Drugs-bust in Niue: The Misuse of Drugs Act 1998 and the Constitution

Andrew Townend*

Section 3(1) of the Misuse of Drugs Act 1998 (Niue) provides that amendments enacted by the Parliament of New Zealand to the Misuse of Drugs Act 1975 (NZ) extend to Niue as part of its law unless the Niue Assembly resolves to the contrary. In this paper I argue that section 3(1) cannot have the effect it was intended to have, and that it introduces into Niue's drug control legislation uncertainty as to whether or not a recent New Zealand amendment to the Misuse of Drugs Act is in force in Niue. I use a hypothetical case to demonstrate the potential for perverse results at the level of law enforcement, and suggest the legislative and constitutional changes needed to remove the current uncertainty and to discourage the Assembly from enacting similarly problematic legislation in the future.

Les dispositions législatives relatives à la lutte contre l'usage et le trafic des stupéfiants votées par le Parlement néo-zélandais ayant vocation à s'appliquer à Niue (Misuse of Drugs Act 1998) sont à l'origine notamment dans sa Section 3(1), d'importantes sources d'incertitudes et de difficultés. Dans ce bref aperçu et à l'aide d'un cas pratique, l'auteur nous expose les principales raisons de cet échec et propose quelques reformes qu'il conviendrait d'entreprendre pour y remédier.

I A TEST CASE

Sam is an Australian speleologist, who recently planned a two-week trip to Niue to study the island's limestone caves. Sam suffers from a debilitating neck condition aggravated by the weight of his caving helmet, so he took with him a two-week supply of mescaline, a hallucinogen that in small doses is an extremely effective pain reliever.[1] The mescaline is in the form of tablets and was supplied lawfully to him by his Australian doctor.

On Sam's arrival at Hanan International Airport a sniffer dog expressed an interest in his bags. The dog's handler searched the bags and discovered the mescaline tablets, which he immediately recognised as a Class A controlled drug under the Misuse of Drugs Act 1975

* Research Assistant and LLB (Hons) student, Faculty of Law, Victoria University of Wellington

1 While mescaline is a hallucinogen, its use in Australia as a lawfully prescribed pain reliever is entirely hypothetical.

(NZ) ('MDA 1975').[2] He notified the local police, who arrested Sam and charged him with possession of the drug under section 7 of the MDA 1975.

Sam knows that he faces stiff penalties.[3] However, he also has a brother who works as a law draftsman in the New Zealand Parliamentary Counsel Office, and is aware that in 2000 an amendment to the MDA 1975 was passed by the Parliament of New Zealand. Among other things, the Misuse of Drugs Amendment Act 2000 ('MDAA 2000') introduces into section 8(2) of the MDA 1975 the following exemption:[4]

> (l) a person may, while entering or leaving [Niue],[5] possess a controlled drug required for treating the medical condition of the person or any other person in his or her care or control, if the quantity of drug is no greater than that required for treating the medical condition for one month, and the drug was –
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> [...]
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> (iii) lawfully supplied to the person overseas and supplied for the purpose of treating a medical condition.

Sam clearly falls within the scope of this provision. Can he use it to avoid prosecution in Niue?

II THE LEGISLATIVE AND CONSTITUTIONAL SETTING

Section 3(1) of the Misuse of Drugs Act 1998 (Niue) ('MDA 1998') provides that

> [s]ubject to [a resolution of the Niue Assembly to the contrary], the Misuse of Drugs Act 1975 of New Zealand [...] shall extend to and be in force in Niue as from time to time amended and in force in New Zealand.

Evidently, the MDAA 2000 is in force in Niue, so the exemption applies. Sam's small medicinal supply of mescaline is apparently not going to get him prosecuted for possession of a controlled drug.

At this point, Sam seems to be in the clear. But if he takes a look at the Constitution he might start having second thoughts. The Constitution is the supreme law of Niue,[6] and as such prevails over inconsistent legislation.[7] According to its article 36(1),[8]

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2 See the MDA 1975, first schedule. The MDA 1975 is in force in Niue by virtue of its section 41 and section 689A of the Niue Act 1966 (NZ) ('Niue Act'). The Niue Act is also in force in Niue, by virtue of its section 3.

3 Up to 6 months' imprisonment and a fine of up to $1000 – see the MDA 1975, s 7(2).

4 See MDAA 2000, s 8. The Act came into force on 15 November 2000 – see its section 2.

5 While section 8 of the MDAA 2000 says 'New Zealand', section 689A(2)(a) of the Niue Act provides that in the application of the MDA 1975 to Niue, and unless the context otherwise requires, references to New Zealand shall be read as references to Niue. The MDAA 2000 is part of the MDA 1975 – see the Interpretation Act 1999 (NZ), s 23.

6 Niue Constitution Act 1974 (NZ), s 4.

7 As well as being a necessary implication of the supremacy of the Constitution, this is reflected in article 28(4): 'Except to the extent to which it is inconsistent with this Constitution, no Act and no

> [n]o Act, and no provision of any Act, of the Parliament of New Zealand passed on or after [19 October 1974] shall extend to Niue as part of the law of Niue, unless –
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> (a) The passing of that Act or the making of that provision, so far as it extends to Niue, has been requested and consented to by resolution of the Niue Assembly; and
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> (b) It is expressly declared in that Act that the Niue Assembly has requested and consented to the enactment of that Act or of that provision.

The MDAA 2000 does not contain a declaration of the sort described in paragraph (b) (suggesting that no request and consent was ever made in the first place).[9] It follows that the MDAA 2000 does not comply with article 36(1) and cannot be in force in Niue, despite what the MDA 1998 might say. The upshot of this for Sam is that he cannot avail himself of the exemption introduced into the MDA 1975 by the MDAA 2000.

There is nothing inherently wrong with the MDA 1998. But in spite of its purported effect, that of extending to Niue any future amendments to the MDA 1975, any one amendment must still comply with article 36(1) of the Constitution. The MDAA 2000 does not comply with the requirements of article 36(1), so it is not in force in Niue. But the MDA 1975 clearly does and is. So Sam cannot take advantage of the exemption introduced by the MDA 2000, and is open to a charge of possession of a controlled drug.

Not only is this a harsh result for Sam; it also appears to conflict with the intention of the Assembly. Since the coming into force of the MDAA 2000 on 15 November 2000, the Assembly appears not to have resolved that the Act not extend to Niue. We can assume, then, that the intention of the Assembly is that people in Sam's situation not be caught by the offence provisions of the MDA 1975. How did we arrive at this unintended result?

III CONFLICTING PRESUMPTIONS

The confusion in this area of Niue law is partly explained by two conflicting presumptions about the way in which legislation enacted by the Parliament of New Zealand may extend to Niue. On the one hand, the MDA 1998 reflects a presumption that amendments to enactments of the Parliament of New Zealand that are in force in Niue also extend to Niue.

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provision of any Act shall be deemed to be invalid solely on the ground that it is inconsistent with any law in force in Niue'.

8 Provided this request and consent procedure is followed, the Act or provision in question has the same force and effect as if it were an Act of the Niue Assembly. – see the Constitution, art 36(3). An example of how the procedure ought to work is the MDA 1975 itself. Section 41 of that Act expressly declares that request and consent by resolution of the Assembly were given to the Parliament of New Zealand, and that the Act extends to Niue accordingly.

9 It might be argued that the request and consent can be implied from thezMDA 1998. While not strictly a resolution of the Assembly, it nevertheless shows an intention to be bound by amendments enacted by the Parliament of New Zealand. Yet the 1998 Act is phrased in general terms. There could be no specific intention to be bound by an amending statute that had not yet been passed. Moreover, even if the 1998 Act amounts to a request and consent, there is no declaration to the same effect in the 2000 amendment.

On the other hand, the Constitution envisages that no provision, amending or otherwise, apply to Niue unless specifically requested.

The clash between these two presumptions is evident in section 676(1) of the Niue Act. As originally enacted, section 676(1) provided that

> [w]hen any enactment of the Parliament of New Zealand is in force in Niue, every existing or future amendment of that enactment [...] shall, as far as applicable and with all necessary modifications, be or become also in force therein, except where otherwise expressly provided.

Up until 1974, there was nothing exceptional about section 676(1). It simply reflected the basic presumption that amendments to New Zealand statutes in force in Niue would automatically extend to Niue also. But section 2(1) of the Niue Amendment Act 1974 (NZ) reversed the presumption, bringing section 676(1) into line with article 36 of the recently adopted Constitution so that it now reads:[10]

> *[s]ubject to Article 36 of the Constitution*, when any enactment of the Parliament of New Zealand is in force in Niue, every existing or future amendment of that enactment [...] shall, as far as applicable and with all necessary modifications, be or become also in force therein, except where otherwise expressly provided.

In a strict sense, section 676(1) is perfectly clear. The supremacy of the Constitution means that everything after 'subject to article 36 of the Constitution' can simply be ignored. But the spirit of the section as originally enacted has lived on, most notably for present purposes in the MDA 1998. And as long as it does so, there will be uncertainty in the law as to whether amending legislation enacted by the New Zealand Parliament in the field of drug control applies also in Niue.[11]

How, then, can Niue's drug control legislation be made to comply with the Constitution while also reflecting the apparent intention of the Assembly? And what can be done to prevent similar problems from arising in the future?

IV THE REMEDY

As far as the first question goes, the Assembly should repeal the MDA 1998 (which, despite its apparent authority, can never have any meaningful effect given that it is forever going to be subject to article 36(1) of the Constitution) and enact in its place a statute along the lines of the MDAA 2000, if necessary with retrospective effect so as to remove the unintended liability of anyone in Sam's situation.[12]

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10 Emphasis added.

11 Strictly speaking, there is no uncertainty, since the Constitution always prevails over inconsistent legislation. But there is uncertainty in the sense that anyone trying to determine the extent of Niuean drug control legislation is faced with two apparently authoritative but contradictory statements – article 36(1) of the Constitution and section 3(1) of the MDA 1998.

12 The MDAA 2000 is the only amendment to the MDA 1975 since the coming into force of the MDA 1998, so no other changes are required to bring Niue's drug control legislation up to date with that of New Zealand.

As for the future, the aim ought to be to bolster the principle that New Zealand legislation only extends to Niue if requested and consented to, while suppressing the opposing view that amendments enacted by the New Zealand Parliament should extend to Niue automatically. Admittedly, the latter view does have the advantage of convenience. If the Assembly can avoid having to enact routine, regulatory legislation such as that relating to drug control, so much the better. But the guarantees of self-government and plenary legislative powers contained in the Niue Constitution Act 1974 (NZ) and the Constitution require that New Zealand's legislative power in Niuean matters be limited to those cases in which it is requested.[13]

Two changes, one legislative and the other constitutional, would advance this aim. The first is to repeal section 676(1) of the Niue Act.[14] It adds nothing that is not dealt with by article 36(1) of the Constitution, and only fosters uncertainty as to whether or not New Zealand amending legislation extends to Niue. Secondly, the Assembly ought to amend article 36(1) of the Constitution so as to make it clear that the request and consent procedure applies to amending legislation as well as principal statutes. A new provision along these lines might be suitable:

> (1A) In sub-article (1) the term 'Act' includes any amendment of an enactment of the Parliament of New Zealand, where that enactment is in force in Niue.

In 1976, at a meeting held in Alofi to review the operation of the recently adopted Constitution, Professor RQ Quentin-Baxter, Constitutional Adviser to the Assembly, urged the importance of 'living in the spirit of the Constitution' if it was not to remain mere 'words on a piece of paper'.[15] The MDA 1998 represents an unfortunate departure from this principle. It should be repealed, and other changes made so that future legislative developments in Niue remain within the letter and the spirit of the Constitution.

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13 Niue Constitution Act, section 3; Constitution, article 28.

14 As the Niue Act has independent force in both jurisdictions, it should be repealed by both legislatures.

15 Alex Frame, 'Making Constitutions in the South Pacific: Architects and Excavators', paper presented at *Roles and Perspectives in the Law – A Conference in Honour of Sir Ivor Richardson on his Retirement as President of the Court of Appeal*, New Zealand Centre for Public Law, Faculty of Law, Victoria University of Wellington, 5 April 2002, p. 8.