



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Misuse of Drugs Amendment Bill

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*11/04/2019*

## **Submission on the Misuse of Drugs Amendment Bill**

### **1 Introduction**

1.1 The New Zealand Law Society welcomes the opportunity to comment on the Misuse of Drugs Amendment Bill 2019 (the Bill).

1.1 The Bill amends the Misuse of Drugs Act 1975 (the Act) by:

- (a) classifying two synthetic cannabinoids (5F-ADB and AMB-FUBINACA) as Class A controlled drugs;
- (b) affirming the existing Police discretion not to prosecute for possession and use (for all drugs) where a health-centred or therapeutic approach would be more beneficial; and
- (c) introducing a power for the Minister of Health to issue temporary (12 month) drug notices which classify new substances as Class C controlled drugs.

### **2 Executive summary**

2.1 The Law Society's key submissions are that:

- (a) The truncated process for development and scrutiny of the Bill creates a risk of poor quality regulation.
- (b) The Ministry of Justice's view that there is no inconsistency with section 25(c) of the New Zealand Bill of Rights Act 1990 (the right to be presumed innocent until proved guilty according to law) requires further examination. That view is difficult to reconcile with:
  - (i) previous negative section 7 reports by Attorneys-General relating to previous amendments to the Act concerning similar thresholds for the presumption of possession for the purpose of supply; and
  - (ii) case law.

2.1 We also comment on whether there is sufficient evidence to establish the correct level at which the presumption of supply should apply, and whether the 56 gram threshold for presumption of supply applies to powder, liquid or plant weight.

2.2 The final point relates to the absence of safeguards to ensure the Police discretion to prosecute is exercised fairly.

### **3 Process**

3.1 The timeframe for considering the proposed legislative amendments has been very short. The Bill was introduced on 7 March 2019, had its first reading on 12 March and submissions to the select committee are due by 11 April.

3.2 The Law Society considers that a longer period should have been allowed for development and scrutiny of the legislation. There are significant questions around the adequacy of the regulatory analysis underpinning the Bill. The Treasury and Ministry of Health quality assurance review of the

Regulatory Impact Assessment for the Bill<sup>1</sup> states that a detailed cost-benefit analysis of the options was not possible due to tight timeframes, and that wider consultation has also not been possible.<sup>2</sup> An inadequate consultation timeframe reduces the ability of the select committee and submitters to undertake an effective review. This creates a risk of poor quality legislation being enacted.

- 3.3 In addition, as discussed below there are important questions that need to be addressed about the Bill's compliance with the New Zealand Bill of Rights Act 1990 (NZBORA).

#### **4 Compliance with the New Zealand Bill of Rights Act**

##### *Presumption of possession for supply – temporary drug notices*

- 4.1 Proposed new section 4D(2), introduced by clause 5, treats a temporary class drug as if it were a non-specified controlled drug. As the current Bill omits any specific level at which possession for the purpose of supply will be presumed, the default presumption under the Misuse of Drugs Act of 56 grams applies.<sup>3</sup>
- 4.2 The Ministry of Justice advice<sup>4</sup> to the Attorney-General is that this is consistent with the section 25(c) NZBORA right to be presumed innocent until proven guilty.
- 4.3 The Law Society considers that conclusion warrants further examination, for the reasons set out below.

##### *Misuse of Drugs Act, section 6(6) reverse onus*

- 4.4 The starting point when considering proposed new section 4D(2) is that the presumption of possession for supply (the section 6(6) reverse onus) is a prima facie breach of NZBORA.
- 4.5 As noted, section 25(c) enshrines the right to be presumed innocent until proven guilty, and the onus is on the Crown to prove guilt beyond reasonable doubt. Section 6(6) of the Misuse of Drugs Act 1975 reverses the burden of proof: a person is presumed to be in possession of a controlled drug with the intention to supply if the amount of the drug exceeds a specified level, unless they can *disprove* that presumption on the balance of probabilities.
- 4.6 This reversal of the burden of proof is prima facie a breach of section 25(c) but may be found to be consistent with NZBORA if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of NZBORA.
- 4.7 The New Zealand Supreme Court in *R v Hansen*<sup>5</sup> considered the section 6(6) presumption of supply. A majority of that Court found that the presumption was not a reasonable and justifiable limitation of the section 25(c) right. While controlling the supply of drugs was considered to be an

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<sup>1</sup> <https://www.health.govt.nz/system/files/documents/pages/impact-summary-synthetic-drugs-response-7mar19.pdf>

<sup>2</sup> Ibid, at page 1

<sup>3</sup> Clause 2, Schedule 5 of the Misuse of Drugs Act 1975 and see Explanatory Note to the Bill, at p3.

<sup>4</sup> <https://www.justice.govt.nz/assets/Documents/Publications/bora-misuse-of-drugs-amendment-bill.pdf>

<sup>5</sup> *R v Hansen* [2007] NZSC 7 at [123].

important and significant objective, it was not reasonable to try to achieve that objective by reversing the burden of proof to create a presumption of supply.<sup>6</sup>

#### *Default amount for presumption of supply*

4.8 The Court in *Hansen* suggested that a reverse onus might be justified under section 5 *if* it were set so high that the purpose of supply was a near certainty, to reduce or avoid the risk of wrongful convictions.<sup>7</sup> Tipping J stated:<sup>8</sup>

“... It matters whether the trigger amount is set on the basis that possession of such an amount raises a bare probability that the purpose of the possession is supply, a high probability that such is the accused’s purposes, or a near certainty. The higher the probability of supply deriving from possession of the trigger amount, the more justifiable will be a presumption of supply. The lower the degree of probability, the more problematic such a presumption becomes.”

4.9 Following *Hansen*, former Attorneys-General concluded that two other Misuse of Drugs amendment bills that relied on the 56 gram default level, and that incorporated the Act’s presumption of supply, were inconsistent with NZBORA:

4.9.1 In 2007, the Attorney-General made a section 7 report relating to a synthetic drug called BZP.<sup>9</sup> He emphasised the conclusion in *Hansen* that unless the threshold was set so high as to make it nearly certain that the purpose of possession was supply, the inconsistency with section 25(c) NZBORA would be unjustified.

4.9.2 In 2010, the Attorney-General made a section 7 report on a Bill that reclassified ephedrine and pseudoephedrine, finding that the default level of 56 grams was not high enough to justify a presumption of supply.<sup>10</sup>

4.10 The Ministry’s NZBORA advice in respect of this Bill distinguishes the conclusions in the 2007 and 2010 reports on the basis that the default amount of 56 grams of the synthetic cannabinoids “*would represent a significant amount unlikely to be held for solely personal use.*”<sup>11</sup>

4.11 That conclusion is directly contrary to the Ministry of Health’s conclusion in the Regulatory Impact Assessment (RIA) for the Bill, that “*Fifty-six grams is about a month’s worth for an average dependent user, or a few days’ worth for some heavy users.*”<sup>12</sup>

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<sup>6</sup> Ibid, at [128].

<sup>7</sup> Ibid, at [143].

<sup>8</sup> Ibid, at [143].

<sup>9</sup> Hon Michael Cullen Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs (Classification of BZP) Amendment Bill 2007) at page 5, <https://www.justice.govt.nz/assets/Documents/Publications/BORA-2007-Misuse-of-Drugs-Classification-of-BZP-Amendment-Bill.pdf>

<sup>10</sup> Hon Christopher Finlayson Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Misuse of Drugs Amendment Bill (Ministry of Justice, 2010), at [16], <https://www.justice.govt.nz/assets/Documents/Publications/BORA-Misuse-of-Drugs-Amendment-Bill.pdf>.

<sup>11</sup> Ibid 4, at [20].

<sup>12</sup> Ibid 1, at page 2.

- 4.12 The Ministry of Justice appears to have based its conclusion on a comparison of synthetic cannabinoids with natural cannabis, for which the current specified amount for a presumption of supply is 28 grams.<sup>13</sup> However, the RIA states that:

*“We do not consider that synthetic drugs are directly comparable. 28g is a reasonably low amount, and specifying that would not protect users from criminalisation. 56g is the default amount in the Act but to specify and [sic] even higher amount needs thorough consultation and further clinical advice which has not been possible at this time.”<sup>14</sup>*

- 4.13 In these circumstances, the Law Society recommends that the committee seeks further advice from officials as to the evidence base for relying on the default level to justify a presumption of supply that can be considered to be consistent with section 25(c) NZBORA. We note, in particular, the Ministry of Health’s recommendation that thorough consultation and further clinical advice is needed to establish the correct level at which the presumption of supply should apply.
- 4.14 The Ministry’s section 7 advice also does not address alternative approaches that might achieve the desired objective without limiting the right to be presumed innocent more than is reasonably necessary. The alternatives include a reverse evidential onus (instead of the section 6(6) persuasive onus) or, as suggested by the Law Commission,<sup>15</sup> an aggravated possession offence.

#### *Measuring the default amount*

- 4.15 An additional complication arises in relation to the *form* of the synthetic cannabinoids. The Act currently defines both cannabis preparations and plants, and distinguishes default amounts at which there will be a presumption of supply by reference to each form of the drug.<sup>16</sup> However, since the Bill does not specify a default amount for the synthetic cannabinoids, it is unclear whether the default amount of 56 grams applies to the targeted synthetics in their powder or liquid form, or to the weight when applied to plant matter. The Regulatory Impact Assessment notes the need for this distinction.<sup>17</sup>
- 4.16 The Ministry of Justice’s comparison in its NZBORA advice to cannabis plants suggests that it has in mind the *weight* of the synthetics when applied to plant matter, however the absence of clarification in the Bill creates uncertainty which needs to be addressed (regardless of whether the presumption threshold of 56 grams remains or an alternative threshold is recommended by the committee).

## **5 Police discretion**

- 5.1 Section 7 of the Act contains the offences of possession and use of controlled drugs. The Bill inserts new subsections 5 and 6 into section 7, which:
- (a) affirm that Police have discretion to prosecute for an offence against section 7, and that a prosecution should not be brought unless it is required in the public interest; and

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<sup>13</sup> Ibid 4, at [20].

<sup>14</sup> Ibid 1, at pages 12-13 [emphasis added].

<sup>15</sup> Law Commission, *Controlling and Regulating Drugs, Issues Paper 16*, 11 February 2010, at [10.95].

<sup>16</sup> The Misuse of Drugs Act 1975, Schedules 2 and 5.

<sup>17</sup> Ibid 1, at page 16.

- (b) provide that when considering whether prosecution is required in the public interest, consideration should be given to whether a health-centered or therapeutic approach would be more beneficial.
- 5.2 In accordance with the Solicitor-General's Prosecution guidelines there is existing provision for prosecutors to exercise their discretion as to whether a prosecution is required in the public interest. What differs here is the express requirement to consider whether an alternative health focused pathway is to be preferred.
- 5.3 This discretion is reiterated in the context described in the Health Minister's press release on the Bill:
- "We also want people caught up in the web of addiction to get the support they need to get off drugs. We don't want to ruin lives by putting people in jail at a cost to taxpayers of \$110,000 a year when we can help them to get the treatment they need.*
- "Fear of prosecution can deter people from seeking help to deal with addiction issues. This Bill reaffirms in law the existing Police discretion about when to prosecute and explicitly requires consideration of whether a health-centred or therapeutic approach would be more beneficial."<sup>18</sup>*
- 5.4 The Departmental Disclosure Statement (DDS) raises the following point about Police discretion:
- "This approach may raise issues round the disproportionate impact of the criminal justice system on Māori. Police have been making progressive steps towards enhancing the organisation's awareness of unconscious biases, and to focus decision making on getting the best outcome in each circumstance."*
- 5.5 As noted in the DDS, discretion in this area increases the risk of discriminatory outcomes, and the progress of Police, whilst laudable, does not obviate that risk. The committee may wish to seek advice from officials on whether it would be helpful to include safeguards in the legislation to minimise the risk of discriminatory practices, and to require Police to report in its Annual Report on gender and ethnicity based statistics regarding the exercise of this discretion.

## **6 Comprehensive review of the Misuse of Drugs Act 1975**

- 6.1 Finally, the Law Society notes that the Law Commission undertook a comprehensive review of the Act and in 2011 recommended a complete rewrite of the Act.<sup>19</sup> That has unfortunately not eventuated.<sup>20</sup> The committee may wish to consider commenting about the broader context in its

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<sup>18</sup> <https://www.beehive.govt.nz/release/bill-introduced-synthetics-crackdown>

<sup>19</sup> *Controlling and Regulating Drugs – A Review of the Misuse of Drugs Act, R122, April 2011*, Law Commission: <https://www.lawcom.govt.nz/our-projects/misuse-drugs-act-1975?id=906>

<sup>20</sup> This is despite the government of the day stating that there would be an overhaul of the Act. In September 2011, Health Minister Peter Dunne stated in response to the Issues Paper: "The near 40-year-old Misuse of Drugs Act will be overhauled and replaced and legislation developed to create a new regime for currently unregulated psychoactive substances."  
<https://www.lawcom.govt.nz/sites/default/files/governmentResponseAttachments/govt-speech-in-response-to-R122.pdf>

report to Parliament on this Bill, namely the need to expedite the systematic, comprehensive reform of the legislative framework for the treatment and/or criminalisation of drug use.

A handwritten signature in black ink, appearing to read 'Tiana Epati', with a horizontal line at the end.

Tiana Epati  
**President**  
11 April 2019