

Misuse of Drugs Amendment Bill

Government Bill

As reported from the Health Committee

Commentary

Recommendation

The Health Committee has examined the Misuse of Drugs Amendment Bill. We recommend that the amendments set out below be passed.

We were unable to agree that the bill be passed. The recommendations we endorse are those on which all members of the committee agree.

Introduction

This bill seeks to amend the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013. The bill aims to address the harm caused by synthetic (and other) drugs by focusing on those who import, manufacture, and supply them, rather than on those who use them. It would also provide for a health-based or therapeutic response to drug-related harm.

The main measures in the bill would:

- classify AMB-FUBINACA and 5F-ADB as Class A drugs
- affirm in law the Police's discretion to prosecute for use and possession of a controlled drug¹
- specify that the Police should give consideration to whether a health-centred or therapeutic approach would be more beneficial than prosecution
- enable temporary drug class orders to be issued for emerging and potentially harmful substances.

¹ Under the Solicitor-General's Prosecution Guidelines, prosecutors must exercise discretion as to whether it is in the public interest to prosecute for an offence.

Classifying AMB-FUBINACA and 5F-ADB as Class A drugs, and enabling temporary drug class orders, are intended to disrupt their supply and availability. The temporary orders would allow for a quick response to a rapidly adapting synthetic drug market, as substances could instantly be treated as Class C controlled drugs.

The bill is in two parts. Part 1 contains the amendments to the Misuse of Drugs Act, and Part 2 contains the amendment to the Psychoactive Substances Act.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced.

Describing drugs on a temporary drug class order

In the bill as introduced, new section 4C proposed by clause 5 would amend the Act to allow the Minister of Health to issue temporary drug class orders. New section 4C(4) specifies how a drug could be described on any temporary drug class order. It includes using a drug's product name as an option.

We recommend removing new section 4C(4)(b) so that only a drug's chemical name, or a description the Minister considers appropriate, could be used on a temporary drug class order.

The term "product name" was used when temporary drug class notices were previously introduced, and reflected the fact there were legal products on the market. Since the Psychoactive Substances Act came into force, there are no longer legal products marketed under a "product name".

Clarification of discretion to prosecute

New section 7(5) as proposed by clause 6 would amend section 7 of the Misuse of Drugs Act. It would affirm in legislation the Police's discretion to prosecute for possession and use of a controlled drug, where it is in the public interest. (At present, the scope for discretion is only spelled out in the Solicitor-General's Prosecution Guidelines.) Having this discretion allows the Police to consider a health-based approach in place of a punitive one when appropriate.

We noticed that new section 7(5) as introduced is broader than intended. It would allow the discretion to prosecute to apply in the case of someone who supplied or administered a controlled drug (section 7(1)(b)), not simply used or possessed a controlled drug (section 7(1)(a)). We recommend amending new section 7(5) in clause 6 to specify that the discretion to prosecute would apply only to subsection (1)(a).

National Party members' view

The National Party supports the intention of clauses 1 to 5 and clause 8 of the bill, but believes that clauses 6 and 7 constitutes the de facto decriminalisation of possession and use of all controlled drugs. For that reason National cannot support the bill overall.

The committee heard from a number of submitters including the Police Association, the New Zealand Drug Foundation, and the New Zealand Law Society; all of whom had the view that the clauses move the law from a presumption of prosecution to a presumption of non-prosecution for those in possession of any illicit drug. When asked by the committee, Drug Foundation CEO Ross Bell said that he could not think of a situation where an offender, in possession or under the influence of an illegal substance, would not benefit from a therapeutic approach. His expectation was that Police should never prosecute for possession after this bill is passed. The Police Association agreed that this was de-facto decriminalisation. The New Zealand Law Society agreed that defence counsel would use both the law and the Cabinet's stated expectations as a defence to any offender prosecuted under section 7 of the Misuse of Drugs Act.

It was also noted by many submitters that there were insufficient drug and alcohol rehabilitation services available presently, and the extra demand that may be placed on them by the passage of this law could be considerable. That notwithstanding, it is not necessary for a therapeutic service to be available, merely that it be beneficial.

New Zealand Police told us they already have discretion in prosecution decisions according to the Solicitor General's Guidelines for prosecution, which begs the question of whether this clause is necessary if the plan is not to further decriminalise drug possession.

Crown Law pointed out the relevant paragraph of the Cabinet minute dated 10 December 2018 on the intent of the bill, which is:

That Police should not prosecute for possession for personal use (for all drugs) where a therapeutic approach would be more beneficial or there is no public interest in proceeding with a prosecution.

Our interpretation of this is that even when the public interest in proceeding with a prosecution has been met, as long as a therapeutic approach would be more beneficial, the prosecution should not proceed and therefore this constitutes decriminalisation by stealth. If this is the Government's intention it should be upfront about that and include the public in that debate.

For this reason the National Party cannot support this bill.

Appendix

Committee process

The Misuse of Drugs Amendment Bill was referred to the committee on 12 March 2019. The closing date for submissions was 11 April 2019. We received and considered 95 submissions from interested groups and individuals. We heard oral evidence from 24 submitters at hearings in Wellington.

We received advice from the Ministry of Health, the New Zealand Police, and the Ministry of Justice.

Committee membership

Louisa Wall (Chairperson)

Hon Maggie Barry

Dr Liz Craig

Matt Doocey

Jenny Marcroft

Dr Shane Reti

Angie Warren-Clark

Hon Michael Woodhouse

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Dr David Clark

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Misuse of Drugs Amendment Act **2019**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act

This Act amends the Misuse of Drugs Act 1975 (the **principal Act**). 5

Part 1**Amendments to principal Act****4 Section 2 amended (Interpretation)**

- (1) In section 2(1), definition of **Class C controlled drug**, after “includes”, insert “any temporary class drug and”. 10
- (2) In section 2(1), definition of **controlled drug**, after “includes”, insert “any temporary class drug and”.
- (3) In section 2(1), insert in its appropriate alphabetical order:

temporary class drug means any substance, preparation, mixture, or article specified as a temporary class drug by an order made under **section 4C** 15

5 New sections 4C to 4G inserted

After section 4B, insert:

4C Temporary class drug order

- (1) The Minister may, by an order published in the *Gazette*, specify any substance, preparation, mixture, or article as a temporary class drug. 20
- (2) The Minister must not make an order if the substance, preparation, mixture, or article is already a Class A controlled drug, a Class B controlled drug, a Class C controlled drug (except a controlled drug analogue), or a precursor substance.
- (3) The Minister must not make an order unless satisfied that the substance, preparation, mixture, or article that is to be specified in the order— 25
 - (a) poses, or may pose, a risk of harm to individuals or to society; and
 - (b) has not been classified under this Act, except as a controlled drug analogue.
- (4) An order may describe the substance, preparation, mixture, or article by ~~1~~ ~~or~~ ~~more~~ either or both of the following: 30
 - (a) its chemical name, or one of its chemical names:
 - (b) its ~~product name~~:

(c)	a description of the substance, preparation, mixture, or article, in the form that the Minister considers appropriate for the purposes of the order.	
(5)	An order must state the date on which the order comes into force, and that date must not be earlier than the day after the date of the publication of the order in the <i>Gazette</i> .	5
4D Effect of temporary class drug order		
(1)	This section applies to every temporary class drug while it remains subject to a temporary class drug order.	
(2)	The temporary class drug must be treated for all purposes as if the drug were a controlled drug that is specified or described in Part 1 of Schedule 3.	10
(3)	<i>See section 7(5)</i> for a prosecutorial discretion that applies to possession and use offences for all controlled drugs (including temporary class drugs).	
(4)	A substance that has a structure substantially similar to the temporary class drug must not be treated as a controlled drug analogue just because of that similarity.	15
4E Further action relating to temporary class drugs		
(1)	While a temporary class drug order is in place, the Minister must seek advice, as the Minister considers appropriate, under section 5 or 5AA (or both) about the temporary class drug and its appropriate classification (if any, including as a precursor substance) under this Act.	20
(2)	As soon as possible after the publication of a temporary class drug order in the <i>Gazette</i> , the Director-General of Health must ensure that, while the order remains in force, both the order and information about its effects are available—	25
(a)	on the Ministry of Health’s Internet site, in an electronic form that is publicly accessible; and	
(b)	in any other way that the Director-General considers appropriate in the circumstances.	
4F Duration of temporary class drug order		
(1)	A temporary class drug order expires at the earliest of—	30
(a)	the close of the day that is 1 year after the date on which the order came into force; and	
(b)	the date on which the substance, preparation, mixture, or article is—	
(i)	classified as a Class A controlled drug; or	35
(ii)	classified as a Class B controlled drug; or	
(iii)	classified as a Class C controlled drug; or	
(iv)	added to Schedule 4 as a precursor substance; and	

- (c) its revocation by the Minister by order in the *Gazette*.
- (2) A temporary class drug order may be renewed by the Minister—
- (a) before the date of its expiry as calculated under **subsection (1)**; and
- (b) on 1 occasion only; and
- (c) only for the purpose of allowing sufficient time for the Minister to obtain the advice that is to be sought under **section 4E(1)**. 5
- 4G Status of temporary class drug order**
- A temporary class drug order is a disallowable instrument but not a legislative instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act. 10
- 6 Section 7 amended (Possession and use of controlled drugs)**
- After section 7(4), insert:
- (5) To avoid doubt, it is affirmed that there is a discretion to prosecute for an offence against ~~this section~~ **subsection (1)(a)**, and a prosecution should not be brought unless it is required in the public interest. 15
- (6) When considering whether a prosecution is required in the public interest, in addition to any other relevant matters, consideration should be given to whether a health-centred or therapeutic approach would be more beneficial.
- 7 Schedule 1 amended**
- In Schedule 1, clause 1, insert in their appropriate alphabetical order: 20
- 5F-ADB: Methyl (2S)-2-([1-(5-fluoropentyl)-1H-indazole-3-carbonyl]amino)-3,3-dimethylbutanoate
- AMB-FUBINACA: Methyl (2S)-2-({1-[(4-fluorophenyl)methyl]-1H-indazole-3-carbonyl}amino)-3-methylbutanoate

Part 2

Amendment to Psychoactive Substances Act 2013

- 8 Psychoactive Substances Act 2013 amended**
- (1) This section amends the Psychoactive Substances Act 2013.
- (2) After section 9(3)(b), insert:
- (ba) a substance, preparation, mixture, or article specified by an order made under **section 4C** of the Misuse of Drugs Act 1975 as a temporary class drug: 30

Legislative history

7 March 2019
12 March 2019

Introduction (Bill 119–1)
First reading and referral to Health Committee

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Wellington, New Zealand:

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