



Cabinet Social Wellbeing Committee

Minute of Decision

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Crown Liability under the Therapeutic Products Bill and Other Offence and Penalty Matters

Portfolio Health

On 16 February 2022, the Cabinet Social Wellbeing Committee:

- 1 **noted** that drafting instructions are being finalised to revise the 2018 exposure draft of the Therapeutic Products Bill (the Bill) to:
 - 1.1 give effect to Cabinet's decision to regulate natural health products under the Bill [SWC-21-MIN-0109];
 - 1.2 give effect to Cabinet's decision to include a civil pecuniary penalty regime in the Bill [CBC-21-MIN-0117];
 - 1.3 address feedback from stakeholders received during public consultation in 2019, advancements in health technologies and lessons from COVID-19;

Reworked offence and penalty framework

- 2 **invited** the Minister of Health to issue drafting instructions to rework the Bill's offence and penalty framework to include:
 - 2.1 allowing the regulator to seek civil pecuniary penalty orders for contraventions of a civil liability provision (generally for conduct that occurs 'in the course of business' or for financial or market-share purposes), with the court able to issue a declaration of contravention and impose a civil pecuniary penalty on the individual;
 - 2.2 simplified criminal offence provisions, with higher-level penalties tied to a defendant's level of intent (i.e. knowledge or recklessness) and the actual or potential consequences of their actions;
 - 2.3 strict liability offences;
 - 2.4 an improved infringement notice regime;
 - 2.5 revisions to defences, evidentiary matters and investigative powers to bring them up to date with current best practice;
- 3 **noted** that above revisions have previously been agreed by Cabinet [SOC-16-MIN-0025, CBC-21-MIN-0117];

Extending liability, including criminal liability, to Crown organisations

- 4 **noted** that the Crown plays an important role at a number of points in the therapeutic product and natural health product supply chain;
- 5 **noted** that the Crown Proceedings Act 1950 provides for a mechanism for civil actions to be brought against the Crown and Crown organisations and that the Crown Organisations (Criminal Liability) Act 2002 provides a mechanism for bringing prosecutions against Crown organisations in their own name;
- 6 **noted** that rule of law and equity considerations, as well as patient-safety and victim's interests support extending liability, including criminal liability, to Crown organisations, especially where those organisations are engaging in similar activities as private-sector actors;
- 7 **agreed** to extend civil liability and criminal liability to Crown organisations for contraventions of the Act and future regulations, including permitting:
- 7.1 criminal proceedings to be brought against Crown organisations in accordance with the Crown Organisations (Criminal Liability) Act 2002, and with a Crown organisation liable to be convicted and fined;
 - 7.2 the regulator to issue infringement fines and fees against Crown organisations and its employees;
 - 7.3 the regulator to enter into enforceable undertakings with Crown organisations;
 - 7.4 the regulator to seek and obtain injunctions against a Crown organisation (noting this will require modifying the application of the Crown Proceedings Act 1950);
- 8 **noted** that criminal liability for Crown organisations is proposed to be limited to conduct where the Crown is acting directly in the therapeutic products and natural health products supply chain in a manner similar to that of a non-state actor;
- 9 **invited** the Minister of Health to issue drafting instructions to give effect to the above decision to extend civil and criminal liability to Crown organisations, with civil remedies including injunctions and enforceable undertakings, but not civil pecuniary penalty orders;
- 10 **agreed** that the Minister for Health may, following engagement with the Ministry of Justice and Parliamentary Counsel Office (PCO), revise the list of offences, including by:
- 10.1 narrowing the offences that the Crown can be prosecuted for or the maximum penalty that can be imposed;
 - 10.2 creating specific exemptions or defences for Crown organisations (including modifying existing defences in the Bill);
 - 10.3 determining good-faith exemptions or other criteria to be satisfied before a prosecution or civil proceeding is brought against a Crown organisation, including its board or management or employees (jointly or separately);
 - 10.4 modifying the way liability of senior managers, workers and agents can be attributed upwards and, likewise, how liability can be attributed downward from a Crown organisation to senior managers, including Board members;
 - 10.5 making other technical and minor changes;

- 11 **noted** that the Crown organisations most likely to be affected by the above change will be: Health New Zealand (including public hospitals), the New Zealand Blood Service and (less likely) the Ministry of Health, the Māori Health Authority, and Pharmac;
- 12 **authorised** the Minister of Health to make minor and technical changes identified during drafting to resolve any unintended consequences that are associated with the extension of criminal liability to Crown organisations.

Jenny Vickers
Committee Secretary

Present:

Rt Hon Jacinda Arden (Chair)
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni
Hon Andrew Little
Hon Poto Williams
Hon Kris Faafoi
Hon Peeni Henare
Hon Willie Jackson
Hon Jan Tinetti
Hon Kiri Allan
Hon Aupito William Sio
Hon Priyanca Radhakrishnan

Officials present from:

Department of the Prime Minister and Cabinet
Officials Committee for SWC

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