

Drug and Substance Checking Legislation Bill

Government Bill

Explanatory note

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 ser-

vice 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.

Departmental disclosure statement

The Ministry of Health is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2020&no=4>

Regulatory impact assessment

A regulatory impact assessment is not required for this Bill.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. It provides that *subpart 1 of Part 1* and *subpart 1 of Part 2* come into force on the day after the Bill receives the Royal assent. *Subpart 2 of Part 1* and *subpart 2 of Part 2* come into force 12 months later. The effect of this commencement provision is that the amendments in *subpart 1* in each of *Parts 1 and 2* will only be in force for 12 months (as they are repealed by the amendments in *subpart 2 of Parts 1 and 2*).

Clause 3 provides that this Bill is repealed on the day after the day the provisions in *subpart 1 of Parts 1 and 2* are repealed, as all provisions in the Bill will then be spent.

Part 1

Amendments to Misuse of Drugs Act 1975

Clause 4 provides that *Part 1* amends the Misuse of Drugs Act 1975 (the **principal Act**).

Subpart 1—Temporary provisions

Clause 5 amends section 2 of the principal Act, which defines various terms used in the principal Act. This clause inserts definitions for drug and substance checking service provider, service provider, and psychoactive substance, which are terms used in the new sections inserted into the principal Act by *clause 10*.

Clause 6 amends section 6 of the principal Act, which is an offence provision for various dealings in controlled drugs, including the supply of controlled drugs and the

possession of controlled drugs for the purpose of supply. The effect of the amendment is to exempt from the application of section 6 of the principal Act—

- a drug and substance checking service provider who in the course of performing their functions possesses a controlled drug, returns a controlled drug to the individual from whom it was received for checking, or sends a controlled drug to an approved laboratory for testing;
- an individual who supplies a controlled drug to a drug and substance checking service provider for checking or disposal.

Clause 7 similarly amends section 7 of the principal Act, which is an offence provision relating to the possession and use of controlled drugs. The effect of the amendment is to exempt from the application of section 7 the same persons referred to above who are exempt from the application of section 6 of the principal Act.

Clause 8 amends section 12 of the principal Act, under which it is an offence to knowingly permit any premises to be used for committing an offence against the principal Act. The amendment exempts from the application of section 12 persons who permit their premises to be used by a drug and substance checking service provider for the provision of drug and substance checking services. This amendment enables persons who host musical festivals and other events to allow drug and substance checking service providers to attend the event to provide drug and substance checking services without the person incurring any liability under the principal Act.

Clause 9 amends section 30 of the principal Act, which provides that in proceedings for possession of a controlled drug the defendant has the burden of proving that their possession was lawful. The effect of the amendment is to apply this provision to drug and substance checking service providers and individuals who give a controlled drug to a service provider for checking or disposal.

Clause 10 inserts into the principal Act a new cross-heading and *new sections 35DA to 35DI*.

New section 35DA provides for the appointment of drug and substance checking service providers. They are appointed by the Director-General of Health by notice in the *Gazette* and a list of service providers must be maintained by the Ministry of Health on its Internet site. An appointment is made subject to reasonable terms and conditions.

New section 35DB sets out the functions of drug and substance checking service providers. Most importantly, service providers provide information and harm reduction advice to individuals and on request from an individual check and advise on the composition and likely identity of any drug or substance that is presented.

New section 35DC provides that for the purpose of performing their functions a drug and substance checking service provider may—

- possess a controlled drug;
- return a controlled drug to the individual who submitted it for checking;
- send a controlled drug to an approved laboratory for testing.

New section 35DD provides that an individual may—

- supply a controlled drug to a drug and substance checking service provider for checking;
- give a controlled drug to a service provider for disposal.

New section 35DE provides that it is an offence for a drug and substance checking service provider to breach any term or condition of their appointment. The penalty on conviction is a fine not exceeding \$5,000.

New section 35DF provides that it is an offence for any person who has not been appointed under *new section 35DA* to interact with individuals to provide checking services in relation to controlled drugs. The penalty on conviction is a fine not exceeding \$5,000.

New section 35DG provides that drug and substance checking service providers must not collect, maintain, use, or disclose any personal information relating to individuals from whom they receive any drug or substance for checking or disposal.

New section 35DH provides that employees or volunteers of drug and substance checking service providers are not liable for any actions taken or not taken in the course of performing the service providers' functions unless they acted in bad faith or without reasonable care. They are also not responsible for any liability of the service provider.

New section 35DI provides that the result of any test carried out by a drug and substance checking service provider in relation to any drug or substance is not admissible as evidence in criminal proceedings.

Subpart 2—Repeal of temporary provisions

Clauses 11 to 16, which come into force 12 months after *clauses 5 to 10*, repeal the amendments in the latter clauses to reinstate the law to its current position.

Part 2

Amendments to Psychoactive Substances Act 2013

Clause 17 provides that *Part 2* amends the Psychoactive Substances Act 2013 (the **principal Act**).

Subpart 1—Temporary provisions

Clause 18 amends section 8 of the principal Act, which defines various terms used in the principal Act. This clause inserts definitions for approved laboratory and drug and substance checking service provider, which are terms used in the amendments to sections 70 and 71 of the principal Act (*see clauses 19 and 20*).

Clause 19 amends section 70 of the principal Act, which is an offence provision relating to the sale and supply of a psychoactive substance that is not an approved product. The amendment exempts from the application of section 70—

- a person who supplies a substance to a drug and substance checking service provider for checking or disposal:
- a drug and substance service provider who returns a substance to the individual who submitted it for checking, or sends it to an approved laboratory for testing.

Clause 20 amends section 71 of the principal Act, which provides that it is an offence to possess a psychoactive substance that is not an approved product. The amendment exempts from the application of section 71 a drug and substance checking service provider who possesses a substance in the course of carrying out their functions.

Subpart 2—Repeal of temporary provisions

Clauses 21 to 23, which come into force 12 months after, *clauses 18 to 20*, repeal the amendments in the latter clauses to reinstate the law to its current position.

Hon Andrew Little

Drug and Substance Checking Legislation Bill

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Contents

		Page
1	Title	2
2	Commencement	2
3	Repeal of this Act	3

Part 1

Amendments to Misuse of Drugs Act 1975

4	Amendments to Misuse of Drugs Act 1975	3
	Subpart 1—Temporary provisions	
5	Section 2 amended (Interpretation)	3
6	Section 6 amended (Dealing with controlled drugs)	3
7	Section 7 amended (Possession and use of controlled drugs)	3
8	Section 12 amended (Use of premises or vehicle, etc)	3
9	Section 30 amended (Burden of proof)	3
10	New sections 35DA to 35DI and cross-heading inserted	3

Drug and substance checking

35DA	Drug and substance checking service providers	4
35DB	Functions of service provider	4
35DC	Possession or supply of controlled drug for purpose of performing functions	5
35DD	Supplying or surrendering controlled drug to service provider	5
35DE	Offence relating to breach of terms or conditions of appointment	5
35DF	Offence to provide checking services, etc, without being appointed under section 35DA	5
35DG	Service providers not to collect, etc, personal information	5

	35DH	Protections from liabilities of service provider	6
	35DI	Test result not admissible in criminal proceedings	6
		Subpart 2—Repeal of temporary provisions	
11		Section 2 amended (Interpretation)	6
12		Section 6 amended (Dealing with controlled drugs)	6
13		Section 7 amended (Possession and use of controlled drugs)	6
14		Section 12 amended (Use of premises or vehicle, etc)	6
15		Section 30 amended (Burden of proof)	6
16		Sections 35DA to 35DI and cross-heading above section 35DA repealed	6

Part 2

Amendments to Psychoactive Substances Act 2013

17		Amendments to Psychoactive Substances Act 2013	6
		Subpart 1—Temporary provisions	
18		Section 8 amended (Interpretation)	7
19		Section 70 amended (Offences relating to psychoactive substance that is not approved product)	7
20		Section 71 amended (Offence relating to personal possession of psychoactive substance that is not approved product)	7
		Subpart 2—Repeal of temporary provisions	
21		Section 8 amended (Interpretation)	7
22		Section 70 amended (Offences relating to psychoactive substance that is not approved product)	7
23		Section 71 amended (Offence relating to personal possession of psychoactive substance that is not approved product)	8

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Drug and Substance Checking Legislation Act **2020**.

2 Commencement

- (1) The following provisions come into force on the day after the date on which this Act receives the Royal assent: 5
- subpart 1 of Part 1:**
 - subpart 1 of Part 2.**
- (2) The following provisions come into force 12 months after the date on which this Act receives the Royal assent: 10
- subpart 2 of Part 1:**
 - subpart 2 of Part 2.**

- 3 Repeal of this Act**
This Act is repealed on the day after the date on which the provisions specified in **section 2(2)** come into force.
- Part 1**
Amendments to Misuse of Drugs Act 1975 5
- 4 Amendments to Misuse of Drugs Act 1975**
This Part amends the Misuse of Drugs Act 1975.
- Subpart 1—Temporary provisions
- 5 Section 2 amended (Interpretation)**
In section 2(1), insert in their appropriate alphabetical order: 10
drug and substance checking service provider or **service provider** means a person appointed as a drug and substance checking service provider under **section 35DA**
psychoactive substance has the same meaning as in section 9 of the Psychoactive Substances Act 2013 15
- 6 Section 6 amended (Dealing with controlled drugs)**
In section 6(1), replace “section 8” with “section 8, **35DC**, or **35DD**”.
- 7 Section 7 amended (Possession and use of controlled drugs)**
In section 7(1), replace “section 8” with “section 8, **35DC**, or **35DD**”.
- 8 Section 12 amended (Use of premises or vehicle, etc)** 20
After section 12(1), insert:
- (1A) It is not an offence against subsection (1) for a person to permit any premises to be used by a drug and substance checking service provider for the purpose of performing the functions specified in **section 35DB** knowing that the service provider will be providing services to individuals who may be committing offences against this Act. 25
- 9 Section 30 amended (Burden of proof)**
In section 30, replace “section 8” with “section 8, **35DC**, or **35DD**,” in each place.
- 10 New sections 35DA to 35DI and cross-heading inserted** 30
After section 35D, insert:

*Drug and substance checking***35DA Drug and substance checking service providers**

- (1) The Director-General of Health may, by notice in the *Gazette*,—
- (a) appoint drug and substance checking service providers to perform the functions specified in **section 35DB**; and 5
 - (b) specify reasonable terms and conditions that an appointment is subject to.
- (2) The Ministry of Health must publish on its Internet site a list of service providers appointed under **subsection (1)** and the terms and conditions to which a service provider's appointment is subject. 10
- (3) A notice given by the Director-General in the *Gazette* for the purpose of **subsection (1)**—
- (a) is a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012; and
 - (b) must be presented to the House of Representatives under section 41 of that Act; and 15
 - (c) is a regulation for the purposes of the Interpretation Act 1999.

35DB Functions of service provider

- (1) The functions of a service provider are to—
- (a) provide information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use: 20
 - (b) test any 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:
 - (c) advise the individual who presented a drug or substance for checking of the outcome of the testing: 25
 - (d) return a drug or substance to the individual who presented it for checking:
 - (e) dispose of any sample of a controlled drug or substance used in testing:
 - (f) dispose of, or arrange for the disposal of, any drug or substance surrendered by any individual for disposal: 30
 - (g) arrange for a sample of a drug or substance to be tested by an approved laboratory.
- (2) A service provider must perform the functions referred to in **subsection (1)(e) and (f)** in accordance with the terms and conditions of their appointment. 35
- (3) In this section and **sections 35DG and 35DI**, **drug or substance** includes a sample of a drug or substance.

35DC Possession or supply of controlled drug for purpose of performing functions

- (1) A service provider may, for the purpose of performing the provider's functions,—
- (a) possess a controlled drug: 5
 - (b) return a controlled drug to the individual who submitted it for checking:
 - (c) send a controlled drug to an approved laboratory for testing.
- (2) **Subsection (1)** is subject to the service provider's terms and conditions of appointment. 10
- (3) In this section and **section 35DD**, **controlled drug** includes a sample of a controlled drug. 10

35DD Supplying or surrendering controlled drug to service provider

An individual may—

- (a) supply a controlled drug to a service provider for the purpose of checking: 15
- (b) surrender a controlled drug to a service provider for the purpose of disposal.

35DE Offence relating to breach of terms or conditions of appointment

- (1) A person appointed as a service provider must not breach any terms or conditions of their appointment. 20
- (2) A person commits an offence and is liable on conviction to a fine not exceeding \$5,000 if the person, without reasonable excuse, contravenes **subsection (1)**.

35DF Offence to provide checking services, etc, without being appointed under section 35DA

- (1) A person must not carry out any of the functions specified in **section 35DB(1)(b) to (e)** without being appointed as a service provider under **section 35DA**. 25
- (2) A person commits an offence and is liable on conviction to a fine not exceeding \$5,000 if the person, without reasonable excuse, contravenes **subsection (1)**. 30

35DG Service providers not to collect, etc, personal information

A service provider must not collect, maintain, use, or disclose any personal information relating to an individual from whom the service provider receives any drug or substance for checking or disposal. 35

35DH Protections from liabilities of service provider

- (1) An employee or a volunteer of a service provider is not liable for anything they do or fail to do in the course of the performance or intended performance of the service provider’s functions, unless it is shown that they acted in bad faith or without reasonable care. 5
- (2) An employee or a volunteer of a service provider is not liable for any liability of the service provider.
- (3) In this section, **volunteer** means a person who is acting on a voluntary basis (whether or not the person receives out-of-pocket expenses).

35DI Test result not admissible in criminal proceedings 10

The result of a test carried out by a service provider in relation to any drug or substance is not admissible as evidence in any criminal proceedings against the individual from whom the drug or substance was received.

Subpart 2—Repeal of temporary provisions

11 Section 2 amended (Interpretation) 15

In section 2(1), repeal the definitions of **drug and substance checking service provider**, **service provider**, and **psychoactive substance**.

12 Section 6 amended (Dealing with controlled drugs)

In section 6(1), replace “section 8, **35DC**, or **35DD**” with “section 8”.

13 Section 7 amended (Possession and use of controlled drugs) 20

In section 7(1), replace “section 8, **35DC**, or **35DD**” with “section 8”.

14 Section 12 amended (Use of premises or vehicle, etc)

Repeal **section 12(1A)**.

15 Section 30 amended (Burden of proof)

In section 30, replace “section 8, **35DC**, or **35DD**,” with “section 8” in each place. 25

16 Sections 35DA to 35DI and cross-heading above section 35DA repealed

Repeal **sections 35DA to 35DI** and the cross-heading above **section 35DA**.

Part 2**Amendments to Psychoactive Substances Act 2013** 30**17 Amendments to Psychoactive Substances Act 2013**

This Part amends the Psychoactive Substances Act 2013.

Subpart 1—Temporary provisions

18 Section 8 amended (Interpretation)

In section 8, insert in their appropriate alphabetical order:

approved laboratory means a laboratory for the time being approved under section 87

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drug and substance checking service provider has the same meaning as in section 2(1) of the Misuse of Drugs Act 1975

19 Section 70 amended (Offences relating to psychoactive substance that is not approved product)

After section 70(2), insert:

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(2A) Subsection (1) also does not apply to—

(a) a person who gives a psychoactive substance that is not an approved product to a drug and substance checking service provider for the purpose of checking or for disposal:

(b) a drug and substance checking service provider who returns a psychoactive substance that is not an approved product to the person who submitted it for checking:

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(c) a drug and substance checking service provider who supplies a psychoactive substance that is not an approved product to an approved laboratory for testing.

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20 Section 71 amended (Offence relating to personal possession of psychoactive substance that is not approved product)

After section 71(2), insert:

(2A) Subsection (1) also does not apply to a drug and substance checking service provider if the provider has possession of the psychoactive substance in the course of performing the provider's functions.

25

(2B) **Subsection (2A)** is subject to the service provider's terms and conditions of appointment.

Subpart 2—Repeal of temporary provisions

21 Section 8 amended (Interpretation)

30

In section 8, repeal the definitions of **approved laboratory** and **drug and substance checking service provider**.

22 Section 70 amended (Offences relating to psychoactive substance that is not approved product)

Repeal **section 70(2A)**.

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- 23 Section 71 amended (Offence relating to personal possession of psychoactive substance that is not approved product)**
Repeal **section 71(2A) and (2B)**.