searches.

39.4 Searches, and accompanying detentions, under a controlled delivery operation are subject to administrative and post-search reporting requirements which facilitate review of individual decisions by police or customs officers. Their legality will also depend on a reasonable suspicion of the commission of an offence under s. 6(1) or s. 12AB, which will have been necessary to justify the controlled delivery itself. The new powers do not apply to the less serious offence under new section 12AC.

39.5 In respect of cl. 15 (Police powers of entry, detention, search and seizure) and cl. 19 (application of 1996 Act powers) the powers have only been extended to ephedrine and pseudoephedrine, and not to any other precursor substances. Ephedrine and pseudoephedrine are primary ingredients used to manufacture methamphetamine and the application of more extensive law enforcement powers to these substances is necessary for that reason.

### **Police or customs – searches associated with internal concealment situations**

40. Clause 27 inserts new sections 12EA – 12EE into the 1978 Act. Where an internal concealment detention has been authorised (i.e. detention of an individual who it is reasonably believed has secreted a Class "A" or "B" controlled drug within his body) it will now be possible for him to be searched externally (either by means of a 'rub-down' search or a strip search) for any Class "A" or "B" drugs he may have secreted on or about himself.

41. These provisions engage s. 21 NZBORA (unreasonable search and seizure). However, the powers are subject to a number of safeguards and on this basis we conclude that they are reasonable and therefore not inconsistent with s. 21 NZBORA. We note in particular the following:

41.1 The detention itself is obviously a prior condition for the new search powers, and the detention must have been authorised by a warrant from a District Court Judge (s. 13E).

41.2 It is further necessary that the person searching should have reasonable cause to suspect that the individual has hidden on / about his person any Class "A" / "B" drug.

41.3 A written report of any search under these provisions must be given to the Commissioner of Police or the chief executive of the Customs Service (as appropriate), and must detail the search itself and its circumstances, including the facts which gave rise to the reasonable suspicion.

## CONCLUSION

42. The Bill contains several provisions that *prima facie* engage the NZBORA, and it should be noted that future amendments to the schedules of the Act must have an effect that is consistent with the NZBORA. However, in our view the provisions of the Bill (PCO 5726/13) are not inconsistent with the fundamental rights and freedoms set out in the NZBORA.

Val Sim  
Crown Counsel

TMA Luey  
Assistant Crown Counsel

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## Footnotes

1 See *Moonen v Literature Board of Review* [2000] 2 NZLR 9 (CA), and *Moonen v Literature Board of Review (No. 2)* [2002] 2 NZLR 754 (CA).

2 [1992] 3 NZLR 260, 283-4 (CA).