

# Misuse of Drugs Amendment Bill 2011

## EXPLANATORY MEMORANDUM

### **Part 1 - Preliminary**

#### **Clause 1. Short Title**

Clause 1 cites the short title of the Act as the *Misuse of Drugs Amendment Act 2011*.

#### **Clause 2. Commencement**

Clauses 1 and 2 come into operation on the day of Assent. The remaining provisions in the Bill come into operation on a day fixed by proclamation. Commencement by proclamation is necessary as Regulations need to be drafted to give effect to some of the provisions contained within the Bill.

### **Part 2 – Misuse of Drugs Act 1981 amended**

#### **Clause 3. Act amended**

The amendments contained in Part 2 of the Bill [clauses 3 to 9] are amendments to the *Misuse of Drugs Act 1981*.

#### **Clause 4. Section 3 amended**

Section 3(1) of the *Misuse of Drugs Act 1981* contains a range of definitions used in the Act. The Bill amends section 3(1) by inserting a definition of “adult”. This definition is needed in relation to amendments to the Act contained in clause 9 of the Bill. The definition of “adult” is a person who has reached 18 years of age.

#### **Clause 5. Section 5 amended**

Clause 5 deletes section 5(1)(d) and section 5(3) from the *Misuse of Drugs Act 1981*. These sections are being replaced, respectively, with proposed section 7B(6) and proposed section 7B(7), as provided by Clause 6.

Section 5(1)(d) contains the offence of possessing pipes or other utensils for use in connection with the smoking of a prohibited drug or prohibited plant, or for the manufacture or preparation of a prohibited drug or plant for smoking, which have detectable traces of a prohibited drug or plant on them.

Section 5(1)(d) is replaced by proposed section 7B(6) which will provide it is an offence for a person to possess any drug paraphernalia in or on which there is a prohibited drug or prohibited plant.

Section 5(3) provides that a person does not commit an offence under section 5(1)(d) if they possess such pipes and utensils, for the purpose of delivering it to an authorised person, with written authority, or if they are analysing or dealing with the pipe or utensil in their capacity as an analyst, botanist or other expert.

Section 5(3) is replaced by proposed section 7B(3). The proposed section provides that a person does not commit an offence under proposed section 7B(6) if they possess drug paraphernalia in or on which is a prohibited drug or prohibited plant in the same circumstances as detailed by deleted section 5(3).

## **Clause 6. Section 7B inserted.**

Clause 6 inserts proposed section 7B into the *Misuse of Drugs Act 1981*. This section provides specific offences relating to drug paraphernalia.

Proposed section 7B(1) provides definitions for the terms “display” and “drug paraphernalia”.

The term “display” in relation to drug paraphernalia, includes to authorise or allow drug paraphernalia to be displayed. This definition is needed in relation to proposed sections 7B(2), 7B(3) and 7B(4) and 7B(5).

The term “drug paraphernalia” is defined as:

- anything made or modified to be used in connection with manufacturing or preparing a prohibited drug or prohibited plant:
  - for administration by a person; or
  - for smoking, ingesting or inhaling by a person; or
  - to be burned or heated so its smoke or fumes can be smoked or inhaled by a person.

or

- anything made or modified to be used in by a person:
  - to administer a prohibited drug or plant to a person; or
  - to smoke, inhale or ingest a prohibited drug or prohibited plant; or
  - to smoke or inhale the smoke or fumes resulting from the burning or heating of a prohibited drug or prohibited plant.

The term “drug paraphernalia” will encapsulate the current definitions of “cannabis smoking paraphernalia” contained within section 19A of the *Misuse of Drugs Act 1981* and the definition of “ice pipes” contained within section 19B of the same.

Proposed section 7B(2) provides that any person who displays drug paraphernalia for sale in a retail outlet commits a simple offence. The proposed penalty for this offence is a fine of \$10,000. This offence is modelled on the offences contained within sections 19A and 19B of the *Misuse of Drugs Act 1981*, which, respectively, relate to the display and sale of cannabis smoking paraphernalia and ice pipes.

Proposed section 7B(3) provides that any person who sells any drug paraphernalia to an adult commits a simple offence. The proposed penalty for this offence is a fine of \$10,000. This offence is also modelled on the offences contained within sections 19A and 19B of the *Misuse of Drugs Act 1981*.

Proposed section 7B(4) provides that any person who sells drug paraphernalia to a child commits a simple offence. The proposed penalty for this offence is a fine of \$24,000 or imprisonment for 2 years or both. This offence is also modelled on the offences contained within sections 19A and 19B of the *Misuse of Drugs Act 1981*.

Proposed section 7B(5) provides that it is a defence to a charge of an offence under proposed section 7B(2), section 7B(3) or section 7B(4) if the accused was a person prescribed, or if the drug paraphernalia sold was a thing prescribed or of a class prescribed, or if the display or sale occurred in circumstances prescribed.

Proposed section 7B(5) allows for regulations to be made which prescribe certain people, things and circumstances. The ability to prescribe these matters in regulations will ensure proposed sections 7B(3) to (5) do not, for example, have any unintended

consequences on initiatives such as syringe exchange programs, or, similarly, prohibit items the sale of items with legitimate uses that may fall within the definition of “drug paraphernalia”, such as shishas and hookahs.

Proposed section 7B(6) provides that any person who is in possession of any drug paraphernalia in or on which there is a prohibited drug or prohibited plant commits a simple offence. The penalty for this offence is a fine of \$36,000 or imprisonment for three years or both.

Proposed section 7B(6) replaces section 5(1)(d) of the *Misuse of Drugs Act 1981* which is repealed by Clause 5 of this Bill.

The monetary penalty has been increased in proposed section 7B(6) from the monetary penalty applicable to repealed section 5(1)(d), as provided by section 34(1)(d) of the *Misuse of Drugs Act 1981*. The maximum monetary penalty for repealed section 5(1)(d) was \$3,000. The increase is to ensure the monetary penalty for proposed section 7B(6) remains consistent with the monetary penalties available for other offences within proposed section 7B and to also ensure consistency with the principles of the *Sentencing Act 1995* which relate to the monetary equivalent for terms of imprisonment.

The maximum term of imprisonment applicable to repealed section 5(1)(d), which is 3 years, remains the same for proposed section 7B(6).

Proposed section 7B(7) provides the circumstances in which it is a defence to a charge under proposed section 7B(6). These circumstances are the same as those provided by section 5(3) of the *Misuse of Drugs Act 1981*, which is to be repealed by Clause 5 of this Bill.

#### **Clause 7. Section 8B amended**

Clause 7 makes a minor amendment to the definition of “minor cannabis related offence” contained within section 8B(1) of the *Misuse of Drugs Act 1981*. The definition is amended to include a reference to proposed section 7B(6). This amendment will ensure an offence committed under section proposed 7B(6), which involves cannabis, is considered a “minor cannabis related offence” for the purposes of cannabis intervention.

#### **Clause 8. Sections 19A and 19B deleted**

Clause 8 deletes section 19A and section 19B from the *Misuse of Drugs Act 1981*. These sections, respectively, relate to the display and sale of cannabis smoking paraphernalia and the display and sale of ice pipes.

The provisions contained within section 19A and section 19B have been replaced by proposed sections 7B(2) to 7B(5).

#### **Clause 9. Section 34 amended**

Clause 9 amends section 34 of the *Misuse of Drugs Act 1981* by inserting proposed sections 34(3), 34(4) and 34(5).

Proposed section 34(3) provides that where a court is sentencing a person [for a first offence], who was an adult at the time the offence was committed, for an offence detailed within section 34(1)(a) which involved selling or supplying, or offering to sell or supply, a prohibited drug or prohibited plant to a child, the court may only impose one of the following sentencing options:

- Suspended imprisonment;
- Conditional suspended imprisonment; or

- Imprisonment.

Where the court is sentencing an adult for a second or subsequent offence, the court:

- Must impose a term of imprisonment of at least six months; and
- May not suspend the term of imprisonment.

Proposed section 34(4) provides that where a court is sentencing a person [for a first offence], who was an adult at the time of the offence, for an offence committed under section 6(1)(b), section 7(1)(a), where it involved cultivating a prohibited plant, or 14(1) of the *Misuse of Drugs Act 1981* and the offence was committed in circumstances where the life, health or safety of a child under the age of 16 years was endangered by the acts constituting the offence, the court may only impose one of the following sentencing options:

- Suspended imprisonment;
- Conditional suspended imprisonment; or
- Imprisonment.

Where the court is sentencing an adult for a second or subsequent offence, the court:

- Must impose a term of imprisonment of at least six months; and
- May not suspend the term of imprisonment.

Section 6(1)(b) relates to the manufacture and preparation or prohibited drugs.

Section 7(1)(a) relate to intention to sell or supply a prohibited plant or any prohibited drug obtainable from the prohibited plant, possession of a prohibited plant and the cultivation of a prohibited plant. The reference to section 7(1)(a) in propose section 34(4) is limited to the cultivation of a prohibited plant.

Section 14(1) relates to the possession of Category 1 or Category 2 items in quantities which exceed the amounts prescribed in Schedule 3 and Schedule 4 of the *Misuse of Drugs Regulations 1982*. Category 1 and Category 2 items include a number of chemicals which are commonly referred to as 'precursors' to the manufacture of prohibited drugs. The possession and storage of such items can pose risks to the health and safety of those exposed to them.

Proposed section 34(5) provides that where a court is sentencing a person, who was an adult at the time of the offence, for an offence committed under section 6(1)(b), section 7(1)(a), where it involved cultivating a prohibited plant, or 14(1) of the *Misuse of Drugs Act 1981* and the acts constituting the offence caused bodily harm, as defined by section 1(1) and (4) of the *Criminal Code*, to a child under the age of 16 years, the court:

- Must impose a term of imprisonment of at least twelve(12) months; and
- May not suspend the term of imprisonment.

Section 1(1) and (4) of the *Criminal Code* define bodily harm as “any bodily injury which interferes with health or comfort” and the term includes “causing a person to have a disease which interferes with health or comfort”.

Proposed section 34(6) provides that Minister must carry out a review of the operation and effectiveness of the changes to section 34 of the *Misuse of Drugs Act 1981*, contained in clause 9 of the Bill, in 3 years.

### **Part 3 – Bail Act 1982 amended**

#### **Clause 10. Act amended**

The amendments contained in Part 3 of the Bill [clauses 10 and 11] are amendments to the *Bail Act 1982*.

#### **Clause 11. Schedule 2 amended**

Clause to inserts section 14(1) of the *Misuse of Drugs Act 1981*, where committed in circumstances which endangered the life, health and safety of a child under the age of 16 years, or caused bodily harm to the child, into Schedule 2 of the *Bail Act 1982*.

Schedule 2 of the *Bail Act 1982* provides a list of serious offences. The list of serious offences is used during the consideration of bail. Specifically, Section 3A of the *Bail Act 1982* provides that where a person has committed a serious offence whilst on bail for another serious offence, or was at liberty of an early release order made in respect to another serious offence, the person should be refused bail, unless there are exceptional circumstances.

It should be noted that section 6(1) and section 7(1) in their entirety are already included within Schedule 2 of the *Bail Act 1982* and therefore not included in this amendment.

### **Part 4 – Spent Convictions Act 1988 amended**

#### **Clause 12. Act amended**

The amendments contained in Part 4 of the Bill [clauses 12 and 13] are amendments to the *Spent Convictions Act 1988*.

#### **Clause 13. Section 11 amended**

Clause 13 amends section 11(6)(a)(i) of the *Spent Convictions Act 1988* to include a references to proposed section 7B(6).

Section 11 of the *Spent Convictions Act 1988* provides that the prescribed period of time a person must wait before a conviction can be spent, or before they can apply to have a conviction spent, is 10 years.

Section 11(6) of the *Spent Convictions Act 1988* provides that the prescribed period for a conviction for an offence involving cannabis which was committed under section 5(1)(d)(i) of the *Misuse of Drugs Act 1981* or section 6(2), where the offence does not involve a cannabis plant under cultivation, cannabis resin or any other cannabis derivative, is 3, rather than 10, years.

Section 11(6) is only applicable to offences where the conviction was received after the commencement of the *Cannabis Law Reform Act 2010*, which was 1 August 2011.

As section 5(1)(d)(i) of the *Misuse of Drugs Act 1981* is being replaced with proposed section 7B(6), a reference to section 7B(6) will be inserted into Section 11(6)(a)(i). The current reference to section 5(1)(d)(i) will not be deleted as it is appropriate the prescribed period also apply to those with a conviction for a cannabis related offence committed under section 5(1)(d)(i).

## **Part 5 – Working with Children (Criminal Record Checking) Act 2004 amended**

### **Clause 14. Act amended**

The amendments contained in Part 5 of the Bill [clauses 14 and 15] are amendments to the *Working with Children (Criminal Record Checking) Act 2004*.

### **Clause 15. Schedule 2 amended**

Clause 15 amends Schedule 2 of the *Working with Children (Criminal Record Checking) Act 2004* by inserting a reference to proposed section 7B(4), the sale of drug paraphernalia to children, into the Schedule.

Schedule 2 contains a lists of offences considered to be ‘Class 2 Offences’ for the purposes of the *Working with Children (Criminal Record Checking) Act 2004*.

Scheduling this offence as a Class 2 offence has the effect of requiring a Negative Notice to be issued, by the Working with Children Screening Unit, to Working with Children Check applicants who are identified as having convictions or pending charges for the offence of selling drug paraphernalia to children, unless there are exceptional circumstances.