

# Explanatory Memorandum

## ***Misuse of Drugs Amendment (Methylamphetamine Offences) Bill 2017***

### **1. Short Title**

Under Clause 1, when the *Misuse of Drugs Amendment (Methylamphetamine Offences) Bill 2017* (the Bill) is passed and receives Royal Assent, it will be known as the *Misuse of Drugs Amendment (Methylamphetamine Offences) Act 2017*.

### **2. Commencement**

Clause 2 of the Bill provides that the short title and commencement clauses come into effect on Royal Assent. The rest of the provisions in the Bill will come into operation on the 28<sup>th</sup> day after Royal Assent.

### **3. Act amended**

Clause 3 of the Bill provides that the Act being amended by Part 2 of the Bill is the *Misuse of Drugs Act 1981* (the MD Act).

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

Clause 4 inserts a definition of 'methylamphetamine' in the MD Act, for the purposes of the proposed amendments to sections 33 and 34 of the MD Act.

**Methylamphetamine** is defined as the prohibited drug referred to in Schedule VII, Item 8.

### **5. Section 32A amended**

Subsection 32A(3) of the MD Act contains a number of defined terms for the purposes of determining whether an offender should be subject to a drug trafficker declaration.

Importantly, an offender may be subject to a drug trafficker declaration if the offender is convicted of 2 or more 'serious drug offences' or 'external drug offences' within a 10-year period, inter alia.

The definitions of 'external serious drug offence' and 'serious drug offence' currently specifically refer to certain offences provisions under the MD Act, including an offence under subsection 33(2)(a); conspiracy to commit a crime under subsections 6(1) and 7(1) of the MD Act.

The proposed amendments to subsection 33(2) (contained at subclause 6(2) of the Bill) amend subsection 33(2), so that:

- subsection 33(2)(a) captures conspiracy offences relating to subsection 6(1), but not involving methylamphetamine;
- subsection 33(2)(b) captures conspiracy offences relating to subsection 7(1); and

- subsection 33(2)(c) captures conspiracy offences relating to subsection 6(1) and involving methylamphetamine.

The proposed amendments to subsection 32(2) of the MD Act, have the effect of rendering the references to subsection 33(2)(a) in the definition provisions in subsection 32A(3) inaccurate. This is because they do not capture the conspiracy offences under proposed subsections 33(2)(b) and (c).

Consequently, clause 5:

- deletes the reference to '7(1), 33(1)(a) or 33(2)(a); or' contained in the definition of 'external serious drug offence' with a reference to '7(1) or 33(1)(a) or, under section 33(2), conspiring to commit a crime under section 6(1) or 7(1); or'; and
- replaces the reference to '7(1), 33(1)(a) or 33(2)(a).' contained in the definition of 'serious drug offence', with a reference to '7(1) or 33(1)(a) or, under section 33(2), conspiring to commit a crime under section 6(1) or 7(1).'

These amendments ensure that the penalties for conspiracy correspond with the overarching intention of the Bill.

## 6. Section 33 amended

### **Subclause 6(1)**

Subclause 6(1) of the Bill is a minor drafting amendment. It inserts 'under this Act' in subsection 33(1), to clarify that the provision applies to a person who attempts to commit an offence *under the MD Act*, and to ensure that the language is consistent with the other proposed amendments to section 33.

### **Subclause 6(2)**

Subclause 6(2) of the Bill amends subsection 33(2) of the MD Act, to increase the maximum penalty that applies to a conspiracy to commit certain offences in relation to methylamphetamine.

Currently, a person who is convicted of conspiring with another to commit an offence under subsection 6(1) of the MD Act is deemed to have committed the offence, but is liable to a lesser maximum penalty than the penalty applicable to the principal offence. This provision applies regardless of the type of drug involved, or the amount of the drug involved.

The proposed framework replaces subsection 33(2) with subsections 33(2)(a)-(c), and operates as follows:

- a. Proposed subsection 33(2)(a) provides that if a person is convicted of conspiring with another to commit an offence under subsection 6(1) of the MD Act, which does not involve methylamphetamine, the person is liable to the penalty referred to in proposed subsection 34(1)(b) (a fine not exceeding \$75,000, imprisonment for 20 years, or both).

This is the penalty that currently exists for a conspiracy offence in relation to subsection 6(1) of the MD Act, and remains unchanged by the Bill when the offence involves drugs other than methylamphetamine.

- b. Proposed subsection 33(2)(b) provides that if a person is convicted of conspiring with another to commit an offence under subsection 7(1) of the MD Act, the person is liable to the penalty referred to in proposed subsection 34(1)(ba) (a fine not exceeding \$75,000, imprisonment for 20 years, or both).

This is the penalty that currently exists for a conspiracy offence in relation to subsection 7(1) of the MD Act and remains unchanged by the Bill.

- c. Proposed subsection 33(2)(c) provides that a person who is convicted of conspiring with another to commit an offence (other than the offences referred to in subsections 33(2)(a) and (b)), is liable to the same penalty which a person who commits the principal offence is liable.

This subsection captures conspiracy offences in relation to subsection 6(1) of the MD Act, which involve methylamphetamine, as these offences are excluded in the preceding subsection 33(2)(a).

Accordingly, a person who conspires to commit an offence under subsection 6(1) in relation to a non-trafficable quantity of methylamphetamine, will be subject to the same maximum penalty as a person who commits the principal offence, that is a fine not exceeding \$100,000, imprisonment for 25 years, or both – see proposed subsection 34(1)(aa) at subclause 7(2).

Further, a person who conspires to commit an offence under subsection 6(1) of the MD Act involving a trafficable quantity (28 grams or more) of methylamphetamine, will be subject to the same maximum penalty as a person who commits the principal offence that is, imprisonment for life-see proposed subsection 34(1)(a) at subclause 7(2).

#### **Subclause 6(3)(a)**

Subclause 6(3)(a) of the Bill is a minor drafting amendment. It inserts ‘under this Act’ in subsection 33(3), to clarify that the provision applies to a person who incites another person to commit, or becomes an accessory after the fact to, an offence *under the MD Act*, and to ensure that the language is consistent with the other proposed amendments to section 33.

#### **Subclause 6(3)(b)**

Subclause 6(3)(b) is a minor drafting amendment to subsection 33(3)(c), due to the proposed amendments to subsection 33(3)(d) of the MD Act.

Subclause 6(3)(c) deletes subsection 33(3)(d), including the text that begins ‘to which’ and continues to the end of the subsection. Currently, this text captures both subsections 33(3)(c) and (d), to cover both fine and imprisonment penalties. When the text is deleted, subsection 33(3)(c), which relates to fine penalties and will remain in the MD Act, is ‘incomplete’.

Subclause 6(3)(b) fixes this issue by deleting the phrase ‘fine; and’ in subsection 33(3)(c) of the MD Act, and inserting, ‘fine to which a person who commits the principal offence is liable; and’.

**Subclause 6(3)(c)**

Subclause 6(3)(c) of the Bill amends subsection 33(3)(d) of the MD Act, in order to allow the current provisions in the MD Act relating to incitement, to apply to the new maximum penalty for methylamphetamine trafficking offences.

Currently, a person who incites another person to commit, or becomes an accessory after the fact to, an offence, is deemed to have committed the offence, but is liable to half of the maximum imprisonment penalty applicable to the offence. To determine what is meant by half of a term of life imprisonment, the Bill takes the approach that is taken in equivalent provisions in the *Criminal Code*.

The proposed Bill replaces subsection 33(d) and the text ‘to which a person who commits the principal offence is liable.’ with subsections 33(d)(i)-(ii).

It operates as follows:

- a. Proposed subsection 33(3)(d)(i) provides that a person who incites another person to commit, or becomes an accessory after the fact to, an offence, where the maximum penalty applicable to that offence is imprisonment for life, is liable to a term not exceeding 14 years imprisonment.
- b. Proposed subsection 33(3)(d)(ii) provides that in any other case, a person who incites another person to commit, or becomes an accessory after the fact to, an offence, is liable to a term not exceeding half the term of imprisonment applicable to the offence.

**7. Section 34 amended**

**Subclause 7(1)**

Subclause 7(1) of the Bill inserts a definition of a ‘trafficable quantity of methylamphetamine’ prior to subsection 34(1) of the MD Act.

**Trafficable quantity of methylamphetamine** is defined as the quantity of methylamphetamine not less than that specified in to Schedule VII, Item 8 of the MD Act.

The definition has been inserted for the purposes of the maximum penalties of life imprisonment contained in subclause 7(2) of the Bill, in relation to methylamphetamine trafficking offences.

**Subclause 7(2)**

Subclause 7(2) of the Bill amends subsections 34(1)(a) and (b) of the MD Act, to insert new maximum penalties, which are applicable to methylamphetamine related offences.

The Bill replaces subsections 34(1)(a)-(b) with subsections 34(1)(a), (aa), (ab), (b) and (ba), and operates as follows:

- a. Proposed subsection 34(1)(a) of the MD Act provides that a person who is convicted of a crime under subsection 6(1) of the MD Act involving a trafficable quantity of methylamphetamine, is liable to a maximum penalty of imprisonment for life.
- b. Proposed subsection 34(1)(aa) of the MD Act provides that a person who is convicted of a crime under subsection 6(1) of the MD Act in any other case, is liable to a maximum penalty of a fine not exceeding \$100,000, imprisonment for a term not exceeding 25 years, or both.

Accordingly, this penalty provision will apply to offences under subsection 6(1) of the MD Act involving other prohibited drugs, and non-trafficable quantities of methylamphetamine.

- c. Proposed subsection 34(1)(ab) of the MD Act provides that a person who is convicted of an offence under subsection 7(1) is liable to a maximum penalty of a fine not exceeding \$100,000, imprisonment for a term not exceeding 25 years, or both.

This is the penalty that currently exists in relation to an offence under subsection 7(1) of the MD Act and remains unchanged by the Bill.

- d. Proposed subsection 34(1)(b) of the MD Act provides that a person who is convicted of conspiring with another to commit a crime under subsection 6(1) that does not involve methylamphetamine, is liable to a fine not exceeding \$75,000, imprisonment for 20 years, or both.

This proposed provision captures conspiracy offences in relation to subsection 6(1) of the MD Act, not involving methylamphetamine. Conspiracy offences involving methylamphetamine are captured by proposed subsection 33(2)(c) (see subclause 6(2) above).

- e. Proposed subsection 34(1)(ba) of the MD Act provides that a person who is convicted of conspiring with another to commit a crime under subsection 7(1), is liable to a fine not exceeding \$75,000, imprisonment for 20 years, or both.

This is the penalty that currently exists for a conspiracy offence in relation to subsection 7(1) of the MD Act and remains unchanged by the Bill.

The amendments to subsection 34(1)(a) of the MD Act necessitate some consequential amendments to subsections 34(2) and (3).

Subsections 34(2) and (3) currently refer to subsection 1(a). Subsection 1(a) has been replaced by subclause 7(2) of the Bill and accordingly, the references to it must also be replaced.

Subsection 34(2) contains a reference to 'a crime referred to in subsection 1(a)-'. Currently, a crime referred to in subsection 1(a) is a crime under subsections 6(1) and 7(1) of the MD Act. In order to ensure that subsection 34(2) continues to refer to these crimes, the Bill replaces the phrase 'referred to in subsection 1(a)', with 'under section 6(1) or 7(1)'.

Subsection 34(3) contains the phrase 'an offence referred to in subsection 1(a)'. Again, in order to ensure that this subsection continues to refer to crimes under subsections 6(1) and 7(1) of the MD Act, the Bill replaces the phrase 'referred to in in subsection 1(a)' with 'an offence under section 6(1) or 7(1)'.

## **8. Act amended**

Clause 8 provides that the Act being amended by Part 3 of the Bill is the *District Court of Western Australia Act 1969* (the DC Act).

## **9. Section 42 amended**

Clause 9 amends subsection 42(2) of the DC Act, to ensure that all matters relating to the sale, supply and manufacture of methylamphetamine, can continue to be heard in the District Court of Western Australia.

Currently, the District Court has jurisdiction to hear all criminal matters, with the exception of offences that carry a maximum penalty of life imprisonment. The proposed amendments to the MD Act to prescribe a maximum penalty of life imprisonment for methylamphetamine trafficking offences, would have the effect of moving these offences to the jurisdiction of the Supreme Court of Western Australia.

Clause 9 replaces the word 'life' and the full stop following that word, in subsection 42(2) of the DC Act, with 'life, unless the offence is-', and inserts new subsections 42(2)(a)-(c).

The proposed new subsections operate as follows:

- a. Proposed subsection 42(2)(a) of the DC Act provides that the District Court can hear matters relating to an offence under subsection 6(1) of the MD Act, involving a trafficable quantity of methylamphetamine, notwithstanding that the maximum penalty for this offence is life imprisonment.
- b. Proposed subsection 42(2)(b) of the DC Act provides that the District Court can hear matters relating to an attempt to commit an offence (current subsection 33(1)(a) of the MD Act) under subsection 6(1) of the MD Act, involving a trafficable quantity of methylamphetamine, notwithstanding that the maximum penalty for this offence is life imprisonment.
- c. Proposed subsection 42(2)(c) of the DC Act provides that the District Court can hear matters relating to a conspiracy to commit an offence (proposed subsection 33(2)(c)) under subsection 6(1) of the MD Act, involving a trafficable quantity of methylamphetamine, notwithstanding that the maximum penalty for this offence is life imprisonment.