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Dear Warren

Controlling and Regulating Drugs

The Society, with assistance from its Criminal Law and Health Law Committees, sets out below its responses to the questions in the issues paper.

Chapter 8 – Our approach to drug regulation

- 1. Do you agree that the model for regulating drugs other than convention drugs should generally be regulation with restrictions, rather than prohibition, but with prohibition available as a last resort where regulation has proved ineffective?**

Yes, because it is a better approach to assess each new substance carefully before automatically classifying it as one that needs to be totally prohibited.

- 2. Do you agree that a psychoactive substance falling within the ambit of the proposed regime should require an approval from the regulatory body before it could be manufactured or imported?**

If a psychoactive substance is to be imported or manufactured, prior approval should be required. There will be cases where neither importation nor manufacture should be allowed.

- 3. Do you agree that all new psychoactive substances that are manufactured or imported for recreational use should be covered by the proposed new regulatory regime?**

Yes, if a substance is designed to be used for recreational use it must be assessed and classified for the potential harms or health hazards it may pose.

4. Do you agree that the following should be standard minimum requirements:

- (a) restrictions on the sale or supply of recreational psychoactive substances to persons under 18 (if so, should the age be changed in the event of a change to the purchase age for alcohol?);**

There should be an age restriction and it would be wise to tie it to the same age as that for alcohol.

- (b) advertising restrictions along the lines of the restrictions on advertising tobacco products under the Smoke-free Environments Act;**

This would be a sensible restriction taking into account the age restriction.

- (c) a prohibition on the promotion of these substances similar to that currently applying to restricted substances;**

This ties in with the advertising restrictions and is therefore a good combination of controls.

- (d) a prohibition on the sale of these substances at: (i) places where alcohol is sold; (ii) petrol stations; (iii) non-fixed premises such as vehicles, tents, and mobile street cars (iv) places where children gather; (v) pharmacies;**

This ties into the other proposed restrictions and would appear to be a wise choice to ensure that access to these substances is not made too easy (or tempting) to younger persons.

- (e) a prohibition on the manufacture, importation and sale of these substances by any person: (i) under the age of 18 years; or (ii) who has been convicted within the previous five years of a dealing offence under the Misuse of Drugs Act or an offence under the Crimes Act punishable by seven years imprisonment; or (iii) who has been convicted of an offence under the regime applying to these substances and has been prohibited by the court from undertaking any of these activities;**

This is a sensible restriction but the previous convictions “window” should be extended to 10 years.

- (f) **a requirement that these substances be stored in child-proof and tamper-proof containers; and**

All potentially toxic substances should be contained within child proof containers (including recreational psychoactive substances).

- (g) **a requirement that the labels should contain the contact details of the National Poisons Centre?**

All toxic substances or poisons should have such safety controls on their containers.

5. Are there other matters that should become minimum standard requirements?

In any case where the Director-General of Health has established the substance poses a health risk, there should be appropriate health warnings.

The degree of danger (or potential toxicity) posed by the substances should be reflected on the labels. If a substance is highly toxic (i.e. it can lead to serious harm or death) there should be a labeling system devised that reflects the degree of toxicity of the substance within the container (e.g. skull and crossbones for example to show that the substance is very dangerous or toxic).

6. Do you agree that the regulating body should have power to impose additional conditions on an approval for a new recreational psychoactive substance? If so, should the conditions cover:

- (a) **additional place of sale restrictions;**
- (b) **labelling restrictions and requirements;**
- (c) **packaging restrictions and requirements;**
- (d) **health warning requirements;**
- (e) **signage requirements;**
- (f) **quantity, dosage, form and serving requirements;**
- (g) **storage and display restrictions;**
- (h) **record-keeping requirements;**
- (i) **any other requirements considered necessary or desirable to minimise harm that might occur as a result of use of these products?**

Yes to all of the above.

7. Should the regulatory body have the power to issue manufacturing codes of practice?

Yes, but only if it has the requisite expertise to provide such guidance for new or novel substances.

8. Do you agree that there should be a power of recall? If so, in whom should that power vest?

If this is viewed from a public safety and health perspective this seems an eminently sensible recommendation.

The power should vest in the Director-General of Health.

9. Should penalty levels for offences be set at the levels currently provided for in HSNO or should they be set at similar levels to penalties in regimes regulating drugs like alcohol and tobacco?

From a simple cost benefit analysis situation it would make sense not to create yet another entity to deal with this issue, but the only caveat on that is whether or not HSNO have the requisite expertise to deal with recreational psychoactive substances. If they do have the expertise then recommendation 9 should be endorsed.

10. Do you agree that new recreational psychoactive substances should be regulated by a separate regime designed specifically for new recreational psychoactive substances rather than HSNO?

No, if there is sufficient expertise in HSNO they should deal with it.

11. Under the proposed separate regime, do you agree that the Minister of Health rather than the Director-General should issue approvals?

No, because this risks the matter being politicised, when it should be strictly dealt with from a health/harm minimisation perspective.

12. Is any formal mechanism required to ensure effective coordination between the various regulatory bodies responsible for foods, medicines, hazardous substances and new psychoactive substances?

If HSNO deals with it, there would be no need to coordinate as the one entity would be dealing with the various harmful substances. No formal mechanism would be required.

Chapter 9 – Drug classification system

13. Do you favour:

(a) no classes and a single maximum penalty for all drugs;

No, because the lack of guidance to a sentencing court would likely lead to very inconsistent penalties for similar offending. It is highly unlikely that the seriousness of offending would be brought home to the public when the “same” offence (but a different drug) could lead to a fine or life imprisonment.

(b) a two-tier classification system;

This could be a suitable option if the drugs were re-assessed, but may not take into account the various degrees of harm posed by different drugs. The recommendation is not supported.

(c) retention of the current three-tier system based on an improved assessment of risk and regular reviews;

As this system is well understood in New Zealand it would seem to be the preferable option of those proposed.

(d) a more nuanced classification system (four-tier plus) based on a scientifically based drug harm matrix;

This would depend too much on timely and adequate scientific and policy analysis of potential harms. It may add an unnecessary level of complexity.

(e) some other approach? (please specify)

No.

14. Do you agree that there should be separate criteria for the decision to regulate a drug and the decision to classify a drug in order to determine penalty? Is it appropriate to classify drugs on the basis of their risk of harm? If so, should harm include physical harms, dependence potential and social harms? Is prevalence a relevant factor in defining drug harm? Are any other factors relevant?

Yes, but the various criteria must be very robust. For example, the description of social harms should be expanded or explained more fully. It should be made plain that the amount of “other” crime generated by the particular drug must be taken in to account. “Other” crime includes offending to support the habit and offending by suppliers to extract profits from drug users, etc.

Prevalence is something that should be taken into account as it can directly relate to “social” harms.

The factor “any other matters the Minister considers relevant” could be made more objectively reasonable by changing it to “any other relevant matters.”

- 15. Do you agree that there is a need for an expert committee to advise on drug regulation and drug classification (if a classification system is retained)? Should the committee be independent? Should it have consumer representation? What expertise is required? What is the committee’s optimal size?**

An expert committee is important; it must retain a police expert on drugs as they will have the most accurate knowledge on potential “social” harms caused by associated crime.

A consumer representative seems unusual if the drugs concerned are recreational drugs. If the drugs fall into the category of a therapeutic type it would make sense.

Optimal size would be no more than 10. If the committee is independent, it must still have government representatives and it should be made up of persons similar to those who already sit on it.

- 16. Do you agree that controlled drug analogues should by default be included as Class C drugs, but only on an interim basis so that they can be evaluated and appropriately classified?**

We agree with this recommendation, as there appears to be no other way to deal with this issue.

- 17. Do you agree that drug classifications should be made by primary legislation rather than by Order in Council? If so, should there be a requirement for the Minister to table an expert report on drug harms when legislation is introduced?**

Yes, as the potential penalties that may be imposed can be very large such decisions should be made through the appropriate primary legislative process rather than by an Order in Council.

There should be a requirement for the Minister to table an expert report.

- 18. If the Order in Council process is retained, should it be available for reducing classifications as well as increasing them?**

Yes, because there are similar considerations in reducing the seriousness of the offence relating to the particular controlled drug.

Chapter 10 – Dealing

- 19. Should the scale of supply rather than whether or not the supply was for profit be the focus of the supply offence?**

Yes. Supplying drugs involves exposing others to risk of harm from consuming drugs and possibly becoming addicted. The reason why someone chose to create that risk is less significant than the fact of creating it.

- 20. Do you agree that the scale of offending should be treated as a sentencing matter rather than be reflected in the offence?**

Yes. Quantity is not the sole criterion of seriousness, the purity of the drugs under consideration is also a factor. This could aggravate or mitigate the situation due to the amount of usable drugs being produced after the drug is diluted for subsequent supply or sale.

- 21. Should social supply be treated differently from other types of supply for all classes of drugs? Should the factors that indicate social supply be broadened as set out in paragraph 10.31?**

This would seem to accord with public opinion on this issue. However, it may be difficult in practice to determine whether a “street sale” was to a friend or a stranger as there would be an incentive for both parties (if caught) to claim that they knew each

other and that it was a “social supply” situation. How the Police could disprove this would be very problematic.

The factors in paragraph 10.31 should not be too broad or it could lead to a major difficulty in determining whether a person is a friend or an acquaintance.

22. If so, do you agree that social supply should be dealt with as a sentencing matter rather than through the creation of a separate offence?

It should be a sentencing matter and not a separate offence.

23. Should there be a presumption against imprisonment in cases of social supply?

No, we do not consider that there should be a statutory presumption against imprisonment for cases of “social supply” where the drug involved is one of moderate or high harm, i.e. drugs that would fall in Classes B or A. We do not consider that any statutory presumption should be stated for such offending. Currently there is no statutory or case law presumption against imprisonment for non-commercial supply.

The Court of Appeal has said that for low level supply of less than 5 grams of Methamphetamine, which is not for commercial purposes, a starting point below Band 1 identified in *Fatu* (2 years to 4 years imprisonment) may be appropriate: see para [32] and [34] of *Queen v Fatu*. We do not see how the adoption of a statutory presumption against imprisonment would encourage the minimisation of drug harm. As an alternative middle path, such offending could be excluded from the current presumption in favour of imprisonment as suggested in question 38.

24. Should the current maximum penalties for the supply of Class A (imprisonment for life) and Class B (14 years imprisonment) drugs be maintained?

Yes.

25. Do you agree that seven years imprisonment is an appropriate maximum penalty for the supply of Class C drugs?

Yes. The current penalty of 8 years is out of step with most other offences and may be the only current offence with such a penalty. The usual penalty at this level of seriousness is either 7 years or if more serious 10 years.

26. Should there be a presumption in favour of imprisonment for Class A drugs in cases of large-scale commercial offending?

Yes, as the degree of harm that can be caused to the community by this activity requires a deterrent penalty of imprisonment. The definition of “large scale commercial offending” will have to be clearly defined.

27. Do you agree that the presumption of imprisonment should not extend to Class B and C drugs?

Yes.

28. Do you agree that, in relation to Class C drugs, supply to those under 18 years of age should be an aggravating factor on sentence rather than a separate and more serious offence?

The offence of supply to a person under 18 years is more serious and requires a more serious response. There is also a case for extending the more serious penalties to supply to persons with an intellectual or psychological disability who are over 18. The victim specific emphasis of an offence is not an incorrect focus and the social harm caused by supply to a young person is supported by evidence as more serious than a supply to an adult.

29. Are any other offences in this area required?

No, with the possible exception of the extension suggested in Q 28 above.

30. Do you agree that the offence of possession for supply should be repealed and replaced with two possession offences: simple possession and aggravated possession (the latter involving a quantity that is indicative of supply)?

Removal of the presumption is not necessary as the presumption has operated for many years within New Zealand’s jurisdiction and does not appear to have led to a large number of “wrongful convictions”. In fact, claims of personal use above the presumptive amounts are often run as a defence and often succeed.

31. If not, which of the following options do you favour:

- (a) remove the presumption;**
- (b) establish an evidential presumption;**
- (c) retain the presumption at its current levels; or**

- (d) retain the presumption, but set at levels that are more likely to be found justified under the Bill of Rights Act?**

We prefer option (d).

- 32. If the offence of possession for supply is retained, do you agree that there should be a single offence and a presumption against imprisonment where the possession is for the purpose of social supply?**

We generally agree, but there should still be a separate more serious offence for supply to those under 18.

- 33. What should the maximum penalties for possession for supply be?**

It should be the current maximum penalties. Treating possession for the purpose of supply as separate from an actual supply will create more anomalies than it will cure. It will lead to inconsistency in sentencing dependent upon when an offender is caught (before a supply occurs or after it is completed) and it would not reflect the true underlying criminal culpability.

- 34. Do you agree that:**

- (a) there should be a single offence, with scale of offending dealt with as a sentencing matter;**

Not if it fails to reflect the problems caused by a more serious offence or sentencing option for supply to those under 18 or the “creation” (importation or manufacture) of a drug.

- (b) importation, exportation, production, manufacture and cultivation should have the same maximum penalty as supply?**

We disagree, as importing and manufacturing is always viewed as more serious because it brings the drug into existence for subsequent distribution to the community. This “creation” of the drug should be treated more seriously than the subsequent distribution of the drug.

- 35. Do you agree that importation, exportation, production, manufacture and cultivation for personal use or for social supply should be distinguished from other forms of dealing?**

Yes, they can be as part of the sentencing discretion.

36. If so, is a presumption against imprisonment the most appropriate way to make this distinction?

If there is a presumption of imprisonment for class A drugs it seems appropriate to have a presumption against imprisonment for “social supply”. There needs to be careful thought as to what can amount to a “social supply” so that it does not create a problem with everyone being an “acquaintance” for the purposes of getting the benefit of the presumption against imprisonment.

37. Do the maximum penalties for these offences need to be revised?

No.

38. Do you agree that the presumption of imprisonment for importation, exportation, production, manufacture and cultivation of Class A drugs should be excluded where the offending is for the purposes of personal use or social supply?

Yes.

39. Do you agree that “administering” should be made a separate offence rather than continuing to be grouped with supply?

Yes.

40. If the former, do you agree that the maximum penalty should be two years of imprisonment? If not, what should it be?

We consider that a maximum penalty of two years imprisonment is too low, particularly as this offence covers non-consensual administration and can have terrible consequences for the recipient. It should be made clear what would happen where death or injury occurs.

Chapter 11 – Personal use

41. Should there continue to be a criminal offence for drug use?

No, a separate criminal offence for drug use as opposed to possession is not necessary, as all instances of use will be covered by possession.

42. If so, should that offence encompass all drug use or only use in specified circumstances?

Not applicable.

- 43. What circumstances, other than those identified in paragraph 11.10, could be considered an “aggravated” form of use?**

No comment.

- 44. Should the possession of utensils for the purpose of using drugs remain a criminal offence?**

Yes.

- 45. Do you agree that a new enforcement approach should be taken to personal use offences?**

No. However, there could be some benefits in a new approach, but only in relation to cannabis. The current approach to possession of Class A and/or B, and other Class C drugs should remain. There is very little public support for adopting a more lenient approach to other drugs.

- 46. If so, should be there a cautioning regime (Option 1), an infringement regime (Option 2) or an approach based on a menu of options (Option 3)? Why?**

Option 1, a form of cautioning scheme is preferred as it means that experimental and first time users are not brought into the Court system. It does however permit prosecution for persons who continue to use illegal drugs after receiving an initial caution notice. It also allows an avenue for educating drug users on the harm caused.

- 47. Would you change any of the proposed key components of Options 1 to 3?**

In relation to Option 1, the formal cautioning scheme, after the first caution and provision of information at the second caution the person should be required to attend the brief intervention session and assessed. There should not have to be two cautions before the stage of intervention is reached. Repeated cautioning without more does not assist rehabilitation or deter offending. Prosecution should occur on the third time that the person comes to the attention of the Police. Such an approach would keep at its heart the purpose of minimising the harm of drugs whilst at the same time showing society’s denunciation of illegal drug use. Such a scheme should only apply to cannabis offending.

- 48. Should any other options be considered (including any from Table 3 that we propose not be progressed)?**

No.

- 49. How should any new approach taken to personal use offences apply to the offence of possession?**

If the cautioning approach is adopted with only two cautions possible before prosecution this issue will only be problematic on the first and second occasion on which a person is found to be in possession of cannabis. The Society supports retention of an offence of possession for supply. Whether a person falls within the cautioning regime or whether they should be charged for possession for supply should remain a matter of Police discretion, irrespective of the quantity. Applying whatever approach is decided upon in relation to the reverse onus issue, if the defendant can prove that the cannabis was not for supply then a prosecution would fail.

- 50. If use remains a criminal offence, should “aggravated” use be excluded from any new approach taken to personal use offences?**

Yes, cannabis use that occurs in a public place or public view or displayed to the public (for instance on the internet) should be excluded from any new approach. Consumption in the presence of children under the age of 18, or while doing dangerous acts, should also be an aggravated offence.

- 51. Should the possession of utensils for the purpose of using drugs, if it remained a criminal offence, be included in any new approach taken to personal use offences?**

Yes, but again this is limited to cannabis offences.

- 52. Should cultivation of the prohibited plant for personal use be included within any new approach taken to personal use offences?**

No, as that may encourage cannabis cultivation and thus use.

- 53. Do you agree that the manufacture, production, and import or export of drugs for personal use should not be included in any regime that is applied to other personal use offences?**

We agree that any new regime should not cover manufacture, production and the import or export of drugs. We also note again that any new regime should apply only to cannabis.

54. Do you agree that the approach that is taken to personal use offences committed by adults should not be extended to personal use offences committed by youth?

Yes, agreed.

55. Should any new approach taken to personal use offences be reviewed after a specified period?

Yes, there should be an initial review after a period of one year to reveal any unexpected trends or consequences followed by a further review after three years.

56. Where prosecutions are initiated for personal use, should any of the following options apply:

(a) Greater use of Police adult diversion scheme?

No, as the person involved will have already been cautioned twice prior to the prosecution. The scheme should not be extended to Class A or B drugs. It is not appropriate to extend the diversion scheme to drugs which are of moderate and high risk of harm to users.

(b) Less severe penalties?

(c) Court based diversion into assessment and treatment?

Only if a more lenient approach to charging as discussed above is not adopted. That would probably achieve the same outcome as a caution scheme, but at greater cost given the involvement of the Court in making directions.

57. Should any other options be considered?

No.

Chapter 12 – Other offences and penalties and procedural provisions

58. Do you agree that precursor substances should not be able to be classified as both precursor substances and controlled drugs?

Yes. Clarity in the law requires them to be in one category or the other.

- 59. Should precursor substances always be classified as controlled drugs in themselves when they are largely or solely used for illegitimate purposes? Is there a need to clarify that the indirect harms they cause should be taken into account in determining their appropriate classification level?**

If precursor substances are not in themselves a drug, then it should not be classed as such. Indirect harm is relevant to the penalty levels attached to possession offences and should be reflected in that way.

- 60. Are there any matters relating to precursor substances that could be usefully addressed as part of the Law Commission's review, rather than by the working group established under the Government's methamphetamine action plan?**

No.

- 61. Is an offence prohibiting the supply and import of utensils still required?**

Yes.

- 62. If an offence of prohibiting the supply and import of utensils is required:**

- (a) Do you agree that it should be in primary legislation, rather than be established via a regulation-making power?**

Yes.

- (b) Should the offence be broadened to cover utensils for using other drugs as well as cannabis and methamphetamine?**

Yes.

- 63. If an offence is not required, should the supply and import of utensils be regulated? If so, what regulatory controls are required?**

Not applicable.

- 64. Should the offence in section 12(1) of the Misuse of Drugs Act of knowingly permitting any premises, vessel etc to be used for the purpose of committing an offence be retained?**

Yes. The transparency argument applies.

- 65. Are any amendments required to the offences in paragraphs 12.25 (b) and (c) (sections 12A(1)(a) and 12A(2)(a))?**

While there are anomalies as to the penalties, generally if the current law is working well, it need not be altered.

- 66. Should the maximum penalties for the offences referred to in Q64 and Q65 be revised? If so, what should they be?**

No, and N/A.

- 67. Do you agree that extra-territorial jurisdiction under section 12C should extend to those “ordinarily resident” in New Zealand? Are any other changes to section 12C required?**

Yes. Consistency in the extra-territoriality rules is desirable.

- 68. Are any other changes to section 12C required?**

No.

- 69. Should the maximum penalties for section 10 be reviewed, to ensure appropriate relativities with acts or omissions committed in New Zealand?**

Yes. Parity is desirable.

- 70. Are any other changes to section 10 required?**

No.

- 71. Are any changes to section 12B required?**

No. In this case duplication is acceptable for the reasons given in the issues paper.

- 72. Should section 11 be retained?**

There are arguments either way. The relevant conduct could be prosecuted under either s11 or the Crimes Act provisions. The Crimes Act provisions mostly use a value-based sentencing regime, but s220 has a 7-year maximum regardless of value. There will be very serious difficulties in many cases for the Crown to establish the value of drugs stolen etc. On balance we favour retention.

73. Should section 13(1)(b) be retained?

Yes, for the reasons given in the issues paper.

74. Are any changes to section 13(1)(b) required?

No.

75. Should it continue to be an offence for a person to make a false statement for the purposes of obtaining a licence under the Act (section 15)?

Yes, for the reasons given in the issues paper.

76. In what other circumstances under the Act should it be an offence for a person to make a false statement?

There is no need for the offence to extend beyond false representations in connection with a licence. If it is to do so, the ambit of the offence should be made clear.

77. In the light of the recommendations outlined in paragraph 12.59, do you agree that no additional offence is required to impose liability on those who expose children to the harms of drug manufacture?

Yes. This is a different kind of concern from drug consumption, and should be addressed separately.

78. Are any new offences required?

Not that we are aware of.

79. Should the general maximum penalty contained in section 27 be reviewed?

Yes. It appears to cover quite disparate offending. The offences listed in paragraph 12.62 (d) and (e) of the issues paper are minor and do not require imprisonment as a sanction. The offences listed in paragraph 12.62 (g), (h) and (i) might well deserve more severe penalties than s 27 provides.

80. Bearing in mind that the scope of the offences to which the general maximum penalty will apply is not yet clear, do you have a view on what the maximum penalty should be?

The most serious of the offences listed in paragraph 12.62 (a) to (i) might perhaps be more appropriately punished by imprisonment for 6 months (perhaps 12 months for

repeat offenders) with a fine of perhaps \$2,000. That might be the high point of a range of penalties for different offences, some punishable by a fine alone, some by the current penalty and some by the suggested higher level.

81. Do you agree that a minimum four-year limitation period (contained in section 28) is not required for drug offences?

There seems to be no reason for different limitation periods for drug offences than for the general law, except perhaps in relation to the minimum period for the least serious offences.

82. Do you agree that the limitation periods should not differ from the limitation periods for general criminal offences? If not, what is it about drugs offences that require limitation periods to be different?

We generally agree. The one difficult point, arguably, comes with the less serious offences where a six-month period would come into play. There may be cases where evidence of drug offending is obtained through prolonged undercover investigations. It would be unfortunate if offenders could not be prosecuted because the limitation period ran out before the investigation was concluded. Consultation with the NZ Police should establish whether there is any basis for this concern. If there is such a basis, perhaps a 12-month limitation period could apply. There are a number of other offences, which have limitation periods longer than the general 6-month limit.

83. Do you agree that section 17(1) should be retained?

No. It is true there is a case for certain offences of negligence, for example in relation to pharmacists as set out in paragraph 12.78. However, any offence of negligence should make it clear that a person is under a particular duty and that negligence in complying with the duty constitutes the offence. An open-ended and broad liability for failure to prevent another's offending is simply contrary to good principle. Section 17(1) should be revisited and replaced with more carefully delineated offences.

84. If section 17(1) is retained, should there be a lower maximum penalty when section 17(1) applies due to negligence?

Yes, if section 17(1) is retained then there should be a lower maximum penalty when it applies due to negligence. However, the difference in the nature of liability should be in the offence, not the penalty.

85. Do you agree that section 17(2) should be retained?

No. The comments in paragraph 12.81 of the issues paper seem to reflect a misunderstanding of the relevant law. Corporate liability makes the company liable for the acts of the director. Section 17(2) makes the director liable for the acts of the company. If there is consent or connivance, the director may be liable as a party to the act of the company. If there is to be an offence of negligently failing to prevent the company committing particular offences, then it should be separately stated and the offences in issue clearly stated.

86. If section 17(2) is retained, should there be a lower maximum penalty when section 17(2) applies due to negligence?

Yes, if s17(2) is retained then there should be a lower maximum penalty when it applies due to negligence.

87. Do you agree that section 29B should be retained?

Yes.

88. Are any amendments to section 29B required?

No.

89. Do you agree that section 31 should be retained?

A provision of this general nature should be in the Act. Section 31 could perhaps be revisited for clarity.

90. Are any amendments to section 31 required?

A tentative suggestion is that consideration could be given to trying to align s31 with the regime for disclosure under the Criminal Disclosure Act 2008.

91. Do you agree that the evidential onus in paragraph 12.97(a) (section 12AC(4)), requiring the defence to point to evidence that the defendant had a reasonable excuse for importing or exporting a precursor substance, does not need to be explicitly stated?

No, we do not agree: the evidential onuses should be explicitly stated as they focus both the minds of counsel and self-represented defendants.

- 92. Should the evidential onuses in paragraphs 12.97(b) and (c) (sections 12B(8) and 12C(5)), requiring the defence to point to evidence that the act (or omission) was not an offence in the country where it occurred, be explicitly stated?**

Yes, for the same reason as above.

- 93 Should the requirement remain that where an offence involves possession (whether as the alleged offence itself or as an element of the offence), the amount possessed must be of a usable quantity?**

Yes. An additional argument for its retention is that a person who has done his or her best to dispose of drugs left in his or her possession without consent may reasonably clearly be able to destroy all usable amounts of a drug, but may not be able to avoid microscopic traces. While such a person would probably not be prosecuted on a “trace” test, we would prefer to ensure the situation fell outside the offence of possession.

- 94. If the requirement identified in Q93 does remain, should there be an evidential onus on the defence to raise the issue?**

No. The Crown can prove the nature of the substance by an analyst’s certificate. This can readily record the quantity of the drug in issue, or other evidence can prove that quantity. Where the quantities are very small, the prosecution can reasonably be expected to adduce evidence of what is a “usable quantity” and demonstrate its presence.

- 95. If the proposal to require the defence in all cases to identify the issues in dispute is implemented, do you agree that the procedural provisions that give the prosecution additional opportunity to respond to the usable quantity issue once raised should be abolished?**

No, reform should be predicated on that proposal being adopted.

- 96. Should the legal onus in section 30 be retained?**

No. We should aim for consistency with NZBORA, and so evidential onuses are preferable. There is no reason why such an onus cannot, however, be combined with a requirement that notice be given of the evidence to be called on the issue sufficient to allow the prosecution to have a reasonable opportunity of calling evidence to the contrary if necessary.

97. If so, should there also be a legal onus in section 12AC?

No, see our comment to question 96.

98. Do you agree that the legal onus on the defendant in section 29C should be retained?

No, an evidential onus provision (with a notice requirement) is all that is needed.

99. When a defendant is charged with the possession of a seed or fruit, or cultivation of a prohibited plant, should there be a legal onus on the defendant to prove that:

- (a) the seed, fruit, or plant was not of the species *Papaver somniferum*; or
- (b) the seed, fruit, or plant was not intended to be a source of any controlled drug or that it was not developed as a strain from which a controlled drug could be produced?

There is a case for a legal onus here. Paragraph 12.124 appears to misapprehend the effect of s9(4). The issue is not the “nature of the substance” but whether there was an innocent purpose for possession or cultivation or use of prohibited plant. That is indeed within the defendant’s exclusive knowledge.

100. Do you agree that section 29 should be retained?

Yes.

101. Do you agree that the forfeiture regime in the Misuse of Drugs Act, as it relates to the forfeiture of profits, should be abolished?

Yes, this should be under the general statutory regime for proceeds of crime.

102. Do you agree that the provisions in the Misuse of Drugs Amendment Act 1978, which enable the court to indirectly recover the proceeds of drug dealing, should be repealed?

Yes, see our comment to question 101.

103. Do you agree that the Misuse of Drugs Act forfeiture regime, as it relates to vehicles and other conveyances, should be abolished?

Yes, this should be under the general statutory regime for proceeds of crime.

104. Do you agree that there should be a requirement that a judge order the forfeiture and destruction of unlawful articles following conviction for any drug offence?

The judge should have the power, but not a requirement, to order forfeiture and appropriate disposal. This may or may not involve destruction.

105. Do you agree that the forfeiture of unlawful items should not be taken into account in an offender's sentence?

No. The sentencing judge should be able to place whatever weight is appropriate on such forfeiture. Forfeiture might also be relevant to assessing whether the offender has means to pay a fine or make reparation for other offending for which s/he is concurrently sentenced.

106. Do you agree with our proposed approach to forfeiture, outlined in paragraph 12.153, in the event that a new approach is taken to dealing with personal use offences?

Yes.

107. Should a statutory provision be introduced allowing enforcement agencies to retain a representative sample of seized articles and to dispose of the remainder?

Yes.

108. Do you agree that there does not need to be separate provision for forfeiting lawful articles used in the commission of an offence under section 12 of the Misuse of Drugs Act?

Yes, there seems no reason why the general regime should not apply.

109. Do you agree that the provisions in the Misuse of Drugs Act that provide immunity from liability for those acting under, or enforcing, the Act should be retained?

Yes.

110. Should the extradition provisions in the Act be retained?

Yes.

111. Are any amendments to the extradition provisions required?

No comment.

112. Do you agree that section 33 should be repealed, so that:

- (a) **the notification of convictions under the Misuse of Drugs Act of a medical practitioner, pharmacist, dentist, midwife or designated prescriber is left to section 67 of the Health Practitioners Competence Assurance Act 2003;**
- (b) **the notification of convictions of veterinarians under the Misuse of Drugs Act is the subject of a separate provision in the Veterinarians Act 2005?**

Yes. The duplication seems unnecessary.

113. Do you agree that section 21 should be repealed?

Yes.

Chapter 13 – Exemptions to prohibition

Overall comment

We are unclear whether the term “prohibited drugs” is meant to be a reference to “controlled drugs”, or means something else. The regulatory framework for controlled drugs is contained in the Misuse of Drugs Act and for controlled drugs the levels of control in all aspects of the prescribing, dispensing, record keeping etc, are more “controlled” than they are for prescription medicines (under the Medicines Act) which are in turn more tightly regulated than pharmacist only, pharmacy only and general sales medicines. That is, what we are seeing in the relationship between the Misuse of Drugs Act and the Medicines Act is a hierarchy of levels of control of different categories of medicines.

114. Do you agree that the main components of the licensing scheme should be in the Act?

Yes, this would be consistent with the licensing arrangements in the Medicines Act.

Paragraph 13.8 states that all matters of substantive policy should be included in primary legislation and not left to regulation. While this is undoubtedly a sensible statement it is probably worth noting that it is apparent in all aspects of medicines related legislation that policy and significant powers are frequently to be found in the regulations.

115. Do you agree that the Director-General of Health should continue to be the licensing authority?

It would seem sensible if the licensing regime was in line with that contained in ss50 and 51 of the Medicines Act 1981, which requires an application to be made to the Director-General and for that application to be determined by “the Licensing Authority”. The definition of licensing authority includes both the Director-General and, for the avoidance of doubt, his or her delegate pursuant to section 41 of the State Sector Act 1988.

116. Do you agree that the Minister of Health should not be involved in individual licensing decisions?

Yes.

117. Do some health professionals need exemptions that permit them to manufacture and produce controlled drugs?

We do not understand the relationship between the terms “prohibited drugs” and “controlled drugs”: the former term is used in paragraph 13.13 of the issue paper but the latter in question 117.

Paragraphs 13.17 and 13.18 discuss exemptions that permit some health professionals to manufacture and produce controlled drugs and express an uncertainty as to why or whether health professionals need such powers. It is exceedingly important that there is an appropriate understanding of pharmacy practice and input from pharmacists. These provisions/exemptions are essential to enable compounding of appropriate formulations of controlled drugs to meet patient need. For example, if a particular controlled drug was required for pediatric use, but was not available in a liquid form or in a sufficiently low dose or, alternatively, there was difficulty swallowing which required a different formulation of a particular controlled drug, the pharmacist may compound a suitable formulation. This compounded product is not then, technically, an “approved medicine”.

118. Should District Health Boards and other certified hospitals be authorised to hold general supplies of controlled drugs for the purposes of treating patients as practicality dictates?

It is important that there is facility for rest homes to hold controlled drugs.

119. Should any other institutions also be authorised to hold general supplies of controlled drugs for the purposes of treating their patients?

It is important that other institutions such as rest homes are authorised to hold supplies of controlled drugs.

120. Are all of the current exemptions in section 8 still needed? Are any other exemptions needed?

No comment.

121. Are all of the exemptions currently in regulations still needed or are some obsolete? Are any new exemptions needed?

The issues relating to the classification of Pseudoephedrine containing medicines as either a C3 or a C5 medicine but nevertheless enabling the continued sale of these medicines without prescription are at least in part an accident of legislative history. It is undoubtedly true that the framework that resulted is unnecessarily complicated from a drafting perspective and warrants being attended to more clearly. There are some significant policy planks which underline these regulations and, as noted in the issues paper, there is further proposed policy change afoot. Therefore, it is difficult to assess which of the exemptions in the regulations relating to Pseudoephedrine containing medicines should be retained. If it is being redrafted then it needs to be attended to differently from at present.

122. Do you agree that the exemptions should in principle be in the Act and that more limited regulation-making powers that authorise exemptions only for a limited time to deal with emergencies would be appropriate?

We wish to stress the importance of Regulation 34, which provides for controlled drugs to be supplied in an emergency without a prescription. This is a regulation that would be relied upon in day-to-day practice and should not be discarded lightly. Regulation 34 provides for telephoned prescriptions (and indeed by practice, not that this is necessarily appropriate, is the regulation relied upon to enable the faxing of prescriptions for controlled drugs).

123. Do you agree that the exemptions that apply to controlled drugs should all be in one Act (with appropriate cross-references)?

Paragraph 13.24 states that “the difficulties are compounded by the fact that the exemptions in the Misuse of Drugs Act are framed differently from those in the Medicines Act”. We consider that the fact that the exemptions in each Act are framed differently is entirely appropriate. The Medicines Act governs, at present, general sales, pharmacy only, pharmacist only and prescription medicines with each of these classifications of medicine being regulated slightly differently as we proceed up this hierarchical classification. That is, prescription medicines are more closely regulated with additional protections in place than pharmacy only medicines.

There are, in this hierarchical structure, those drugs which are classified as controlled drugs and which, as the name suggests, are appropriately subject to an additional level of controls. We believe that the differences between the controls around controlled drugs and Medicines Act reflect the importance of this hierarchical classification and of the increasing levels of control placed around the management of medicines depending upon their classification.

Paragraph 13.26 suggests that there should be one set of rules governing the supply and use of all medicines. It is important that it is well understood that there will always need to be specific requirements that apply only to controlled drugs to reflect the additional restrictions.

The paper proposes in paragraph 13.27 that the option of amalgamating all classifications of medicine into one Act “would not require significant change to the Medicines Act”. While there is some merit to considering whether all medicines are managed under one piece of legislation regardless of their classification, we certainly do not agree that this is anything other than a very significant and very extensive change to the Medicines Act.

124. Do you agree that section 20 should be repealed or should a more confined version of section 20 be retained under which medical officers of health can publish (in a limited way) information about people suspected of being drug seekers?

We believe that it is important to understand the day-to-day issues that arise. There is concern in the paragraphs about the “breadth of the authorisation to publish statements”. This breadth of authorisation needs to be extremely wide and is not more than is necessary. The section proposes extensive restrictions on the powers of the Medical

Officer of Health to alert other healthcare providers to individuals who have caused concern. We believe it is extremely important that there be some understanding of the difficulties pharmacists face on a day-to-day basis with people who may have caused them concern.

Pharmacies already adopt a much more informal approach to advising each other and other health professionals of clients who are causing concern. If anything, there is in our view an insufficient reliance by pharmacies on the powers given to the Medical Officer of Health. That system is seen as already unduly rigorous and bureaucratic. To suggest that this could be further tightened would not accord with practice. There would need to be careful consideration of the current practices, whether they are justified and whether the issues that pharmacists are trying to deal with could be managed more appropriately in a way that would address both the clinical need and also achieve compliance with privacy requirements.

Paragraph 13.41 also states “we question also whether the provision is even necessary”. We would take issue strongly with any suggestion that the Health Information Privacy Code can still achieve what is required without s20.

125. If it is retained, do you agree that it should only apply to drug seeking behaviour and that the person who is the subject of the statement should have an opportunity to challenge any statement?

No comment.

126. Do you agree that medical officers of health should continue to have the power to issue notices imposing restrictions on the supply of controlled drugs to restricted persons?

Yes, absolutely.

127. If so, do you agree that the test in section 49 of the Medicines Act, which sets a lower threshold, would be a better test to use?

No comment.

128. Do you agree that the offence of supplying or prescribing a controlled drug to a person in contravention of a restricted person notice should be repealed?

No. It is our view that if the offences were dispensed with that this would in turn influence the approach of the Health Practitioners Disciplinary Tribunal.

It is also important to note that one of the grounds for discipline of a health professional is an offence under the Misuse of Drugs Act so to remove that offence is to undermine this basis of discipline.

129. Do you agree that section 23 should be repealed?

No comment.

130. Overall, do you think that the legislative controls that are in place are adequate? If not, what further legislative controls do you think are necessary?

This concerns the legislative controls contained in the Misuse of Drugs Regulations, most notably regulations 31 and 32. One of the key problems with regulation 31 is that it does not accord with Pharmac rules and therefore is problematic on a minute-to-minute basis.

Paragraph 13.57 considers regulation 32. The controls in place in the regulations broadly speaking do not accord with practice and do need significant reworking. That said, in each case, there are some significant protections/policy justifications for these rules and it is not simply a matter of discarding them.

By way of example, regulation 32 is not complied with in practice and compliance with it would impose an unworkable burden on day-to-day pharmacy practice. Nevertheless the sentiment behind regulation 32 is understandable.

Any overhaul of the regulations relating to controlled drugs needs to also revisit regulations 23 and 24, both of which concern the limits on delivery of a dispensed controlled drug to somebody other than the patient. Regulations 23 and 24 are difficult, largely ignored, and unworkable, but again there does need to be a sensible regulatory framework around the delivery of controlled drugs to people other than the patient for whom the prescription medicine is being dispensed.

- 131. Do the legislative controls that are in place provide adequate support for professional education and guidance and appropriate monitoring systems? If not, what changes do you think are necessary?**

No comment.

- 132. Is section 24 too restrictive? If so, what changes are needed?**

No. The suggestion in paragraph 13.67 that (because methadone is diverted from the methadone programme) there should not be restrictions on who can prescribe for drug dependent individuals is surprising. Those closely involved in the management of the methadone treatment programme will be in a position to comment more expertly about what, if any, changes are required to these sections. It would be important to ensure that this difficult area of clinical practice is not hampered by unnecessary legislative change.

- 133. Do you agree that a provision allowing the Minister of Health to impose restrictions on exemptions to deal with unanticipated and urgent safety issues should be retained?**

No comment.

- 134. Should the Minister of Health's approval be required before certain controlled drugs can be supplied or used?**

No comment.

- 135. Do you agree that the law should authorise the medicinal use of cannabis by people suffering from a chronic or debilitating illness?**

No comment.

- 136. If a medicinal cannabis scheme is established, which of the three cultivation options outlined in paragraphs 13.105 to 13.121 do you think would be best?**

No comment.

- 137. If a medicinal cannabis scheme is established, which of the three prescribing and supply approaches discussed in paragraphs 13.123 to 13.128 would be best?**

No comment.

138. If a medicinal cannabis scheme is established, should specific conditions for which cannabis can be prescribed be specified by legislation or should medical practitioners determine the circumstances in which it might be used?

No comment.

Chapter 14 - Enforcement

General comment

In this part of the issues paper there is an apparent concern that a longer period of detention will encourage longer retention of the drugs in the body cavity. We consider that this is a totally unproductive tactic.

If there is no limit on detention once it has been shown to a judicial officer's satisfaction, using if necessary non-invasive imaging technology, that someone has a significant quantity of drugs, then detention should continue until the person retrieves the drugs or nature takes its course. In effect, deprive the drug carrier of any benefit from retention, and discourage the practice.

While this logic would apply to all drug possession, it is sufficient to provide for the power to detain where the drugs are internally concealed for the purposes of supply or appear to be of sufficient volume to trigger the presumption of possession for supply.

The following answers should be read with the above general comment in mind.

139. Do you agree that the circumstances in which a person may be detained by reason of internal concealment of drugs should be limited to situations where the person is suspected of concealing for the purposes of a drug dealing offence?

Yes, if “drug dealing offence” includes possession for supply.

140. Do you agree that the maximum period of detention for internal concealment should not be extended beyond 21 days?

No.

141. Do you agree that the requirement for a person to consent to an examination under section 13C should be retained?

No.

142. Do you agree that the law should permit the use of a wider range of medical imaging techniques and technologies in relation to internally concealed drugs?

Yes, with judicial warrant only.

143. Do you agree that the current section 19 inspection power should be retained and made subject to the generic regime in the Search and Surveillance Bill?

Yes.

144. Do you agree that a power to enter premises, inspect documents, and take samples of substances is required for the purpose of monitoring compliance with any approvals given under our proposed regime for non-convention drugs (discussed in chapter 8)?

Yes.

Chapter 15 - Achieving balance in drug policy

145. Should greater use be made of treatment as a disposition option within the courts for people with alcohol and other drug dependence and abuse problems? If so, how?

No comment.

146. Do you think that the new legislative framework should allow for additional problem limitation measures to be adopted by regulation?

No comment.

147. Do you agree that additional reporting requirements or the establishment of an advisory committee with policy, accountability, and advocacy functions for drugs and alcohol would have insufficient benefit to justify the cost? If not, what benefits would there be?

No comment.

- 148. Do you agree that the development of a blueprint for drug and alcohol and other addiction service delivery could provide a practical way of significantly increasing the emphasis on treatment?**

No comment.

- 149. What else might be done to provide greater support for demand reduction and problem limitation measures?**

No comment.

Chapter 16 - Alcoholism and Drug Addiction Act 1966

- 150. Do you agree that a regime allowing civil committal for the detention and treatment of alcohol and drug dependence should be retained?**

Yes. There is ambiguity surrounding what is a “voluntary” application under the Alcoholism and Drug Addiction Act 1966. Only the decision to apply to be committed could be considered voluntary, after which there must be some element of compulsion if treatment is without consent. This is arguably in breach of s22 New Zealand Bill of Rights Act 1990 (NZBORA) and the right not to be arbitrarily detained. Any process for civil committal should expressly recognise the compulsion required to place a person under the proposed therapeutic regime and the reasons for it.

- 151. If civil committal for the detention and treatment of alcohol and drug dependence is retained, do you agree with the key features and safeguards outlined in paragraph 16.103? Are there any others you would add?**

The phrase “last resort” needs clarification. If this is a matter of ensuring all options have been explained to the patient, this should be explicit. Greater emphasis of the principle of the least restrictive intervention would clarify what other possibilities for treatment might be considered before detaining a person for involuntary treatment of their drug and alcohol dependence.

The process of ensuring a lawyer is appointed to represent the patient when detention is contemplated should be clearer and more detailed.

Other legislation provides that persons who lack capacity or have diminished capacity have a statutory right to have a court appointed lawyer appointed by the family court to

represent them; for example, the Protection of Person and Property Rights Act 1988 (PPPR Act 1988) and the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act). When a person has a temporary disorder of volition or chronic cognitive damage he or she is likely to have diminished capacity and, by definition, have “impaired capacity” under the threshold test, and are particularly vulnerable for that reason.

152. If a regime for civil detention and treatment is retained, should there be an offence of escaping from an institution as discussed in paragraphs 16.58 to 16.60?

This would be counterproductive. There is little to be achieved by taking a punitive approach, and a rehabilitative approach would be more beneficial.

It is unclear if there is a breach of an order, whether it is possible to get a warrant to enforce it.

153. Do you agree that alcohol and drug treatment facilities operating within a new regime should, as discussed in paragraph 16.53, be certified by the Director-General of Health under the Health and Disability Services (Safety) Act 2001 in the same way as other health care providers?

Yes. There are certain people who are recognised as able to make an assessment, and a certifying process provides further safeguards.

154. Do you agree that the threshold for compulsion should be:

(a) that the person has a “dependence” on alcohol or other drugs; and

If there is to be a lawful justification for detainment without consent, there should be a higher threshold than “dependence”. We suggest a threshold of “severe dependence”, as it is possible that even social drinkers and tobacco smokers may get caught here.

Dependence is not a static state, and can fluctuate. People are entitled to make unwise decisions, and may make decisions that another person disagrees with. However, this does not mean the decision should be superceded by the dissenter’s opinion.

(b) detention and treatment is necessary to protect the person from significant harm;

- (c) **the person is likely to benefit from treatment for his or her alcohol or drug dependence but has refused treatment; and**
- (d) **no other appropriate and less restrictive means are reasonably available for dealing with the person.**

“Dependence” means that a person has:

- (i) **a tolerance to a substance; and**
- (ii) ***shows withdrawal symptoms when he or she reduces the level or stops using the substance; and***
- (iii) **has a substantially impaired capacity to make decisions about his or her substance use and personal welfare due primarily to his or her dependence on the substance.**

It may be better phrased here to say a person has been “shown” to have impaired capacity, especially as this can fluctuate due to alcohol or drug use.

It would be useful to have a qualifying word in front of “decisions” such as “good” or “sensible”.

It is not clear why “tolerance” is relevant to the definition here.

155. If you do not agree with the approach we have set out in Q154, what criteria do you suggest?

See answer to 154 above.

156. Do you agree that people should not be able to be detained on the grounds that they are unable to care for themselves when detention is not necessary to protect them from significant harm?

Yes.

157 Do you agree that people should not be able to be detained on the grounds that they are perceived to pose a serious danger to others?

Yes, it does not seem logical that posing a danger to others should not be included if posing a danger of self-harm is included. Even if there is little empirical evidence to suggest that those with drug or alcohol dependence are not likely to pose a serious

danger to others, it would be in keeping with other compulsory regimes such as the definition of mental disorder in s2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act) to include this ground. It would then leave open the possibility that a person with drug dependence who does not pose a risk to themselves could still fall within the jurisdiction of the Act if they pose a risk to the health or safety of others.

158. Do you think that the legislation should, like the Drug and Alcohol Treatment Act 2007 (NSW), set a maximum period for detention? If so, what should the maximum be?

Yes, but a similar system of procedural safeguards as contained in the MHCAT Act that require steps to be taken and ongoing review of the person's reason for compulsory treatment.

159. Should provision be made allowing the courts to extend this? If so, for how long and on what grounds?

This question and Q158 above require expert medical opinion as to the appropriate maximum period length of detention, which could vary widely depending on the nature or type of alcohol or drug dependence. Emphasis should be on the least restrictive intervention principle, which permits relatively short-term detention.

160. Should provision be made for community-based treatment orders?

Yes. Even if a compulsory treatment regime permitted only short-term detention there would be a role for community based treatment orders to ensure continuity of care and linking of treatment services once a person is no longer required to be detained under compulsory treatment. It would also potentially provide less restrictive options in keeping with this principle and avoid arbitrariness of detainment in terms of s22 New Zealand Bill of Rights Act.

161. Which of the options outlined in paragraphs 16.116 to 16.121 do you think provides the best legislative vehicle for any civil regime for compulsory drug and alcohol assessment, detoxification and treatment?

We support a separate Act that is closely aligned with the procedural safeguards and rights protections set out in the MHCAT Act. Careful attention would need to be given

to the interface with s4(d) of the MHCAT Act as solely substance abuse is specifically excluded from the assessment and treatment procedures in that Act. We consider there is merit in having stand alone legislation, partly to avoid any social stigma attributed to

drugs legislation, such as the Misuse of Drugs Act, being associated with criminal law and that there will be those who have substance dependence without any dual mental disability under the MHCAT Act.

The Society agrees with the proposed shift of focus from criminal justice to treatment and rehabilitation in the health setting.

The Society hopes that the above comments are of assistance to the Law Commission. If you wish to discuss any matters raised please contact the Criminal Law Committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President