



Human Rights  
Commission  
*Te Kāhui Tika Tangata*



21 September 2010

The Committee Secretariat  
Health Committee  
Parliament Buildings  
**Wellington**

Dear Secretary

### **MISUSE OF DRUGS AMENDMENT BILL**

This letter sets out the Human Rights Commission's (the Commission's) position on the Misuse of Drugs Amendment Bill. The Bill adds ephedrine and pseudoephedrine to the list of Class B2 controlled drugs. By doing so it makes possession of 10 or more grams of the drug(s) subject to s.6(6) of the principal Act. Section 6(6) reverses the onus of proof requiring the person possessing the drug to establish that they do not have it for the purpose of supply. The Amendment therefore effectively increases the range of drugs that the reverse onus of proof applies to.

The Commission supports the intent of the Bill. Controlling the supply of illegal drugs is clearly an important and significant objective. Our concern is that it further consolidates the reverse onus of proof in the principal Act and undermines a fundamental tenet of our criminal justice system, namely the right to be presumed innocent until proved guilty. As Lord Bingham of Cornhill noted in *McIntosh v Lord Advocate*<sup>1</sup>:

*... the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing inquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to public ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book ... Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.*

#### **The Commission's role**

The Commission's mandate is found in the Human Rights Act 1993. The long title to that Act refers to the provision of "better protection of human rights in New Zealand in general accordance with the United Nations Covenants or Conventions on Human Rights." This engages not only legislation such as the New Zealand Bill of Rights Act

<sup>1</sup> [2001] 3 WLR 107 (quoting Sachs J in *State v Coetzee* [1997] 2 LRC 593)

1990 (NZBoRA) - which was enacted to affirm the International Covenant on Civil and Political Rights (ICCPR) - but also commentary and recommendations by the UN agencies charged with monitoring New Zealand's implementation of the human rights treaties it has ratified.

### **UN comment**

The reversal of the onus of proof and its link to the Misuse of Drugs Act is an issue which has exercised the Human Rights Committee of the UN for some years now. In 2009 in the context of New Zealand's report on implementing the ICCPR, the Committee indicated that it wished to hear what measures the Government was proposing to take to ensure full respect for the right to be presumed innocent until proven guilty in cases of the possession of drugs following the Supreme Court's decision in *R v. Hansen*<sup>2</sup>. The Committee also asked for information on the results of the Parliamentary review of the Act.<sup>3</sup> In 2010 the Government responded that the Law Commission had released an issues paper on the control and regulation of drugs which addressed (among other things) the problems of proof that the presumption of supply seeks to remedy. The Government stated that it intended to respond when the Law Commission released its final report later this year while stressing that a rewrite of the Misuse of Drugs Act was not a priority.<sup>4</sup>

The Committee found the response unconvincing, and reiterated in its final recommendations that New Zealand should:

*...expedite the adoption of amendments to the Misuse of Drugs Act 1975, with a view to ensuring compatibility with articles 9 and 14 of the Covenant and ensure the right to be presumed innocent<sup>5</sup>.*

### **The present position**

Under section 25(c) of the NZBoRA everyone charged with an offence has "the right to be presumed innocent until proved guilty according to law". While the right can be limited in some situations the Supreme Court in *Hansen* held that such situations will not be a common occurrence<sup>6</sup>. In *Hansen* the majority held that although the control of illegal drugs was a significant objective the fact that the reverse onus was triggered by possession of an arbitrary amount, it was not rationally connected with the objective and could not be justified in a free and democratic society.

Courts have reached the same conclusions in other countries. This happened most recently in Australia where the Victorian Court of Appeal in *R v Momcilovic*<sup>7</sup> found that a reverse onus of proof provision infringed the right to the presumption of innocence that could not be cured by s.32 of the Victorian Charter – the requirement

---

<sup>2</sup> [2007] NZSC 7

<sup>3</sup> CCPR/C/NZL/Q/5 at para 19 1

<sup>4</sup> Minister Simon Power, Response to questions of Human Rights Committee (16/3/10) at 3

<sup>5</sup> CCPR/C/NZL/CO/5 at para 17

<sup>6</sup> The Chief Justice considered whether justification of the presumption of innocence could ever be limited as it denies the right entirely

<sup>7</sup> [2010] VSCA 50 (17 March 2010)

that an interpretation be adopted that least infringes the statutory right<sup>8</sup> - or justified by s.7 (which is effectively the same as s.5 of the NZBoRA). The Court went so far as to hold that the reverse onus was “not so much an infringement of the presumption of innocence as a wholesale subversion of it”.

### **Implications of the proposed amendment**

In the wake of *Hansen*, the Attorney-General has twice found that the reverse onus of proof in proposed legislation could not be justified under s.5 NZBoRA<sup>9</sup> but the legislation has been passed despite the inconsistency, or (as here) is likely to be. If this situation continues New Zealand will increasingly find itself at odds both with international treaty body comment and the principles in the NZBoRA.

The suggestion that the Law Commission’s review will address the issue is not the answer. We note, for example, that the review is not limited to the issue of the reverse onus of proof but covers the entire legislative regime including possible repeal and/or amendment of the Alcoholism and Drug Addiction Act 1966. Such a review will clearly take some time.

The Commission supports amending the Bill to ensure an accused person has the right to be presumed innocent until proven guilty but recognises that this would be difficult to achieve while the presumption in the principal Act is retained. We therefore also recommend repealing s.6(6) in the Misuse of Drugs Act itself - preferably by removing the presumption entirely<sup>10</sup>.

While we recognise that such a change is a matter for Parliament rather than the Committee, the Committee could – and we would argue, should – recommend to Parliament that the reverse onus of proof in s.6 of the principal Act is repealed.

The Commission would be pleased to expand on the points made in this letter if necessary.

Yours sincerely,



Dr Judy McGregor  
**Commissioner**  
**New Zealand Human Rights Commission.**

---

<sup>8</sup>Cf. s.6 NZBoRA. The Victorian Court endorsed the approach adopted by the Chief Justice in *Hansen*

<sup>9</sup> Misuse of Drugs (Classification of BZP) Amendment Act 2008 and the present Bill

<sup>10</sup> We support this option rather than the others identified by the Law Commission as it is more consistent with the NZBoRA.