

Departmental Disclosure Statement

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| Drug and Substance Checking Legislation Bill (No 2) |
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Health

The Ministry of Health certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

28 April 2021

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Part One: General Policy Statement

The Drug and Substance Checking Legislation Bill (No 2) (the Bill) is an omnibus Bill introduced under Standing Order 267(1)(a). That Standing Order provides that an omnibus Bill to amend more than 1 Act may be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. The single broad policy implemented by the amendments in this Bill is to try to minimise drug and substance harm by allowing drug and substance checking services to operate legally in New Zealand.

This Bill amends the Misuse of Drugs Act 1975, the Psychoactive Substances Act 2013 and the Medicines Act 1981 to allow drug and substance checking services to operate with legal certainty. Drug and substance checking services check the composition of drugs and substances and provide information and harm reduction advice to help individuals make informed decisions about drug and substance use. If, after testing, a drug or substance is discovered not to be as presumed, the individual can make the potentially life-saving decision not to consume it.

The Bill follows on from the Drug and Substance Checking Legislation Act 2020 (the Drug Checking Act), and is similar in most respects. The Drug Checking Act was developed to allow drug checking to take place with legal certainty over the summer of 2020-21, while a permanent system was developed. It includes repeal provisions which will take effect 12 months after the Drug Checking Act's date of commencement.

Before the Drug Checking Act came into force, there were limited exemptions to the prohibitions on possession and supply of controlled drugs in the Misuse of Drugs Act 1975, none of which covered drug and substance checking service providers. Organisations and individuals who conducted drug checking were therefore at risk of being charged with possession or supply if they handled controlled drugs in the course of providing their services. There was also legal uncertainty about whether drug checking services could send controlled drugs to an approved laboratory for further testing.

Similar risks arose under the Psychoactive Substances Act 2013 with the checking of psychoactive substances that were not approved products, and under the Medicines Act 1981 with the checking of prescription medicines that were not controlled drugs.

Under section 12 of the Misuse of Drugs Act 1975, it is an offence to knowingly allow premises to be used for the commission of any offence against that Act. Before section 12 was amended by the Drug Checking Act, event organisers and other hosts who allowed drug checking services to take place were at risk of prosecution under section 12 because the promotion of drug checking services could have constituted evidence of knowledge that drugs were being consumed or possessed on the premises. This meant hosts were disincentivised from hosting a harm reduction initiative. The Drug Checking Act amended section 12 to provide that it is not an offence to host a drug checking service.

If a permanent regulatory system is not introduced, drug checking will revert to a legal grey area. Drug checking service providers and their hosts would be at risk of prosecution, and it is likely that drug checking services would be provided at fewer events.

In order to enable drug and substance checking services to operate with legal certainty, this Bill enables the Director-General of Health to issue licenses for drug and substance checking service providers to carry out the following functions:

- providing information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use:
- testing any drug or substance, or sample of a drug or substance, (which may be a controlled drug or psychoactive substance) that an individual presents for checking to ascertain the composition and likely identity of the drug or substance:
- advising the individual who presented a drug or substance for checking of the outcome of the testing:
- returning a drug or substance to the individual who presented it for checking:
- arranging for a sample of a drug or substance to be tested by an approved laboratory:
- disposing of any sample of a controlled drug or substance used in testing:
- disposing of, or arranging for the disposal of, any drug or substance surrendered by any individual for disposal.

The licence provisions are the main difference between this Bill and the Drug Checking Act, which provided for the Director-General to appoint service providers. The licensing system will set clear expectations and requirements for all providers, and enable ongoing oversight.

Transitional provisions will ensure that providers appointed under the Drug Checking Act can continue to operate legally while they are awaiting a licence under the new system.

Regulations under the Misuse of Drugs Act will give effect to elements of the regulatory system, including:

- pathways for licence applications, renewals, suspensions and revocations,
- an appeals process,
- requirements for all licence holders, including:
 - that clients are not charged to use the service
 - reporting requirements
 - a requirement that any surrendered drugs be stored securely.

Possession of controlled drugs and unapproved psychoactive substances by members of the public will continue to be illegal. However, the results of testing by drug and substance checking service providers will not be admissible in criminal proceedings against the person who supplied any controlled drug or unapproved psychoactive substance for testing.

The Bill makes it an offence for a drug and substance checking service provider to breach, without reasonable excuse, any terms or conditions of their licence, and for a person, without reasonable excuse, to operate a drug and substance checking service without being licensed to do so. The penalty for these offences is a fine not exceeding \$5,000.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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| 2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill? | NO |
| There are no inquiries, reviews or evaluation reports specifically about regulation of drug checking services. However there is research from New Zealand and overseas on the effectiveness of drug checking services. This includes Victoria University of Wellington research commissioned by the Ministry of Health, available at Hutton (2020), 'Drug Checking at New Zealand Festivals: Final Report', available at https://openaccess.wgtn.ac.nz/articles/report/Drug_Checking_at_New_Zealand_Festivals_Final_Report_/13936346 | |

Relevant international treaties

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| 2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty? | NO |
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Regulatory impact analysis

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| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill? | YES |
| 'Regulatory Impact Statement: Regulation of drug checking services', Ministry of Health, March 2021, published at https://www.health.govt.nz/about-ministry/information-releases/regulatory-impact-statements/regulatory-impact-statement-regulation-drug-checking-services | |

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| 2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements? | NO |
| Treasury have reviewed and commented on the regulatory impact statement, but have not provided a formal opinion. | |

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| 2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements? | NO |
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Extent of impact analysis available

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| 2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill? | NO |
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| 2.5. For the policy to be given effect by this Bill, is there analysis available on: | |
| (a) the size of the potential costs and benefits? | NO |
| (b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth? | NO |
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| 2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by: | |
| (a) the level of effective compliance or non-compliance with applicable obligations or standards? | NO |
| (b) the nature and level of regulator effort put into encouraging or securing compliance? | NO |
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Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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| 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations? |
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| The Ministry of Foreign Affairs and Trade have determined that this policy is consistent with New Zealand's international obligations. |
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Consistency with the government's Treaty of Waitangi obligations

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| 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi? |
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| The Ministry of Health has consulted on this policy with Te Puni Kōkiri. The Ministry's Māori Health Directorate and Māori Monitoring Group have also been consulted. Nothing in this Bill will adversely affect Māori rights under the Treaty / te Tiriti o Waitangi. |
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Consistency with the New Zealand Bill of Rights Act 1990

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| 3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990? | NO |
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| The Ministry of Justice has determined that this Bill does not limit or otherwise affect any rights or freedoms affirmed in the New Zealand Bill of Rights Act 1990. |
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Offences, penalties and court jurisdictions

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| 3.4. Does this Bill create, amend, or remove: | |
| (a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)? | YES |
| (b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)? | NO |
| <p>This Bill creates new offences of:</p> <ul style="list-style-type: none"> breaching the conditions of a drug checking appointment operating an unappointed drug checking service <p>Both offences carry a penalty of a fine of no more than \$5000.</p> <p>The Bill amends the offence provisions in sections 6, 7 and 12 of the Misuse of Drugs Act 1975. These amendments:</p> <ul style="list-style-type: none"> allow licensed service providers to possess and supply controlled drugs in the course of their work allow individuals to supply controlled drugs to licensed providers for checking or surrender provide that it is not an offence under section 12 to permit a premises to be used for drug checking by a licensed provider. <p>The Bill amends the offence provisions in sections 70 and 71 of the Psychoactive Substances Act 2013 to allow licensed service providers to possess and supply unapproved psychoactive substances in their course of their work, and to allow individuals to supply unapproved psychoactive substances to licensed providers for checking or surrender.</p> <p>The Bill amends section 109 of the Medicines Act 1981 to provide that a licensed drug and substance checking service provider does not commit an offence against the Medicines Act or regulations in performing their functions in accordance with their licence. This amendment is necessary to ensure that providers are not committing an offence if they receive a medicine regulated by the Medicines Act for checking.</p> | |

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| 3.4.1. Was the Ministry of Justice consulted about these provisions? | YES |
| <p>The Ministry of Justice has been closely involved in every stage of the development of this Bill, and of the Drug and Substance Checking Legislation Act 2020 which preceded it. The Misuse of Drugs offence provisions are based on Ministry of Justice advice.</p> | |

Privacy issues

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| 3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information? | YES |
| <p>The Bill includes a provision (35DG) that service providers must not collect, maintain, use, or disclose any personal information relating to an individual from whom the service provider receives a drug or substance. Personal information and collect have the meanings given to them in the Privacy Act 2020.</p> | |

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| 3.5.1. Was the Privacy Commissioner consulted about these provisions? | YES |
| The Privacy Commissioner was provided with a draft copy of the Bill, and supports the provision relating to personal information. | |

External consultation

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| 3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill? | YES |
| <p>There has been close consultation with the Ministry of Justice and New Zealand Police on the policy given effect by this Bill, and on drafts of this Bill.</p> <p>The Ministry of Health has also consulted with the Treasury, Te Puni Kōkiri, WorkSafe New Zealand, the Ministry for Pacific Peoples, the Privacy Commissioner, and the Ministry of Business, Innovation and Employment on the policy to be given effect by this Bill and the Bill itself.</p> | |

Other testing of proposals

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| 3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete? | YES |
| The Bill is similar to the Drug and Substance Checking Legislation Act 2020 (the Drug Checking Act), which was enacted in December 2020. The operation of the Drug Checking Act has informed the development of the Bill. | |

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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| 4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property? | NO |
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Charges in the nature of a tax

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| 4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax? | NO |
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Retrospective effect

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| 4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively? | NO |
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Strict liability or reversal of the usual burden of proof for offences

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| 4.4. Does this Bill: | |
| (a) create or amend a strict or absolute liability offence? | YES |
| (b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding? | NO |
| <p>This Bill creates new offences of:</p> <ul style="list-style-type: none">breaching the conditions of a drug checking licenceoperating an unlicensed drug checking service <p>Both parts of the offence will be strict liability because no intention is required to be proved, however they are not absolute liability offences because there is a defence of reasonable excuse.</p> | |

Civil or criminal immunity

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| 4.5. Does this Bill create or amend a civil or criminal immunity for any person? | NO |
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Significant decision-making powers

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| 4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests? | NO |
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Powers to make delegated legislation

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| 4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation? | NO |
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| 4.8. Does this Bill create or amend any other powers to make delegated legislation? | NO |
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Any other unusual provisions or features

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| 4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment? | NO |
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