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Report of the

# ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act  
1990 on the Misuse of Drugs Amendment  
Bill

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Presented to the House of Representatives pursuant to  
Section 7 of the New Zealand Bill of Rights Act 1990  
and Standing Order 261 of the Standing Orders of the  
House of Representatives

1. I have considered whether the Misuse of Drugs Amendment Bill (“the Bill”) is consistent with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). I have concluded that the Bill appears to be inconsistent with s 25(c) of the Bill of Rights Act (right to be presumed innocent until proved guilty according to law), and that the inconsistency cannot be justified under s 5 of that Act.
2. As required by s 7 of the Bill of Rights Act and Standing Order 261, I draw this to the attention of the House of Representatives.

#### **Purpose of the Misuse of Drugs Amendment Bill**

3. The Bill amends the Misuse of Drugs Act 1975 to reclassify ephedrine and pseudoephedrine as Class B2 controlled drugs. This will make ephedrine and pseudoephedrine available only with a prescription from a medical practitioner. Pseudoephedrine is an essential ingredient for the production of methamphetamine. Ephedrine can be converted into pseudoephedrine.
4. The Bill will also establish that possession of 10 or more grams of ephedrine or pseudoephedrine will be presumed to be for supply. It is an offence under the Act for a person to have in their possession a Class B controlled drug for the purpose of supply. The offence is punishable by imprisonment for a term not exceeding 8 years. Exemptions from the offence apply for chemists and other legitimate suppliers.
5. The purpose of the amendments is to restrict the availability of ephedrine and pseudoephedrine to make it more difficult for potential manufacturers of methamphetamine to access its key ingredients.

#### **Inconsistency with s 25(c) of the Bill of Rights Act**

6. 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 Crown to prove an accused person’s guilt beyond reasonable doubt.
7. Section 6(6) of the Misuse of Drugs Act provides:
 

For the purposes of [the offence of possession for supply], a person is presumed until the contrary is proved to be in possession of a controlled drug for [the purpose of supply] if he or she is in possession of the controlled drug in an amount, level, or quantity at or over which the controlled drug is presumed to be for supply.
8. This presumption reverses the onus of proof so that, to avoid a conviction, a defendant who is in possession of an amount greater than the fixed quantity of the drug in question must prove on the balance of probabilities that he or she was not in possession of the drug for the purposes of supply. The Bill extends this presumption to possession of 10 or more grams of ephedrine or pseudoephedrine. This extension therefore creates a *prima facie* breach of s 25(c) of the Bill of Rights Act.

### Justifications under s 5 of the Bill of Rights Act

9. Where a Bill is found to be *prima facie* inconsistent with a right or freedom in the Bill of Rights Act, it may nevertheless be found that the inconsistency is a reasonable limit justifiable under s 5 of that Act. The inquiry under s 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?
10. In assessing the Bill under s 5 of the Bill of Rights Act I have had regard to the judgment of the New Zealand Supreme Court in *R v Hansen*.<sup>1</sup> In that case, a majority of the Court found the presumption in s 6(6) of the Misuse of Drugs Act limited the right to be presumed innocent to an extent that could not be justified under s 5.

### *Important and Significant Objective*

11. The majority in *Hansen* concluded that the control of the supply of illegal drugs is a pressing social objective which might justify limitations on rights and freedoms affirmed in the Bill of Rights Act.<sup>2</sup> Accordingly, for the purposes of this advice, I have concluded that the Bill's objective is sufficiently important and significant.

### *Rational and Proportionate Connection*

12. Some members of the Court in *Hansen* suggested a reverse onus might be justified under s 5 if the presumptive levels were set on the basis that possession at those levels would corresponded with either a high probability or a near certainty that the quantity of drugs was possessed for the purposes of supply. This approach would reduce or avoid the possibility of wrongful convictions.<sup>3</sup>
13. The Ministry of Health has advised that the maximum period of supply on a prescription containing pseudoephedrine will be one month. Assuming the maximum dosage of 240 milligrams over 24 hours is adhered to, a maximum of 7.2 grams of pseudoephedrine could be acquired per prescription. Under the Bill, the s 6(6) presumption will apply to a person possessing two prescriptions of the maximum dosage.
14. I have considered the Expert Advisory Committee of Drugs' (EACD) advice to the Associate Minister of Health and the Ministry of Health's advice to the EACD. In its advice to the Associate Minister of Health the EACD said the presumption for supply "would be better represented by an upper limit less likely to capture legitimate consumers holding larger quantities of [the drug]." The EACD appeared to base its recommendation on an amount of ephedrine or pseudoephedrine that is related to the presumption for supply of methamphetamine and is more than a

<sup>1</sup> *R v Hansen* [2007] NZSC 7

<sup>2</sup> See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [69] per Blanchard J, at [125] per Tipping J, at [207] per McGrath J and at [273] per Anderson J.

<sup>3</sup> *R v Hansen* [2007] NZSC 7, For example Tipping J at [143]

person with a cold or flu could reasonably use. It is therefore apparent the threshold of 10 grams was not selected on the basis that possession above this level would correspond with a high probability or near certainty that the ephedrine or pseudoephedrine was possessed for the purposes of supply.

#### **Law Commission Review**

15. The Law Commission is conducting a comprehensive review of the Act and has tentatively considered that the presumption in section 6(6) should not be retained. 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 this analysis.

#### **Conclusion**

16. Based on the analysis set out above, I have concluded that the Bill appears to be inconsistent with the right in the Bill of Rights Act to be presumed innocent until proved guilty according to law and the inconsistency cannot be justified under s 5 of that Act.



Hon Christopher Finlayson  
Attorney-General