



LEGISLATION DESIGN AND ADVISORY COMMITTEE

11 April 2019

Louisa Wall MP
Parliament Buildings
Wellington

Dear Ms Wall

Misuse of Drugs Amendment Bill

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the *Legislation Guidelines* (2018 edition), which have been adopted by Cabinet.
2. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The Misuse of Drugs Amendment Bill was not considered by LDAC prior to introduction. LDAC has therefore reviewed and wishes to make the attached submission on the Bill as introduced.
4. Thank you for taking the time to consider the LDAC's submission.

Yours sincerely

Karl Simpson
Chairperson
Legislation Design and Advisory Committee



LEGISLATION DESIGN AND ADVISORY COMMITTEE

11 April 2019

Louisa Wall MP
Health Committee
Parliament Buildings
Wellington

Dear Ms Wall

Misuse of Drugs Amendment Bill

Introduction

1. The Legislation Design and Advisory Committee has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
2. Our submission is directed at clauses 5 and 6 of the Bill.
3. Clause 5 creates a new section 4C which confers power on the Minister of Health to temporarily add by notice in the Gazette any new substance, preparation, mixture, or article to the list of controlled drugs specified in Part 1 of Schedule 3 of the Misuse of Drugs Act 1975 (the Act) (a temporary class drug order). We are concerned that this power to amend the Act by notice in the Gazette is a significant power as it has the effect of criminalising possession and use of temporary class drugs.
4. Clause 6 creates new subsections 7(5) and 7(6) which affirm prosecutorial discretion and state that a prosecution should not be brought unless it is required in the public interest. Clause 6 also prescribes factors that should be considered in determining whether a prosecution is in the public interest. We are concerned that this clause conflicts with the Solicitor-General's Prosecution Guidelines (**Prosecution Guidelines**) and creates justiciable grounds to challenge a prosecution.
5. We do not submit on the policy underlying the Bill.

Clause 5: Delegating law-making power

Scope of Henry VIII power

6. New section 4C of the Bill is an empowering provision that, in essence, provides for the Minister of Health to amend Part 1 of Schedule 3 of the Act, by notice in the Gazette, to temporarily add any new substance, preparation, mixture, or article to the list of controlled drugs specified in that Schedule. Section 4C is, in terms of the Guidelines, a “Henry VIII” power. Under the Guidelines, a Henry VIII power should be “as limited as possible to achieve the objective”. The scope, criteria or context for the power should be clear enough to circumscribe the power so that the policy is set wholly or largely by Parliament.¹
7. We acknowledge the Bill seeks to address the significant public health problem that is the use of synthetic drugs and disrupt the supply of new synthetic drugs. We accept that the policy objective behind new section 4C is to enable the Minister to respond quickly to emerging products in the synthetic drug market by classifying new substances, preparations, mixtures, or articles as temporary class drugs.
8. LDAC is satisfied that, in terms of the Guidelines, the criteria in section 4C(3) and (4) of the Act appropriately define the scope and criteria for the use of the power and that the power could be justified in terms of the reduction of risk of harm to individuals and society.

Is the power subject to appropriate safeguards?

9. Henry VIII powers should be subject to appropriate safeguards designed to address the risks posed by the provision. Safeguards may include matters such as consultation, providing that the power to make the secondary legislation to be exercised by the Governor-General by Order in Council, prescribing for the power to be temporary, and making the power subject to parliamentary approval.²
10. In determining whether to make a temporary class drug order, new section 4C requires that the Minister be satisfied that the temporary class drug proposed poses, or may pose, a risk of harm to individuals or society and has not already been classified under the Act. We note the Minister is not required to seek advice before making an order, but we accept that for the Minister to act quickly, such a requirement may not be practical in every situation.
11. We support new section 4E, which requires the Minister to seek technical advice after an order is made from an advisory and technical committee and/or the Expert Advisory Committee on Drugs, as the Minister considers appropriate, about the temporary class drug and its appropriate classification. We further support new section 4F, which sets time limits for the duration of a temporary class drug order.

¹ *Legislation Guidelines* (2018 edition), chapter 15.1 of the Guidelines

² *Ibid*

12. New section 4C(1), supported by new section 4G, provides for a temporary class drug order to be made by the Minister by notice in the Gazette. Section 4 of the Act currently provides for substances, preparations, mixtures and articles to be added to relevant Schedules by Order in Council. We understand the policy objective behind new section 4C is to enable a timely response. However, we suggest that, given the significance of the power conferred by new section 4C, and in particular the resulting criminalisation of those who possess or use the relevant drugs, it is more appropriate for this temporary power to continue to be exercised by the Governor-General in Council than by an individual Minister.
13. We note that, although we think an Order in Council should be used, we do not think that these temporary Orders in Council would need to follow the affirmative resolution processes or require consultation and the further consideration by the Minister that currently apply for permanent Orders to amend the controlled drug schedules. This would assist with ensuring that the objective of creating a way to respond quickly to emerging drugs can still be achieved.

Clause 6: Prosecutorial discretion

Inconsistency with the Prosecution Guidelines

14. The Prosecution Guidelines ensure that prosecutions in New Zealand are underpinned by core values which aim to achieve consistency and common standards in key decisions and trial practices.³ The Prosecution Guidelines provide that prosecutions should be initiated only where the prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction and that prosecution is required in the public interest.⁴
15. The presumption behind the public interest test is that the public interest requires prosecution where there has been a contravention of the law. This presumption is the starting point for consideration in each individual case, public interest considerations for and against prosecution are then weighed up. An example of a consideration against prosecution is whether there are any proper alternatives to prosecution available. It is always within the prosecutor's discretion to decide not to prosecute.⁵
16. Clause 6 introduces a unique discretion in determining whether to prosecute for an offence against section 7 of the Act. We understand the policy objective behind new clause 6 is to signal that a prosecution may not be the most appropriate way to deal with every instance of offending against section 7. New section 7(6) provides that a health-centred or therapeutic approach may be a proper alternative. We submit, however, that new section 7(5) and 7(6) are unnecessary to achieve this policy objective and instead add an unnecessary level of complexity and uncertainty in the enforcement of the law.

³ Crown Law Office, *Solicitor-General's Prosecution Guidelines*, chapter 1.1.

⁴ *Solicitor-General's Prosecution Guidelines*, chapter 5.1.

⁵ *Solicitor-General's Prosecution Guidelines*, chapter 5.

17. We submit that new section 7(5), on its face, changes the presumption under the Prosecution Guidelines that a prosecution is required where there has been a contravention of the law. The presumption is changed such that a prosecution should not be brought unless there are public interest reasons to do so. New section 7(6) prescribes additional matters that should be given consideration in assessing whether there is public interest (i.e. whether a health-centred or therapeutic approach would be more beneficial).
18. In our view, it is unnecessary and generally undesirable to affirm that prosecutorial discretion exists in some legislation but not others. It may have unintended consequences for application of the public interest test, the ability to challenge prosecution decisions, and risks negative inference in relation to other legislation.
19. We understand that a targeted reference to prosecutorial discretion can provide necessary assurance in particular circumstances. This appears to be the rationale for its inclusion in section 59 of the Crimes Act 1961 and clause 59B of the proposed Arms (Prohibited Firearms, Magazine, and Parts) Amendment Bill. The proposal in new section 7(5) of this Bill is different, however, to the clauses found in section 59 of the Crimes Act 1961 and clause 59B of the Arms (Prohibited Firearms, Magazine, and Parts) Amendment Bill. In our view, the drafting of clause 6 suggests a significantly higher threshold for prosecution than these two precedents.
20. We are also concerned that new section 7(5) may have the practical consequence of unequal enforcement of the law. This is particularly the case given that a course of criminal conduct may give rise to offences against both the Misuse of Drugs Act and the Crimes Act 1961. LDAC submits that there would need to be to compelling reasons for requiring different starting points for prosecutorial discretion in relation to different crimes which may arise from a similar course of criminal conduct. The key matter for the committee is whether this Bill is also a special case where it is desirable to make specific mention of prosecutorial discretion.
21. We have also considered new section 7(6) in isolation of new section 7(5). We appreciate that new section 7(6), which refers to a health-centred or therapeutic approach to enforcement, could assist with providing guidance to a person making a prosecution decision. LDAC is less opposed to new subsection (6) in that it simply specifies factors that should form part of the prosecutorial discretion. We note, however, that if these factors are already a feature of Police practice, as suggested in the Explanatory Note, then this subsection appears redundant.
22. If new section 7(6) is to be retained, we suggest that it could be improved, and the risks associated with it minimised, by an amendment to the following effect:

When deciding whether to prosecute for an offence against this section, the Police must, in addition to any other relevant matters, consider health-centred or therapeutic alternatives.

Justiciable grounds to challenge

23. The inclusion of an objective public interest test in section 7(5) and 7(6) risks giving rise to justiciable grounds to challenge a prosecution of an offence against section 7 on the grounds that the prosecution was not in the public interest.

Recommendations

24. We **recommend** the power to make temporary class drug orders is conferred on the Governor-General by Order in Council, on the recommendation of the Minister of Health.
25. We **recommend** that section 7(5) of clause 6 be deleted. The more usual approach would be for the Ministry to use internal prosecution policies to guide and ensure consistent departmental prosecutorial decision making.
26. We **recommend** that section 7(6) of clause 6 be deleted or, if not deleted, be amended along the lines suggested in paragraph 22 of this submission.
27. Thank you for considering our submission. We do not wish to be heard in person.

Yours sincerely



Karl Simpson
Chairperson
Legislation Design and Advisory Committee