

Departmental Disclosure Statement

Drug and Substance Checking Legislation Bill
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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.

30 November 2020

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Part One: General Policy Statement

The Drug and Substance Checking Legislation Bill (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 and the Psychoactive Substances Act 2013 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.

There are limited exemptions to the prohibitions on possession and supply of controlled drugs in the Misuse of Drugs Act 1975, none of which cover drug and substance checking service providers. Organisations and individuals who conduct drug checking are therefore at risk of being charged with possession or supply if they handle controlled drugs in the course of providing their services. There is also legal uncertainty about whether drug checking services can send controlled drugs to an approved laboratory for further testing or can dispose of drugs they receive.

Similar risks arise under the Psychoactive Substances Act 2013 with the checking of psychoactive substances that are not approved products.

Section 12 of the Misuse of Drugs Act 1975 also makes it an offence to knowingly allow premises to be used for the commission of any offence against that Act. Event organisers and other hosts who allow drug checking services to take place are at risk of prosecution under that section because the promotion of drug checking services would constitute evidence of knowing that drugs are being consumed or present on the premises. This means hosts are disincentivised from hosting a harm reduction initiative.

The legal risks arising from section 12 therefore create significant problems for checking services. Currently, when drug checking is provided at a festival venue, festival organisers do not inform attendees that drug checking services are available. Due to the legal risk for service providers, services are often provided outside of the festival premises.

In order to enable drug and substance checking services to operate with legal certainty over the summer of 2020/2021, this Bill enables the Director-General of Health to appoint, by notice in the *Gazette*, drug and substance checking service providers to carry out the following functions:

- provide information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use;
- test 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;
- advise the individual who presented a drug or substance for checking of the outcome of the testing;
- return a drug or substance to the individual who presented it for checking;

- arrange for a sample of a drug or substance to be tested by an approved laboratory;
- dispose of any sample of a controlled drug or substance used in testing;
- dispose of, or arrange for the disposal of, any drug or substance surrendered by any individual for disposal.

Amendments in this Bill are made to enable service providers to handle controlled drugs and unapproved psychoactive substances for the purposes of performing the above functions without committing any offence. The amendments also permit event organisers and other hosts to allow a drug and substance checking service provider to operate on their premises without committing an offence under the Misuse of Drugs Act 1975.

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 creates offences for a drug and substance checking service provider to breach, without reasonable excuse, any terms or conditions of their appointment, and for a person, without reasonable excuse, to operate a drug and substance checking service without being appointed to do so. The penalty for these offences is a fine not exceeding \$5,000.

The amendments to the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013 are temporary and will be repealed 12 months after their date of commencement. This Bill will also be repealed 12 months after its commencement.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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
Victoria University of Wellington has conducted research into drug checking services. The Ministry of Health has been provided with interim results of this research, but these are not yet publicly available.	

Relevant international treaties

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

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	NO
The Treasury Regulatory Quality Team determined, in relation to an earlier Cabinet paper on this policy, that the decisions sought are not subject to the Regulatory Impact Analysis requirements on the basis that they will have no or minor impacts on businesses, individuals or not-for-profits. There has been insufficient time to revisit this question. However the Ministry of Health does not consider that the impact of the policy has changed.	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO

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
<p>The benefits and non-monetary costs of this policy are difficult to quantify, and could not be quantified in the time available.</p> <p>The monetary costs of the Policy to the Ministry of Health will depend on the number of drug checking service providers seeking appointment, but are expected to be low. Costs will be met from Ministry of Health baselines.</p> <p>Drug-checking is currently funded by donation to drug-checking service providers. This policy is likely to increase demand for services, and therefore the cost to providers. However the legal clarification is likely to remove barriers to fundraising by service providers.</p> <p>There is no potential for any group of persons to suffer a substantial unavoidable loss of income or wealth as a result of this policy.</p>	

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?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The effectiveness of this policy will be dependent on service provider compliance with best practice standards for harm reduction and drug checking. This dependency will be addressed by only appointing providers with a strong track record of harm reduction service provision. These providers are committed to complying with harm reduction standards, and should not require high levels of compliance monitoring.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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

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?

This policy has been analysed for Treaty of Waitangi compliance by staff at the Ministry of Health, Ministry of Justice, and New Zealand Police. Nothing in this Bill will adversely affect Māori rights under the Treaty / te Tiriti o Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

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

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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This Bill creates new offences of:

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| a) breaching the conditions of a drug checking appointment
b) operating an unappointed drug checking service |
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The behaviour captured by these offences is likely to already be a possession and/or supply offence under the Misuse of Drugs Act. The new offence better reflects the nature of the specific action and its likely impacts.
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3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
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The Ministry of Justice has been closely involved in every stage of the development of this Bill. The offence provisions are based largely on Ministry of Justice advice.

Privacy issues

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?	NO
The Bill forbids service providers from collecting, maintaining, using or disclosing any personal information relating to individuals who supply drugs or substances for drug-checking.	

External consultation

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
The broad policy has been discussed with KnowYourStuff, a drug checking organisation.	

Other testing of proposals

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?	NO
There has been insufficient time to consult more widely. However it is planned that the Ministry of Health will develop options for a regulatory system for drug checking services. Full consultation is planned as part of this policy development, and any subsequent development of a future Bill.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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

Charges in the nature of a tax

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

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

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?	YES
<p>This Bill creates new offences of:</p> <ul style="list-style-type: none">a) breaching the conditions of a drug checking appointmentb) operating an unappointed 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. Section 30 of the Act provides that where a person is authorised to possess or do an action with a controlled drug by section 8 or a licence, the burden of proving that authorisation is on the person who would otherwise be committing an offence. It is appropriate that the burden of proof for these new offences is similarly reversed.</p>	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO

Significant decision-making powers

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

Powers to make delegated legislation

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

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
Clause 9 New section 35DA creates a power for the Director-General of Health to appoint drug and substance checking service providers by notice in the Gazette. The notice is a legislative instrument, a disallowable instrument and a regulation for the purposes of the Interpretation Act 1999.	

Any other unusual provisions or features

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