

# **Drug and Substance Checking Legislation Bill (No 2)**

Government Bill

## **Explanatory note**

### **General policy statement**

The Drug and Substance Checking Legislation Bill (No 2) (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, the Psychoactive Substances Act 2013, and the Medicines Act 1981 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.

The Bill follows on from the Drug and Substance Checking Legislation Act 2020 (the **Drug Checking Act**), and is similar in most respects. The Drug Checking Act was developed to allow drug checking to take place with legal certainty over the summer of 2020–21, while a permanent system was developed. It includes repeal provisions which will take effect 12 months after the Drug Checking Act’s date of commencement.

Before the Drug Checking Act came into force, there were limited exemptions to the prohibitions on possession and supply of controlled drugs in the Misuse of Drugs Act 1975, none of which covered drug and substance checking service providers. Organisations and individuals who conducted drug checking were therefore at risk of being charged with possession or supply if they handled controlled drugs in the course of

providing their services. There was also legal uncertainty about whether drug checking services could send controlled drugs to an approved laboratory for further testing.

Similar risks arose under the Psychoactive Substances Act 2013 with the checking of psychoactive substances that were not approved products, and under the Medicines Act 1981 with the checking of prescription medicines that were not controlled drugs.

Under section 12 of the Misuse of Drugs Act 1975, it is an offence to knowingly allow premises to be used for the commission of any offence against that Act. Before section 12 was amended by the Drug Checking Act, event organisers and other hosts who allowed drug checking services to take place were at risk of prosecution under section 12 because the promotion of drug checking services could have constituted evidence of knowledge that drugs were being consumed or possessed on the premises. This meant hosts were disincentivised from hosting a harm reduction initiative. The Drug Checking Act amended section 12 to provide that it is not an offence to host a drug checking service.

If a permanent regulatory system is not introduced, drug checking will revert to a legal grey area. Drug checking service providers and their hosts would be at risk of prosecution, and it is likely that drug checking services would be provided at fewer events.

In order to enable drug and substance checking services to operate with legal certainty, this Bill enables the Director-General of Health to issue licences for drug and substance checking service providers to carry out the following functions:

- providing information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use:
- testing 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:
- advising the individual who presented a drug or substance for checking of the outcome of the testing:
- returning a drug or substance to the individual who presented it for checking:
- arranging for a sample of a drug or substance to be tested by an approved laboratory:
- disposing of any sample of a controlled drug or substance used in testing:
- disposing of, or arranging for the disposal of, any drug or substance surrendered by any individual for disposal.

The licence provisions are the main difference between this Bill and the Drug Checking Act, which provided for the Director-General to appoint service providers. The licensing system will set clear expectations and requirements for all providers, and enable ongoing oversight.

Transitional provisions will ensure that providers appointed under the Drug Checking Act can continue to operate legally while they are awaiting a licence under the new system.

Regulations under the Misuse of Drugs Act 1975 will give effect to elements of the regulatory system, including—

- pathways for licence applications, renewals, suspensions, and revocations:
- an appeals process:
- requirements for all licence holders, including—
  - a requirement that clients are not charged to use the service:
  - reporting requirements:
  - a requirement that any surrendered drugs be stored securely.

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 makes it an offence for a drug and substance checking service provider to breach, without reasonable excuse, any terms or conditions of their licence, and for a person, without reasonable excuse, to operate a drug and substance checking service without being licensed to do so. The penalty for these offences is a fine not exceeding \$5,000.

### **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=2021&no=34>

### **Regulatory impact statement**

The Ministry of Health produced a regulatory impact statement in March 2021 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <https://www.health.govt.nz/about-ministry/information-releases/regulatory-impact-statements/regulatory-impact-statement-regulation-drug-checking-services>
- <https://treasury.govt.nz/publications/informationreleases/ris>

### Clause by clause analysis

*Clause 1* is the Title clause.

*Clause 2* is the commencement clause. It provides that the Bill comes into force on the later of the following:

- the day after the date on which the Bill receives the Royal assent:
- immediately after subpart 2 of Part 1 and subpart 2 of Part 2 of the Drug and Substance Checking Legislation Act 2020 come into force.

Those subparts repeal the temporary provisions inserted by the Drug and Substance Checking Legislation Act 2020 into the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013. As a result of *clause 2*, this Bill will not come into force until the temporary provisions are repealed.

## Part 1

### Amendments to Misuse of Drugs Act 1975

*Clause 3* provides that *Part 1* amends the Misuse of Drugs Act 1975 (the **principal Act**).

*Clause 4* amends section 2 of the principal Act, which defines various terms used in the principal Act. This clause inserts definitions of drug and substance checking service provider, service provider, and psychoactive substance.

*Clause 5* inserts *new section 2AA*, which gives effect to the transitional, savings, and related provisions set out in *new Schedule 1AA*.

*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 an individual who supplies a controlled drug to a drug and substance checking service provider (a **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 individuals who are exempt from the application of section 6 of the principal Act.

Sections 6 and 7 of the principal Act do not apply to a person who is acting pursuant to a licence under the principal Act. As a result, those sections will not apply to a service provider who, for the purpose of performing their functions, takes the actions permitted by *new section 35DC* (which are to possess a controlled drug, return a controlled drug to the individual from whom it was received for checking, and send a controlled drug to an approved laboratory for testing).

*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 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 14 of the principal Act to clarify that—

- the general provision for licences to be issued by persons who are prescribed by regulations does not apply to licences for service providers (which are issued by the Director-General of Health under *new section 35DA*); and
- the general offence provision for the breach of licence conditions does not apply to licences for service providers (a specific offence provision for those licences is set out in *new section 35DE*).

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

*New section 35DA* provides for the licensing of service providers. The licences are issued by the Director-General of Health. A list of service providers must be maintained by the Ministry of Health on its Internet site.

*New section 35DB* sets out the functions of 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 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 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 service provider to breach any term or condition of their licence. 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 licensed 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 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 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 service provider in relation to any drug or substance is not admissible as evidence in criminal proceedings.

*Clause 11* inserts into the principal Act *new section 37(1)(aa)*, which empowers the Governor-General to make regulations providing for the issue of licences to service providers.

*Clause 12* inserts into the principal Act *new Schedule 1AA*, which sets out transitional, savings and related provisions. Under those provisions,—

- the Director-General of Health may not issue a licence under *new section 35DA* until regulations under *new section 37(1)(aa)* come into force;
- so long as an existing service provider applies for a licence within 1 month after the regulations come into force, their appointment is continued until the licence application is decided.

## Part 2

### Amendments to Psychoactive Substances Act 2013

*Clause 13* provides that *Part 2* amends the Psychoactive Substances Act 2013 (the **principal Act**).

*Clause 14* amends section 8 of the principal Act, which defines various terms used in the principal Act. This clause inserts definitions of approved laboratory and drug and substance checking service provider.

*Clause 15* 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 service provider for checking or disposal;
- a service provider who returns a substance to the individual who submitted it for checking, or sends it to an approved laboratory for testing.

*Clause 16* 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.

## Part 3

### Amendment to Medicines Act 1981

*Clause 17* provides that *Part 3* amends the Medicines Act 1981 (the **principal Act**).

*Clause 18* inserts *new section 109(3A)* into the principal Act. *New section 109(3A)* states that a service provider does not commit an offence against the principal Act if they are acting in accordance with their functions as a service provider and the terms and conditions of their licence.





*Hon Andrew Little*

## **Drug and Substance Checking Legislation Bill (No 2)**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Drug and Substance Checking Legislation Act **(No 2) 2021**.

**2 Commencement**

This Act comes into force on the later of the following: 5

- (a) the day after the date on which this Act receives the Royal assent:
- (b) immediately after subpart 2 of Part 1 and subpart 2 of Part 2 of the Drug and Substance Checking Legislation Act 2020 come into force.

**Part 1**

**Amendments to Misuse of Drugs Act 1975** 10

**3 Amendments to Misuse of Drugs Act 1975**

This Part amends the Misuse of Drugs Act 1975.

- 4 Section 2 amended (Interpretation)**
- In section 2(1), insert in their appropriate alphabetical order:
- drug and substance checking service provider** or **service provider** means a person licensed 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
- 5 New section 2AA inserted (Transitional, savings, and related provisions)**
- After section 2A, insert:
- 2AA Transitional, savings, and related provisions**
- The transitional, savings, and related provisions set out in **Schedule 1AA** have effect according to their terms.
- 6 Section 6 amended (Dealing with controlled drugs)**
- In section 6(1), replace “section 8” with “section 8 or **35DD**”.
- 7 Section 7 amended (Possession and use of controlled drugs)**
- In section 7(1), replace “section 8” with “section 8 or **35DD**”.
- 8 Section 12 amended (Use of premises or vehicle, etc)**
- 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.
- 9 Section 14 amended (Licences)**
- After section 14(6), insert:
- (7) The following do not apply in relation to licences for drug and substance checking service providers:
- (a) the provision in subsection (1) for licences to be issued by such persons as may be prescribed by regulations (licences for service providers are issued by the Director-General of Health under **section 35DA**):
- (b) the offence provision in subsection (6) (an offence for breaching terms or conditions of a service provider’s licence is set out in **section 35DE**).
- 10 New sections 35DA to 35DI and cross-heading inserted**
- After section 35D, insert:

*Drug and substance checking***35DA Licensing of drug and substance checking service providers**

- (1) The Director-General of Health may, in accordance with regulations made under this Act, issue licences for persons to be drug and substance checking service providers. 5
- (2) The Ministry of Health must publish on its Internet site a list of the service providers that are licensed under **subsection (1)**.

**35DB Functions of service provider**

- (1) The functions of a service provider are to do 1 or more of the following:
- (a) provide information and harm reduction advice to help individuals make informed decisions about drug and psychoactive substance use: 10
  - (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: 15
  - (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: 20
  - (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)** in accordance with the terms and conditions of their licence. 25
- (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's licence entitles them to do 1 or more of the following for the purpose of performing the provider's functions: 30
- (a) possess a controlled drug:
  - (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 terms and conditions of the service provider's licence. 35

- (3) In this section and **section 35DD**, **controlled drug** includes a sample of a controlled drug.

### **35DD Supplying or surrendering controlled drug to service provider**

An individual may do 1 or both of the following:

- (a) supply a controlled drug to a service provider for the purpose of checking: 5
- (b) surrender a controlled drug to a service provider for the purpose of disposal.

### **35DE Offence relating to breach of terms or conditions of licence**

- (1) A person licensed as a service provider must not breach any terms or conditions of their licence. 10
- (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 licensed** 15

- (1) A person must not carry out any of the functions specified in **section 35DB(1)(b) to (e)** without being licensed as a service provider under **section 35DA**. 15
- (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)**. 20

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

- (1) 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. 25
- (2) In this section, **collect** and **personal information** have the meanings given to those terms by section 7(1) of the Privacy Act 2020.

### **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. 30
- (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). 35

**35DI Test result not admissible in criminal proceedings**

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.

**11 Section 37 amended (Regulations) 5**

After section 37(1)(a), insert:

- (aa) providing for the issue of licences for persons to be drug and substance checking service providers:

**12 New Schedule 1AA inserted**

Insert the **Schedule 1AA** set out in the **Schedule** of this Act as the first schedule to appear after the last section of the Misuse of Drugs Act 1975. 10

**Part 2****Amendments to Psychoactive Substances Act 2013****13 Amendments to Psychoactive Substances Act 2013**

This Part amends the Psychoactive Substances Act 2013. 15

**14 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

**drug and substance checking service provider** has the same meaning as in section 2(1) of the Misuse of Drugs Act 1975 20

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

After section 70(2), insert:

**(2A) Subsection (1) also does not apply to— 25**

(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: 30

(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.

**16 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. 5
- (2B) **Subsection (2A)** is subject to the terms and conditions of the licence issued to the service provider under **section 35DA** of the Misuse of Drugs Act 1975.

**Part 3**

**Amendment to Medicines Act 1981**

10

**17 Amendment to Medicines Act 1981**

This Part amends the Medicines Act 1981.

**18 Section 109 amended (Relationship with Misuse of Drugs Act 1975)**

After section 109(3), insert:

- (3A) A person does not commit an offence against this Act (or any regulations under this Act) if they— 15
- (a) are a drug and substance checking service provider under the Misuse of Drugs Act 1975; and
- (b) are acting in accordance with their functions, and the terms and conditions of their licence, as a service provider under that Act. 20

**Schedule**  
**New Schedule 1AA inserted**

s 13

**Schedule 1AA**  
**Transitional, savings, and related provisions**

5

s 2AA

**Part 1**  
**Provisions relating to Drug and Substance Checking Legislation Act**  
**2021**

- 1 Interpretation** 10
- In this Part,—
- existing service provider** means a person who—
- (a) was appointed as a drug and substance service provider under old section 35DA; and
- (b) still held the appointment immediately before old section 35DA was repealed 15
- new section 35DA** means **section 35DA** as inserted by the Drug and Substance Checking Legislation Act **2021**
- old section 35DA** means section 35DA as it was immediately before its repeal
- repeal**, in relation to old section 35DA, means its repeal by section 16 of the Drug and Substance Checking Legislation Act 2020. 20
- Issue of licences under new **section 35DA***
- 2 When Director-General of Health may issue licences under new section 35DA**
- The Director-General of Health may not issue a licence under new **section 35DA** until regulations made under **section 37(1)(aa)** come into force. 25
- Continuation of current appointments*
- 3 Appointments of existing service providers continued**
- (1) An existing service provider must be treated as still holding an appointment under old section 35DA for the period that— 30
- (a) starts immediately after the repeal of old section 35DA (regardless of whether that is on or before the commencement of the Drug and Substance Checking Legislation Act **2021**); and



- (b) ends under **clause 4**.
- (2) For the purposes of **subclause (1)**,—
- (a) this Act and the Psychoactive Substances Act 2013, as they were immediately before their amendment by subpart 2 of Part 1 and subpart 2 of Part 2 of the Drug and Substance Checking Legislation Act 2020, continue to apply in relation to the existing service provider; and 5
- (b) the terms and conditions of the existing service provider’s appointment are the same as those that applied immediately before that amendment.
- (3) **Section 109(3A)** of the Medicines Act 1981 applies to the existing service provider as if they held a licence issued under new **section 35DA** (and the terms and conditions of their appointment were the terms and conditions of their licence). 10
- 4 When continued appointments end**
- (1) An existing service provider’s appointment ends if they do not apply for a licence to be issued under new **section 35DA** within 1 month after regulations made under **section 37(1)(aa)** come into force. 15
- (2) If an existing service provider applies for a licence before the deadline under **subclause (1)**, their appointment ends when—
- (a) the Director-General of Health issues the existing service provider a licence under new **section 35DA**; or 20
- (b) the Director-General of Health decides not to issue the existing service provider a licence under new **section 35DA** and their rights of appeal or review are exhausted.