

Misuse of Drugs Amendment (Psychoactive Substances) Bill 2015

EXPLANATORY MEMORANDUM

The *Misuse of Drugs Amendment (Psychoactive Substances) Bill 2015* (the Bill) seeks to amend the *Misuse of Drugs Act 1981* to insert provisions to deal with the manufacture, sale, supply and promotion of psychoactive substances.

Clause Notes

Part 1 — Preliminary

Clause 1. Short title

This Bill will become the *Misuse of Drugs Amendment (Psychoactive Substances) Act 2015*.

Clause 2. Commencement

This clause provides that sections 1 and 2 of the Bill will commence operation when the Act receives the Royal Assent and the remainder of the Bill will commence operation on a day or days to be fixed by proclamation.

This commencement of the majority of the Bill by Proclamation is required to:

- allow time to train police officers in relation to the enforcement of the new offences and provisions generally;
- prepare relevant computer system changes to record the new offences created;
- enable relevant regulations required under the legislation to be prepared; and
- undertake awareness raising initiatives targeting local retailers and suppliers in relation to the dangers associated with psychoactive substances and the enactment of new legislation pertaining to same.

Clause 3. Act amended

The clauses contained within the Bill amend the *Misuse of Drugs Act 1981*.

Clause 4. Part IIIB inserted

This clause inserts a new Part IIIB into the *Misuse of Drugs Act 1981* to deal with the manufacture, sale, supply and promotion of psychoactive substances. The proposed new Part IIIB of the *Misuse of Drugs Act 1981* contains the following provisions.

New section 8N. Terms used

The proposed section 8N outlines the meanings of different terms used for the purposes of Part IIIB of the Bill.

New section 8O. Application of this Part to particular substances

The proposed section 8O relates to particular substances that are not captured via the proposed Part IIIB of the *Misuse of Drugs Act 1981* as they are otherwise captured by separate legislation. Those substances are listed in subsection (1) as:

- medicines or a Schedule 9 poison as those terms are already defined in section 3 of the *Medicines and Poisons Act 2014*, or if section 137 of that Act has not commenced to a medicine defined in section 5(1) or included in Schedule 9 of the *Poisons Act 1964*, noting these are otherwise captured in the general offence provisions of the *Misuse of Drugs Act 1981*;
- a therapeutic good included in the Register as defined in section 3(1) of the *Therapeutic Goods Act 1989* (Commonwealth) or exempted for the operation of Part 3-2 of that Act by regulations made under section 18 of that Act;
- a tobacco product defined in the *Glossary to the Tobacco Products Control Act 2006*;
- liquor as defined in section 3(1) of the *Liquor Control Act 1988*;
- food as defined in section 8 of the *Food Act 2008*;
- agricultural and veterinary chemical products defined under the Agvet Code of Western Australia [established via the *Agricultural and Veterinary Chemicals (Western Australia) Act 1995*];
- a plant or fungus or an extract from a plant or fungus; and
- any other substances prescribed by regulation.

The proposed subsection (2) clarifies that despite any non-inclusions resulting from subsection (1) Part IIIB still applies to a substance that contains, or has added to it, a substance that is not otherwise listed in subsection (1).

New section 8P. Effect of representing substance as psychoactive substance

The proposed section 8P means that a substance which is represented in any way as being psychoactive generally, or a specific type of psychoactive substance, is taken to be a psychoactive substance for the purpose of Part IIIB of the Bill. The manner in which such a representation is made is drafted so as to be read broadly and include any form by which representation is made that a substance is psychoactive. This can range, for example, from

broad public representations via advertisements to representations made from one individual to another person or other persons to the effect that a substance may cause a psychoactive effect.

This proposed provision is particularly relevant when ascertaining whether an offence relating to the manufacture, sale or supply of psychoactive substances has occurred under the proposed section 8Q; or in relation to the seizure by police and subsequent disposal of suspected psychoactive substances under the proposed section 8T.

This clause does not limit, though, the ability to establish that a substance is psychoactive following analysis.

New section 8Q. Manufacture, sale or supply of psychoactive substances

The proposed subsection (1) creates the offence of manufacturing a psychoactive substance; and subsection (2) creates the offence of selling and supplying a psychoactive substance. The penalties for offences under this clause are a maximum fine of \$48,000 and/or imprisonment for four years.

The proposed subsection (3) clarifies that the usage instructions concerning a substance, or whether a substance is intended or not intended for human consumption, is not relevant in determining whether a substance is psychoactive for the purposes of determining whether an offence has been committed under this clause.

New section 8R. Promoting psychoactive substances

The proposed section 8R creates an offence of promoting a substance as having a psychoactive effect on a person who consumes such a substance; or provides information as to how a psychoactive substance can be acquired. The penalty for an offence under this clause is a maximum fine of \$24,000 and/or imprisonment for two years.

The proposed subsection (2) provides that such promotion can include where a person has taken any action intended to publicise or promote the substance via visual or auditory means. It also includes the direct depiction of the substance, or a circumstance where some other form of symbolic description of a psychoactive substance occurs.

The proposed subsection (2) includes the ability to prescribe via regulations additional actions that can be taken as intending to publicise or promote psychoactive substances. This is to ensure that any actions to publicise or promote a substance not already captured via this provision can be expeditiously provided for.

New section 8S. Powers of police officers for purposes of this Part

The proposed subsection (1) provides police with the authority to enter the premises of a person suspected on reasonable grounds of:

- manufacturing, selling or supplying a psychoactive substance (refer clause 8Q); and/or
- promoting a substance as having a psychoactive effect [refer clause 8R(1)(a)]; and/or
- providing information as to how or where a psychoactive substance can be acquired.

It further provides the ability to demand the production of any books, papers or documents relating to the above and to inspect such items.

The reference in the proposed subsection (2) to section 25 of the *Misuse of Drugs Act 1981* ensures that police are provided with the authority to seize and detain or make extracts or copies of any books, papers or documents found during the course of the entry to the premises. It further imposes a requirement upon a person in the premises to provide such information requested by police that is within their power to give to assist; and provides for an offence where a person does not comply with a requirement without reasonable excuse.

The reference in the proposed subsection (3) to section 29 of the *Misuse of Drugs Act 1981* ensures that the offence of hindering a police officer acting in the exercise of their powers applies under this proposed provision.

It is relevant to note that this clause is similar to section 19 of the *Misuse of Drugs Act 1981*, which relates to illicit substances generally under that Act.

New section 8T. Powers to seize and dispose of thing suspected of being psychoactive substance

The proposed section 8T provides the ability for a destruction notice (in a form prescribed by regulation) to be given to a person from whom a suspected psychoactive substance has been seized by a police officer where the officer is:

- satisfied that no person will be tried with the commission of an offence in relation to the seized substance; or
- a person has been tried but not convicted.

The effect of the written notice is to identify the item concerned and advise that the item will be destroyed in 21 days or more after the notice is served, unless the person upon who the notice was served makes application under the proposed section 8U to have the substance analysed.

New section 8U. Analysis of seized thing may be requested

The proposed subsection (1) provides that upon receipt of a destruction notice under the proposed section 8T, a person can apply to the Commissioner of Police to have the substance held by police analysed.

Subsection (2) provides that the application has to be made in the prescribed form within 21 days of the receipt of the destruction notice served under section 8T and be accompanied by the prescribed fee. The fees will be commensurate with the costs that it takes to have the substance analysed.

Subsection (3) provides that the Commissioner must ensure the relevant substance is not destroyed prior to it having been analysed.

Subsection (4) provides what is to occur after the item has been analysed. Where the analysis indicates the substance is psychoactive, the Commissioner can order its destruction.

Where the Commissioner is satisfied that the item is not psychoactive, but is a 'relevant thing' under section 27(6) of the *Misuse of Drugs Act 1981*, the Commissioner can still order that it be destroyed. In this context such a 'relevant thing' relates to another form of illicit drug or plant or a dangerous substance provided for under the Act.

Where the Commissioner is satisfied that the substance is not psychoactive, or a 'relevant thing' under section 27(6) of the *Misuse of Drugs Act 1981*, the Commissioner is to release the substance back to the person from whom it was seized and refund any fee paid by the applicant under subsection (1) to have the relevant substance analysed.