

New Organisms And Other Matters Bill

26 March 2003

Attorney-General

Preliminary Legal Advice

New Organisms And Other Matters Bill:

Consistency With The New Zealand Bill Of Rights Act 1990

INTRODUCTION

1. We have considered the New Organisms and Other Matters Bill (PCO 5072/4) for consistency with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). We understand that the current intention is for this Bill to be considered by the Cabinet Legislation Committee at its meeting on Thursday 3 April 2003, although there is a possibility that the Bill may be submitted directly to Cabinet on Monday 7 April 2003 for approval.
2. The New Organisms and Other Matters Bill amends the Hazardous Substances and New Organisms Act 1996 (HSNO). We have been asked to consider this Bill under an urgent timeframe as the passage of the Bill is required to coincide with the expiry of the moratorium on the release of genetically modified organisms. The moratorium expires on 31 October 2003. We understand that further amendments to this Bill are to likely be made to reflect any decisions of Cabinet in relation to the Treaty of Waitangi (proposals to address this matter are expected to be considered by Cabinet Policy Committee on Wednesday 2 April 2003).
3. We are providing you with this preliminary advice based on the most recent version of the Bill that we have available to us. We will provide you with further advice as soon as we receive the version of the Bill that is to proceed to the Cabinet Legislation Committee.
4. The Bill does not appear to be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act. However, the Bill does raise one issue that we wish to draw to your attention.

Overview of the Bill

5. The New Substances and Organisms Bill seeks to implement key recommendations made by the Royal Commission on Genetic Modification. Amongst other things, the Bill gives effect to recommendations to improve the procedures for approving genetic modification of new organisms in laboratories and the approval of the conditional release of new organisms. The Bill also includes new enforcement provisions under HSNO establishing a regime of pecuniary penalties and civil liability.

6. The Bill is also to address a number of operational issues under HSNO and related enactments.

Issue of consistency with the Bill of Rights Act

7. The Bill introduces a regime providing for pecuniary penalties and civil liability for breaches of HSNO. The making of a pecuniary penalty order does not bar subsequent criminal proceedings and conviction in relation to the same conduct. We have considered whether the potential for a person to be subject to two separate penalties in relation to the same act or omission raises a prima facie inconsistency with section 26(2) of the Bill of Rights Act (the right not to be tried or punished for an offence twice).
8. In particular, the proposed section 124E(1) provides that criminal proceedings for a breach of HSNO [\[1\]](#) can be commenced whether or not proceedings for a pecuniary penalty order under new section 124A of HSNO have been started or an order made in respect of the breach for which criminal proceedings have commenced. New sections 124E(2) and (3) respectively provide that proceedings for a pecuniary penalty order cannot be completed if related criminal proceedings have been commenced or if the person has been convicted of an offence for a breach for which an order is sought.
9. The majority of the Court of Appeal in the leading case on 26(2), *Daniels v Thompson* [\[2\]](#) made it clear that section 26(2) must be read as referring:

Only to criminal proceedings relating to an offence against the law, for which the person has been tried. What is prohibited is further trial for the same offence, that is a trial which may also result in acquittal or conviction. The provision is not concerned with a trial which may result in a form of civil liability.

10. On this basis, we consider that new section 124E is not inconsistent with section 26(2) of the Bill of Rights Act as a pecuniary penalty order is not a punishment for the purposes of section 26(2).

CONCLUSION

11. We have concluded that the Bill as currently drafted does not appear to be inconsistent with the Bill of Rights Act. We will provide you with further advice as required. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister for the Environment, if you agree.

Allison Bennett Boris van Beusekom
Principal Legal Adviser Legal Adviser

cc Minister of Justice
Minister for the Environment

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whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the New Organisms and Other Matters Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.

Footnotes

1. The offence provisions are found in section 109 of HSNO.
2. Daniels v Thompson [1998] 3 NZLR 22