

In Confidence

Office of the Minister of Health

Cabinet

Facilitating drug checking services

Proposal

- 1 This paper seeks agreement to introduce a Drug and Substance Checking Legislation Bill to amend the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013 to allow drug checking services to operate legally in New Zealand.

Relation to government priorities

- 2 This policy supports the Government's focus on minimising drug harm and promoting health.

Terminology

- 3 This policy relates to substances which are, or are believed to be, controlled drugs under the Misuse of Drugs Act or unapproved psychoactive substances under the Psychoactive Substances Act. To assist readability, this paper will use the term "drugs" to mean both controlled drugs and unapproved psychoactive substances.
- 4 The term "drug checking" likewise covers the checking of substances which are, or are believed to be, controlled drugs or unapproved psychoactive substances. The Bill uses the term "drug and substance checking" to ensure that both are covered by the legislation.

Executive Summary

- 5 Drug checking services check the composition of illicit drugs and provide information and harm reduction advice to help individuals make informed decisions about drug use. Where a drug is not as presumed, the individual can make the potentially life-saving decision not to consume it. There is currently one drug checking service operating in New Zealand.
- 6 Although drug checking services fully align with the Government's focus on minimising drug harm and promoting health, neither the Misuse of Drugs Act nor the Psychoactive Substances Act permit this activity. This means the service provider, the service user, and people who permit the service to operate at their event or premises, risk prosecution where the drugs in question are controlled drugs or unapproved psychoactive substances.
- 7 In order to ensure that drug checking services are able to operate with legal certainty during the 2020/21 festival season, the Attorney-General has authorised the drafting of the attached omnibus Bill. This Bill will amend the Misuse of Drugs Act to:

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- 7.1 allow the Director-General of Health (the Director-General) to appoint drug checking service providers by notice in the *Gazette*
 - 7.2 define a “drug checking service provider” as a person appointed as a drug and substance checking service provider by the Director-General of Health for the functions set out in the Bill
 - 7.3 allow service providers to possess controlled drugs for drug checking, disposal and destruction purposes, and to supply drug samples to approved laboratories
 - 7.4 protect hosts of drug checking service providers from prosecution for hosting the service.
- 8 The Bill will also amend the Psychoactive Substances Act to allow drug checking service providers to possess unapproved psychoactive substances for drug checking purposes, and to provide the substances to approved laboratories.
 - 9 The Bill is narrow in scope and time limited to twelve months, at which time the Bill will be repealed. Officials will develop advice on a regulatory system for longer term drug checking, which I intend to be in place in time for the 2021/22 festival season. I will return to Cabinet in early 2021 with these proposals.
 - 10 When considering Gazette notices, the Director-General of Health must ensure that the service provider align their drug testing services within the scope of Cabinet’s expectation that this narrow and time limited proposal will focus on protecting people at festivals during the 2020/21 season.

Background

- 11 Drug checking services indicate the likely identity of a drug. Services test unknown substances (which may be illicit drugs), interpret results, and provide harm reduction information to a person who provides a sample. The aim of these services is to help individuals to make more informed decisions about whether or how to use a drug. Services can also monitor drug market changes and inform specific harm reduction interventions such as tailored public alerts when particularly dangerous drug samples are identified.
- 12 There is one service provider currently operating in New Zealand. The provider is a non-government organisation focused on preventing and reducing drug-related harm.
- 13 The Ministry of Health considers drug checking an important element of any alcohol and drug harm reduction plan and strongly encourages all festival organisers to have a plan in place. As part of any plan, the Ministry advises clear messaging that use of illicit drugs is prohibited, is risky for reasons other than the law, and is discouraged.
- 14 Between April 2019 and March 2020, the provider tested 1368 samples, and found most were ‘as presumed’ (86 percent). When a sample was not as presumed, 52 percent of clients said they would not take the drug. Some of the detected drugs are highly dangerous, illustrating the potential for drug checking services to reduce drug harm.

- 15 In 2019, the Ministry of Health commissioned Victoria University of Wellington to complete a report on drug checking. I expect to publish their report in December 2020. Preliminary results show that more than 80 percent of surveyed users of drug checking services said that the service had increased their knowledge of drug harm reduction. Around 68 percent had changed their drug consumption behaviour, for example by taking less of a drug or not taking it at all.
- 16 There are limited exemptions to the prohibition on possession of controlled drugs in the Misuse of Drugs Act, none of which cover drug checking services. Individuals who conduct drug checking are therefore at risk of being charged with possession of a controlled drug if they handle drugs while testing them. There is also legal uncertainty about whether drug checking services can receive illicit drugs for disposal, destruction or further testing. Similar risks arise under the Psychoactive Substances Act 2013 if the substance being checked is an unapproved psychoactive substance.
- 17 Section 12 of the Misuse of Drugs Act 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 to take place are at risk of prosecution under section 12. In particular, promotion of drug checking services would constitute evidence of knowing drugs are being consumed at the premises. This means hosts are disincentivised from hosting a harm reduction initiative. There is no equivalent offence under the Psychoactive Substances Act.
- 18 The legal risks arising from section 12 create significant problems for drug checking services. When drug checking is provided at a festival venue, festival organisers do not inform attendees that drug checking is available. Due to legal risk, services are often provided outside, or before, the festival rather than at the festival itself.

Analysis

- 19 Without amendments to the Misuse of Drugs Act and the Psychoactive Substances Act, drug checking services and event organisers are at risk of prosecution and their ability to reduce drug harm is significantly constrained. This situation does not align with the Government's intent to treat drug use as a health rather than criminal issue.
- 20 It is not possible to develop and implement a regulatory system for drug checking services in time for the 2020/21 festival season, which begins in mid-December 2020. Without legal certainty, the services will continue to have challenges reaching people who use drugs at festivals and other events. This increases the risk of people taking drugs without being aware of the level of danger, potentially with fatal consequences.
- 21 Therefore I propose enabling the Director-General to appoint drug checking services by notice in the *Gazette*. The notice will include conditions to ensure that the services are high quality and delivered appropriately. This will ensure that services can be provided with legal certainty while options are developed for a broader scheme.

Drug checking services support informed decision making and help reduce harm

- 22 One of the risks associated with illicit drug use is the consumption of unknown and potentially dangerous drugs. Drug checking in New Zealand has detected drugs including N-ethylpentylone, a very dangerous synthetic cathinone which has resulted

in multiple hospitalisations. Pills which appear to contain very high doses of MDMA (the active ingredient in the drug ecstasy) have also been found. Medical personnel interviewed by Victoria University researchers said that the most serious non-alcohol drug incidents at festivals tend to arise from unknown or combined drugs. Both of these risks can be reduced through drug checking.

- 23 Drug checking services also provide a data collection point for New Zealand's drug early warning system, Drug Information and Alerts New Zealand. This alerts the public to especially dangerous drugs circulating in New Zealand. Drug Information and Alerts already works closely with the provider, sharing information and providing multiple media streams to get harm reduction messaging to the public.

Immediate legislative change is needed to maximise the harm reduction opportunities of drug checking activities

- 24 No prosecutions have been taken as a result of drug checking activities in New Zealand. However, there is a clear legal risk for drug checkers and their hosts which disincentivises providing the service and creates barriers to awareness and inclination to use the service.
- 25 To ensure that drug checking services can operate with legal certainty over the 2020/21 festival season, the Misuse of Drugs Act requires amendment to:
- 25.1 enable the Director-General to appoint drug checking services by notice in the *Gazette*
 - 25.2 define a "drug and substance checking service provider" as a person appointed as a drug and substance checking service provider by the Director-General of Health for the functions set out in the Bill
 - 25.3 allow possession of controlled drugs for drug checking, disposal and destruction purposes by drug checking service providers
 - 25.4 allow event organisers and other hosts to knowingly permit drug checking services to operate on their premises
 - 25.5 ensure that supply offences are not committed as part of drug checking services
 - 25.6 ensure that service users are not penalised for using the service, by making test results inadmissible in criminal cases against the service user, and preventing the collection of personal information about service users
 - 25.7 create a new offence of breaching the conditions of a drug checking service appointment without reasonable excuse, or operating an unappointed drug checking service.
- 26 The Bill states the that functions of drug checking service providers are to:
- 26.1 provide information and harm reduction advice to help members of the public make informed decisions about drug and psychoactive substance use

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- 26.2 test any sample of a drug or substance (which may be a controlled drug or psychoactive substance) that a member of the public presents for checking to ascertain the composition and likely identity of the drug or substance
 - 26.3 advise the member of the public who presented a sample of a drug or substance for testing the outcome of the testing
 - 26.4 arrange for a sample of a drug or substance to be tested by an approved laboratory
 - 26.5 dispose of any sample of a controlled drug or illegal substance used in testing
 - 26.6 dispose of, or arrange for the disposal of, any drug or substance surrendered by any member of the public for disposal.
- 27 In order to avoid unintended consequences, such as low-quality services operating, I propose services are appointed by the Director-General. Only services with a strong track record of harm reduction will be appointed.
- 28 I do not expect any expansion of drug checking services as a result of this proposal. There is currently only one drug checking service provider operating in New Zealand, and it is unlikely that others will be able to reach the required standards in the near future. While a new system is developed, this proposal will allow the existing service provider to operate with legal certainty, and better protect people from drug harm during the 2020/21 festival season.
- 29 Possession of illicit drugs will still be illegal. People may be reluctant to use drug checking services because this would indicate that they are committing a possession offence. This has some impact on current service provision. It is anticipated that enabling a legal service will increase willingness to approach the service.
- 30 Any broad exemption for service users may have unintended consequences, including increased inequity due to people consuming testable drugs having greater protection than people consuming untestable drugs. Police will continue to use discretion when deciding whether to prosecute people found in possession of illicit drugs, consistent with the health-based approach codified in the Misuse of Drugs Act in 2019.
- 31 The Psychoactive Substances Act will require amendment to allow drug checking service providers to possess unapproved psychoactive substances as necessary for their work.
- 32 The following amendments to the Misuse of Drugs Act and the Psychoactive Substances Act are proposed:

A provision allowing the Director-General of Health to appoint a drug checking service provider by notice in the Gazette

- 33 In order to enable drug checking services to go ahead with legal certainty over the summer of 2020/21, I propose that the Misuse of Drugs Act be amended to grant the Director-General a power to appoint a drug checking service provider by notice in the *Gazette*.

- 34 The Director-General will set conditions on appointment, which could include locations where a service may or may not operate, how the service may be promoted, and what will happen to samples and surrendered drugs.
- 35 There will be an associated offence of breaching the conditions of a drug checking service appointment without reasonable excuse, or operating an unappointed drug checking service. This will be a strict liability offence, with a penalty of \$5000.
- 36 The creation of a new offence reflects the significant risks which can arise from substandard drug checking services, in particular a false sense of confidence that a drug is safe to consume. Without a specific offence, unappointed service providers could be prosecuted for a possession offence, but this would not reflect the true nature of the offence or the risk the offence creates.

Provisions to permit, or provide an exemption, for appointed drug checking services to operate (to cover service providers, service users and hosts)

- 37 The Misuse of Drugs Act and the Psychoactive Substances Act will be amended to allow appointed drug checking services to operate. Service providers will be allowed to possess controlled drugs and unapproved psychoactive substances in the course of carrying out drug checking services. They will also be able to receive drugs for disposal or destruction, return drugs which have been supplied for testing, and to supply drugs to an approved laboratory for further testing. Service provider employees and volunteers will be protected from liability unless it can be shown that they acted in bad faith or without reasonable care.
- 38 Two amendments will help ensure that service users are not penalised for using the service. The Misuse of Drugs Act will be amended to prevent drug checking service providers from collecting, maintaining, using or disclosing any personal information relating to service users. In addition, results of tests carried out by service providers will not be admissible as evidence in any criminal prosecution against the individual who provided the sample for testing.
- 39 The Misuse of Drugs Act will be amended to protect hosts from prosecutions based on the presence of drug checking services.

Longer term legislative change

- 40 The proposed policy is a short-term measure designed to allow drug checking services to operate with legal certainty over the coming summer (2020/21). The amendments are expected to be in effect for up to 12 months after commencement, at which point the Bill will be repealed.
- 41 In the longer term, officials will develop options for regulating drug checking services. This will ensure that services are able to operate with legal certainty, while preventing the emergence of low-quality services. Officials will take into account lessons learnt from the operation of drug checking services this summer.
- 42 This work will take place in the context of broader work on increasing the health focus of the response to drug harm. I plan to review the effects of recent amendments

to the Misuse of Drugs Act, including enabling Police discretion on prosecution decisions to reflect a health-based approach.

- 43 The report on drug checking services completed by Victoria University of Wellington will inform longer term proposals.
- 44 I will return to Cabinet in early 2021 with further proposals. I intend to implement a new system for regulating drug checking in time for the 2021/22 festival season.

Drug samples can be used to better understand drug trends

- 45 Due to the current legal constraints, the provider disposes of most drug samples. Some samples are passed on to the Institute of Environmental Science and Research (ESR) for further testing. However there is legal uncertainty around this, which prevents more frequent further testing.
- 46 I propose amending the Misuse of Drugs Act and the Psychoactive Substances Act to allow drug checking services to provide samples to an approved laboratory to inform drug harm reduction initiatives such as Drug Information and Alerts.
- 47 Currently, ESR obtains drug samples for analysis from a range of sources including Police and Customs seizures, blood samples from emergency departments, and waste-water testing. The ability to analyse substances that drug checking services could not identify, and to undertake quantitative analysis of any preserved samples, will be a significant expansion to the evidence base.

Operational issues for law enforcement

- 48 Officials considered creating a bespoke exception for drug possession while participating in a drug checking service. I do not recommend proceeding with this because of the difficulty in drafting a sufficiently limited exception, and the risk of people attempting to misuse any such exception. There is also potential that an exception of this kind could increase inequity. This is because an exception to the possession offence would be limited to people possessing testable drugs at those events hosting a drug checking service. Those with untestable, but potentially less harmful, drugs would not qualify.
- 49 Police note the potential for drug checking services to reduce harm for people who use illicit drugs, and the alignment with Police's Prevention First operating model and health-based approach to personal drug use and possession. Police operational guidance will be updated to reflect the amended legislation.
- 50 For drug dealers, drug checking services could make identifying potential buyers easier. There is a risk that areas around drug checking services could become dealing hotspots. It will be important to ensure that Police retain the ability to undertake enforcement activities at festivals and other places where drug dealing may occur. This is consistent with Police's focus on disrupting drug supply.

Te Tiriti o Waitangi implications

- 51 The Crown has a duty under Te Tiriti o Waitangi to actively protect Māori communities and Māori health. This policy will help to protect the health of Māori who use illicit drugs, by enabling them to make informed decisions about drug use.
- 52 This policy will enable Māori organisations to host drug checking services if they choose to do so, in keeping with Tiriti principles of autonomy and options.
- 53 It is not expected that the operators of drug checking services will expose Māori who use illicit drugs to prosecution. Results of tests conducted by the services will be inadmissible as evidence, and the services will not be allowed to collect personal information on service users.
- 54 When relying on Police discretion a risk persists, especially for Māori, of inequitable enforcement of drug possession offences. Therefore, it will be important to closely monitor any trends in enforcement to inform longer term policy changes in this area.

Financial Implications

- 55 There will be a small cost to the Ministry of Health for appointing drug checking services. The expectation is that the number of services seeking appointment will be very low and administration costs will be met within baselines.
- 56 This proposal does not include any funding for drug checking service providers.

Legislative Implications

- 57 The proposals require an omnibus bill to amend the Misuse of Drugs Act 1975 and the Psychoactive Substances Act 2013. In order to allow drug checking services to operate with legal certainty over the summer of 2020/21, the Attorney-General has authorised Parliamentary Counsel Office to draft the attached Bill.
- 58 s 9(2)(h) [REDACTED] I intend to pass all stages of this Bill under urgency.
- 59 The Bill will be repealed after twelve months. Amendments to enable to longer term regulatory system for drug checking services will be required in 2021.

Impact Analysis

Regulatory Impact Statement

- 60 The Treasury Regulatory Quality Team determined, s 9(2)(g)(i) [REDACTED] that the decisions sought are not subject to the Regulatory Impact Analysis requirements on the basis that they will have no or minor impacts on businesses, individuals or not-for-profits. s 9(2)(g)(i) [REDACTED]

Climate Implications of Policy Assessment

- 61 This policy has no climate implications.

Population Implications

- 62 The population impacted by this policy is people who use illicit drugs. Within that population, the impact is limited to people who use drugs which can be tested using current technologies. These are primarily drugs which are available in pill or powder form. Organic or partially organic drugs such as cannabis and most forms of synthetic cannabinoids cannot currently be tested in the field.
- 63 Until recently drug and substance checking has mostly taken place in association with music festivals. Due to the high cost of festival tickets, this has made drug checking inaccessible to many people who use drugs, particularly groups likely to suffer from economic deprivation.
- 64 Demographic information about drug checking clients is not available, as the provider does not collect personal information about clients other than age group.
- 65 Māori are more likely than other New Zealanders to experience harm from illicit drugs, including mental and physical health problems. This policy will help prevent some of the harms associated with drug use, and enable better communication of harm reduction messages.
- 66 Rainbow communities (gay, lesbian, and transgender people and other sexual and gender minority groups) have higher rates of illicit drug use than the total population. Enabling drug checking will help to reduce harms from this drug use, particularly if rainbow events and venues choose to host drug checking services.

Compliance

Human Rights

- 67 This proposal complies with the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.

Principles of te Tiriti o Waitangi

- 68 This proposal is compliant with the principles of te Tiriti o Waitangi.

Disclosure statement requirements

- 69 A disclosure statement has been prepared and is attached to this paper.

Privacy Act

- 70 This proposal has no Privacy Act 2020 implications, as drug checking services will be barred from collecting personal information about service users.

Relevant international standards and obligations

- 71 New Zealand is a signatory to the United Nations Drug Conventions. The Conventions require states to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. While the Conventions do not directly address drug checking, the International Narcotics Control Board (INCB) and the UN Office of Drugs and Crime (UNODC) have, at times, expressed doubt over whether drug checking is consistent with states' obligations under the Drug Conventions.
- 72 Legal advisers note that the INCB and UNODC's interpretation of the Conventions are not binding or determinative and consider that there are good arguments that drug checking is not prohibited by the Drug Conventions. At least 18 countries have permitted drug checking services without any legal sanction and it is clearly arguable that drug checking services are permitted within the "medical and scientific purposes" exception of the Drugs Conventions.

Legislation guidelines

- 73 This Bill complies with Legislation Guidelines.

Consultation

- 74 The Prime Minister's Office, the Minister of Justice, the Associate Minister of Justice, The Minister of Police, Associate Ministers' of Health, Police, Ministry of Justice, the Ministry of Foreign Affairs and Trade and Parliamentary Counsel Office have been consulted on this paper.

Binding on the Crown

- 75 This Bill will be binding on the Crown.

Allocation of decision making powers

- 76 The Bill allocates the power to the Director-General of Health to appoint drug checking service providers by notice in the *Gazette*.

Commencement

- 77 This Bill will commence the day after it receives Royal Assent.

Communications

- 78 There is significant media interest in drug use and drug harm, and this is likely to continue. The Ministry of Health and my office will manage media statements and queries around drug checking services. The Ministry of Justice and Police may also be called upon to contribute.

Proactive Release

- 79 I intend to proactively release this paper in accordance with Cabinet Office Circular CO(18)4.

Recommendations

I recommend that the Committee:

- 1 **note** that drug checking is an effective harm reduction tool and can save lives;
- 2 **note** that initial findings of a Ministry of Health commissioned research report have been considered in developing proposals for this paper and the full report will be released in December 2020;
- 3 **note** that neither the Misuse of Drugs Act 1975 nor the Psychoactive Substances Act 2013 permits drug checking services to operate legally;
- 4 **agree** to amend the Misuse of Drugs Act to:
 - 4.1 enable the Director-General to appoint drug checking services by notice in the *Gazette*
 - 4.2 define a “drug and substance checking service provider” as a person appointed as a drug and substance checking service provider by the Director-General of Health for the functions set out in the Bill
 - 4.3 allow possession of controlled drugs for drug checking, disposal and destruction purposes by drug checking service providers
 - 4.4 allow event organisers and other hosts to knowingly permit drug checking services to operate on their premises
 - 4.5 ensure that supply offences are not committed as part of drug checking services
 - 4.6 ensure that service users are not penalised for using the service, by making test results inadmissible in criminal cases against the service user, and preventing the collection of personal information about service users
 - 4.7 create a new offence of breaching the conditions of a drug checking service appointment without reasonable excuse, or operating an unappointed drug checking service.
- 5 **agree** to amend the Psychoactive Substances Act to protect drug checking services from prosecution relating to unapproved psychoactive substances;
- 6 **note** the Bill is narrow in scope and time limited to twelve months, at which time the Bill will be repealed;
- 7 **note** when considering *Gazette* notices, the Director-General of Health must ensure that the service provider align their drug testing services within the scope of Cabinet’s expectation that this proposal will focus on protecting people at festivals during the 2020/21 season;
- 8 **direct** the Minister of Health to return to Cabinet in early 2021 with long term proposals for drug checking services;

- 9 s 9(2)(g)(i) [REDACTED]
[REDACTED]
- 10 **approve** the Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 11 **agree** that the Bill be introduced on 1 December 2020;
- 12 **agree** that the government propose that the Bill be progressed under urgency without a Select Committee process.

Authorised for lodgement

Hon Andrew Little

Minister of Health



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Facilitating Drug Checking Services

Portfolio Health

On 30 November 2020, Cabinet:

- 1 **noted** that drug checking is an effective harm reduction tool and can save lives;
- 2 **noted** that initial findings of a Ministry of Health commissioned research report have been considered in developing the proposals set out below and the full report will be released in December 2020;
- 3 **noted** that neither the Misuse of Drugs Act 1975 nor the Psychoactive Substances Act 2013 permits drug checking services to operate legally;
- 4 **agreed** to amend the Misuse of Drugs Act to:
 - 4.1 enable the Director-General to appoint drug checking services by notice in the Gazette;
 - 4.2 define a “drug and substance checking service provider” as a person appointed as a drug and substance checking service provider by the Director-General of Health for the functions set out in the Bill;
 - 4.3 allow possession of controlled drugs for drug checking, disposal and destruction purposes by drug checking service providers;
 - 4.4 allow event organisers and other hosts to knowingly permit drug checking services to operate on their premises;
 - 4.5 ensure that supply offences are not committed as part of drug checking services;
 - 4.6 ensure that service users are not penalised for using the service, by making test results inadmissible in criminal cases against the service user, and preventing the collection of personal information about service users;
 - 4.7 create a new offence of breaching the conditions of a drug checking service appointment without reasonable excuse, or operating an unappointed drug checking service;
- 5 **agreed** to amend the Psychoactive Substances Act to protect drug checking services from prosecution relating to unapproved psychoactive substances;

- 6 **noted** that the Drug and Substance Checking Legislation Bill (the Bill) is narrow in scope and time limited to twelve months, at which time the Bill will be repealed;
- 7 **noted** that when considering Gazette notices, the Director-General of Health must ensure that the service provider align their drug testing services within the scope of Cabinet's expectation that this proposal will focus on protecting people at festivals during the 2020/21 season;
- 8 **invited** the Minister of Health to report to Cabinet in early 2021 with long term proposals for drug checking services;
- 9 s 9(2)(h) [REDACTED]
- 10 **approved** for introduction the Drug and Substance Checking Legislation Bill [PCO 23333/7.0], subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 11 **agreed** that the Bill be introduced on 1 December 2020;
- 12 **agreed** that the government propose that the Bill be progressed under urgency without reference to a select committee.

Michael Webster
Secretary of the Cabinet