



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

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990 and
Standing Order 266 of the Standing Orders of the House
of Representatives*

I have considered the Misuse of Drugs (Classification of BZP) Amendment Bill 2007 ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). I have concluded that clause 5 of the Bill authorises measures that limit the right affirmed in section 25(c) of the Bill of Rights Act. These limitations cannot be justified in terms of section 5 of that Act. As required by section 7 of the Bill of Rights Act and Standing Order 266, I draw this to the attention of the House of Representatives.

PURPOSE OF THE BILL

The Bill amends the Misuse of Drugs Act 1975 ("the Act") to make it illegal to possess and use, sell, supply, import, export, or manufacture benzylpiperazine (BZP), phenylpiperazine, and related substances. These substances, which are the active ingredients in the majority of "party pills", will be reclassified as Class C1 drugs in Schedule 3 of the Act. The Bill also establishes the quantity or amount of these drugs over which they are presumed to be possessed for supply in Schedule 5 of the Act. The level is set at five grams or 100 flakes, tablets, capsules, or other drug forms each containing some quantity of the drug. These amounts were recommended by the Expert Advisory Committee of Drugs (EACD).

INCONSISTENCY WITH SECTION 25(C) OF THE BILL OF RIGHTS ACT

Section 25(c) of the Bill of Rights Act affirms the right of everyone charged with an offence to be presumed innocent until proved guilty according to law. The right to be presumed innocent requires the State to prove an accused's guilt beyond reasonable doubt. In general, a provision which requires an accused person to disprove on 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.¹

Section 6(6) of the Act creates a presumption that a person is in possession of a controlled drug for the purpose of supply if that person has an amount of the drug at or above that specified in Schedule 5 of the Act. The presumption creates a prima facie breach of section 25(c) of the Bill of Rights Act because it imposes an obligation on an accused to prove on the balance of probabilities that he or she did not intend to supply a controlled drug in order to escape liability (i.e. a reverse-onus).² I have concluded that clause 5 of the Bill also creates a prima facie breach of section 25(c) by extending the reverse-onus to a new category of persons (possessors of BZP).

JUSTIFICATIONS UNDER SECTION 5 OF THE BILL OF RIGHTS ACT

Where a Bill is found to be prima facie inconsistent with a particular right or freedom, it may nevertheless be found to be consistent with the Bill of

¹ *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)

² *R v Hansen* [2007] NZSC 7

Rights Act if the inconsistency is considered to be a reasonable limit that is justifiable under section 5 of that Act. The inquiry under section 5 is essentially two-fold:

- Does the provision serve an important and significant objective; and
- Is there a rational and proportionate connection between that objective and the provision?

In assessing the Bill under section 5 of the Bill of Rights Act I have relied on the judgment of the New Zealand Supreme Court in *R v Hansen*. In that case, a majority of the Court found the reverse-onus in section 6(6) of the Act to be unjustified under section 5.

Important and Significant Objective

In December 2006, the EACD reviewed the available research on BZP and concluded it poses a moderate risk of harm. The purpose of the Bill is to address the harm posed by BZP by making it an offence to possess and use, sell, supply, import, export, or manufacture the drug.

Case law in other jurisdictions appears to establish 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. In *R v Oakes* the Supreme Court of Canada 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. Similarly, in *S v Bhulwana*, the South African Constitutional Court agreed that the need to suppress illicit drug trafficking was an urgent and pressing one.³

A majority of the Court in *Hansen* also appeared to accept that controlling the risk posed to society by the trafficking of drugs was a significant and important objective. Accordingly, for the purposes of this advice, I have concluded that the purpose of clause 5 of the Bill is a significant and important objective under section 5 of the Bill of Rights Act.

Rational and Proportionate Connection

A majority of the Court in *Hansen* found either that the reverse-onus contained in section 6(6) of the Act was not rationally connected to the objective or it was not a proportionate response to the problem.

In finding that section 6(6) of the Act was a disproportionate response, Tipping J stated:

...it becomes crucial at what quantity of the drug the presumption is fixed. It matters whether the trigger amount is set on the basis that

³ See also *R v Sin Yau-Ming* [1992] LRC (Const) 547

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 purpose, 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. As I point out later, the present legislative scheme presents problems in this respect for s 5 purposes.⁴

Tipping J did not consider it self-evident that possessing more than a "reasonable" amount for personal use necessarily makes it highly probable or nearly certain in any particular case that the possession is for supply.

McGrath J did not consider the reverse-onus to be proportionate because having primary knowledge of facts relevant to an element of a crime does not necessarily make proof of that element by the accused an easier task. First, proving a state of mind is more difficult than proving a simple fact (such as the possession of a licence). Secondly, a person charged with possession of controlled drugs for supply, whose defence is that the drugs were held exclusively for personal use, has to acknowledge guilt of the offence of possession. That is likely to demean the accused in the eyes of the jury and the uncorroborated evidence of a person who admits to being a drug user will often carry little weight.⁵ Thirdly, those who might support the accused's version in court will often be unwilling to give evidence for the defence.

Anderson J did not consider the reverse-onus to be rationally connected to the objective or a proportionate response to the problem. In particular, he observed that the presumption is most telling in cases where the quantity possessed may not give rise to the necessary inference of intent to supply.

What is clear however, to my mind, is that the more compelling the inference to be taken in light of the expert opinion, the less there is a need for a presumption, and the less compelling the inference, the less there is a justification for a presumption.⁶

If expert opinion could support a logical inference of intent to supply, Anderson J believed that opinion should be presented to a court as such and not as a proved fact.

The judgment of the Supreme Court in *Hansen* suggests that the threshold required to avoid an inconsistency with the Bill of Rights Act must be so high as to make it highly probable or nearly certain that the purpose of possession is supply. It is apparent from the advice provided by the EACD to the Minister of Health that the EACD based its recommendation on an amount of BZP that would be considered *reasonable* for presuming a purpose of supply rather than an amount that would make it highly likely that the purpose of the possession was supply. Consequently, the EACD recommended a much lower threshold than is required by the Court in *Hansen*.

⁴ *R v Hansen* [2007] NZSC 7, para 143

⁵ *R v Hansen* [2007] NZSC 7, para 228

⁶ *R v Hansen* [2007] NZSC 7, para 279

Conclusion

Following consideration of the judgment of the Supreme Court in *Hansen*, and the advice of the EACD to the Minister of Health, I have concluded that the inconsistency with section 25(c) of the Bill of Rights Act cannot be justified under section 5 of that Act. Although the objective of the Bill is significant and important, the reversal of the presumption of innocence is not rationally or proportionately connected to that objective. The amounts set out in the Bill are not sufficiently high that it is safe to conclude that there is a high probability that the purpose of possession of the drug is supply.

FURTHER CONSIDERATION OF SECTION 6(6)

The risk to public health posed by BZP makes it necessary to reclassify the drug without delay and that the scheme of the Act requires a level to be set at which possession is presumed to be for supply. The Government has made a request to the New Zealand Law Commission to undertake a comprehensive review of the Act. It is likely that the broader question of the consistency of section 6(6) of the Act with the Bill of Rights Act will be addressed as part of that review. Nevertheless, I am required to assess the consistency of legislation with the Bill of Rights Act under the current law. The possibility of changes to the law in the future is a matter for Parliament to consider and does not form any part of my analysis.

CONCLUSION

Based on the analysis set out above, I have concluded that the Bill appears to be inconsistent with section 25(c) of the Bill of Rights Act and that the inconsistency cannot be justified under section 5 of that Act.



Hon Michael Cullen
Attorney-General