

# Departmental Disclosure Statement

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Misuse of Drugs Amendment Bill
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by John Doyle, Group Manager, System Strategy and Policy.

The Ministry of Health certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

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## Part One: General Policy Statement

The Bill is the Misuse of Drugs Amendment Bill. It amends the Misuse of Drugs Act 1975. The Bill will:

- classify AMB-FUBINACA and 5F-ADB as Class A drugs
- affirm the existing discretion not to prosecute for possession and use (for all drugs) and specify that when considering whether a prosecution would meet the public interest requirement, consideration is given to whether a health-centred or a therapeutic approach would be more beneficial
- enable temporary drug class orders to be issued for emerging and potentially harmful substances.

The use of synthetic drugs is a major public health problem. Since June 2017, there has been a total of 50-55 deaths provisionally linked to the use of two dangerous synthetic drugs 5F-ADB, and AMB-FUBINACA.

These measures are introduced to address the harm being caused by synthetic (and other) drugs by ensuring that legislation is focussed on those who import, manufacture and supply the drugs and not those who use them. Addressing drug-related harm requires a health-based response, rather than a punitive one, so that people can access the health and social support services they need.

The Bill reaffirms the existing Police discretion and specifies that when considering whether a prosecution is required in the public interest for drug possession and use, consideration should be given to whether a therapeutic approach would be more beneficial. This discretion exists for all drug offences.

Enabling temporary drug class orders to be made by the Minister of Health provides for the immediate classification of substances to be treated as Class C1 controlled drugs under the Act. This allows for a quick response to a rapidly adapting synthetic drug market and ensure the continued disruption of the supply of new synthetic drugs.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
<p><i>National Drug Policy 2015 to 2020</i>, Ministry of Health, August 2015, accessed at <a href="https://www.health.govt.nz/system/files/documents/publications/national-drug-policy-2015-2020-aug15.pdf">https://www.health.govt.nz/system/files/documents/publications/national-drug-policy-2015-2020-aug15.pdf</a></p> <p><i>He Ara Oranga : Report of the Government Inquiry into Mental Health and Addiction</i>, Inquiry into Mental Health and Addiction, November 2018, accessed at <a href="https://mentalhealth.inquiry.govt.nz/inquiry-report/he-ara-oranga/">https://mentalhealth.inquiry.govt.nz/inquiry-report/he-ara-oranga/</a></p> <p><i>Review of the Psychoactive Substances Act 2013</i>, Ministry of Health, December 2018, accessed at <a href="https://www.health.govt.nz/publication/review-psychoactive-substances-act-2013">https://www.health.govt.nz/publication/review-psychoactive-substances-act-2013</a>.</p> <p><i>AB-FUBINACA and AMB FUBINACA: Report to the Expert Advisory Committee on Drugs</i>. Ministry of Health, April 2018, accessed at <a href="https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees">https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees</a></p> <p><i>Minutes 33<sup>rd</sup> Expert Advisory Committee on Drugs meeting</i>, Ministry of Health, April 2018, accessed at <a href="https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees">https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees</a></p> <p><i>Synthetic cannabinoids: Report prepared for the Expert Advisory Committee on Drugs</i>, Ministry of Health, April 2018, accessed at <a href="https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees">https://www.health.govt.nz/new-zealand-health-system/key-health-sector-organisations-and-people/ministerial-health-committees/national-drug-policy-committees</a></p>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>n/a</b>

## Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<i>Impact Summary: Synthetic Drugs Response</i> , Ministry of Health. Paper will be available at <a href="https://www.health.govt.nz/our-work/regulation-health-and-disability-system/psychoactive-substances-regulation/synthetic-cannabis">https://www.health.govt.nz/our-work/regulation-health-and-disability-system/psychoactive-substances-regulation/synthetic-cannabis</a> .	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>YES</b>
<p><i>Impact Summary: Synthetic Drugs Response, Quality Assurance Statement</i>, provided on 28 November 2018.</p> <p>A Quality Assurance Panel with representatives from the Ministry of Health and the Treasury Regulatory Quality Team has reviewed the Regulatory Impact Assessment (RIA) “Synthetic Drugs Response” produced by the Ministry of Health and dated October 2018. The panel considers that it does not meet the Quality Assurance criteria.</p> <p>The Panel and Treasury’s Vote team support funding for the health and education initiatives in the non-regulatory option.</p> <p>The Panel considers, however, that the RIA does not provide sufficient information for Ministers to make an informed decision about the regulatory proposals.</p> <p>The Panel notes the Ministry’s view that the two drugs 5F-ADB and AMB-FUBINACA are of particular concern. However, even if it is accepted that these two drugs should be dealt with now, the same urgency does not yet exist for other potential future drugs. The RIA should give greater consideration to this, particularly to any proposal that allows future drug reclassification with less public and Parliamentary scrutiny than currently.</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>

## Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
The issues raised in the quality assurance statement will be addressed through the broader drug policy work programme.	

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>YES</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
An initial analysis is provided below, and further detail is in the Impact Assessment.	

### **Reclassification of synthetic cannabinoids**

The proposed change will classify the synthetic cannabinoids 5F-ADB and AMB-FUBINACA as Class A drugs. The Expert Advisory Committee on Drugs (EACD) recommended that 5F-ADB and AMB-FUBINACA be Class A drugs because of the risk of harm they pose.

#### *Benefits*

Classifying these two synthetic cannabinoids as Class A under the Misuse of Drugs Act gives the Police and Customs greater search and seizure powers. This increases the Police and customs' ability to disrupt supply and reduce the availability of these dangerous drugs.

#### *Costs*

Classifying 5F-ADB and AMB-FUBINACA as Class A drugs and defining an amount for presumption of supply means there are offences and penalties for import, manufacture, supply, as well as for possession and use. This does not align with the goal of taking a health-based approach to personal possession and use that does not criminalise users.

### **Reinforce and specify Police powers of discretion**

The Bill affirms the existing Police discretion and specifies that when considering whether a prosecution is required in the public interest for drug possession and use, consideration should be given to whether a therapeutic approach would be more beneficial. This discretion exists for all drug offences.

This provision would apply to all controlled drugs under the Act, not only the two synthetic cannabinoids.

#### *Benefits*

This approach will better enable people to easily access the health and social support services they need without fear of a punitive response.

#### *Costs*

This approach may raise issues around the disproportionate impact of the criminal justice system on Maori. Police have been making progressive steps towards enhancing the organisation's awareness of unconscious biases, and to focus decision making on getting the best outcome in each circumstance. In particular, Police has ensured that recruit training has a focus on equitable and unbiased decision making.

### **Temporary classification measures**

These provisions in the Bill provide for the immediate control of substances under the Act, with the same penalties as for class C controlled drugs, except that personal possession or use is not to be an offence.

#### *Benefits*

Currently, new, and potentially harmful, products are rapidly produced, and current classification processes (which occur via legislative amendment) are unable to keep pace. Unless classified, these products will not be subject to the search and enforcement measures available under the Act. Having a means to quickly and appropriately classify emerging products, and use the associated controls, will allow for a quick response to a rapidly adapting synthetic drug market, and ensure the continued disruption of the supply of new synthetic drugs.

#### *Costs*

The temporary classification measure will have impacts on suppliers and users of those substances, as it will create greater offence and penalty provisions for its supply, possession and use, without full scrutiny of the evidence that it merits classification as a controlled drug.

However, these substances will be required to undergo the full classification process within 12 months, including consultation and consideration by Select Committee.

None of the provisions in the Bill would cause business or individuals to suffer a substantial or unavoidable loss of income or wealth.

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>YES</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>YES</b>
<p>The costs and benefits are impacted by the level of Government compliance. However as Police and other central agencies are enforcing the proposals, the level of compliance expected is high.</p> <p>The costs and benefits will be impacted by whether the temporary drug classification mechanism is used, and how consistently the discretion policy is applied. Police policy already supports the use of discretion, but a Police Practice Guide could be developed on how best to apply discretion for particular offences. The Ministry of Health will monitor data on prosecutions.</p>	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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The provisions of the Bill are consistent with New Zealand's international obligations under the United Nations Drug Conventions.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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Maori are disproportionately represented in synthetic cannabis deaths investigated by the Coroner, and disproportionately impacted by cannabis possession and use prosecutions.
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Reinforcing Police powers of discretion may raise issues around the disproportionate impact of the criminal justice system on Maori.
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Police have been making progressive steps toward enhancing the organisation's awareness of unconscious biases and to focus decision making on getting the best outcome in each circumstance. In particular, Police has invested in training staff regarding custody and ensuring that recruit training has a focus on equitable and unbiased decision making. The Police Commissioner's Maori Focus Forum, comprises senior Maori leaders from throughout Aotearoa who meet quarterly to discuss issues of mutual interest, and provide advice and guidance on policing strategy. Similarly, the 12 Police Districts have Maori Advisory Boards that enable iwi representatives to work with Police District Leadership Teams.
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### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>
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<b>NO</b>
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### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>
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<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>
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<b>NO</b>
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YES. The Bill amends section 7 of the principal Act, which contains the offences of possession and use of controlled drugs. It affirms the existing discretion not to prosecute for possession and use (for all drugs) and specifies that when considering whether a prosecution would meet the public interest requirements, consideration is given to whether a health-centred or therapeutic approach would be more beneficial.
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<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
The Ministry of Justice was consulted on these provisions as part of the consultation on the <i>Cabinet paper: Synthetic Drugs Response</i> .	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>NO</b>

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>The following departments and agencies have been consulted on the policy proposals for the Misuse of Drugs Amendment Bill: DPMC (Policy Advisory Group), Parliamentary Counsel Office, NZ Police, Ministry of Justice, Customs, Te Puni Kokiri, Treasury.</p> <p>NZ First and the Green Party were consulted on the policy proposals for the Misuse of Drugs Amendment Bill.</p> <p>The Ministry of Justice, Customs and NZ Police have been consulted on the Misuse of Drugs Amendment Bill.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p>The workability of the proposals was tested with other agencies as part of the development of the Bill.</p> <p>The Ministry will continue to work with Police.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>NO</b>

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>NO</b>

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>YES</b>
Clause 6 of the Bill amends section 7 of the principal Act, which contains the offences of possession and use of controlled drugs. This clause inserts new subsections (5) and (6) into section 7. It affirms the existing discretion not to prosecute (for all drugs) and specifies that when considering whether a prosecution would meet the public interest requirement, consideration is given to whether a health-centred or therapeutic approach would be beneficial.	

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>NO</b>

### Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>Section 4C enables the Minister to make temporary class drug orders. An order cannot be made in respect of anything that is already a Class A controlled drug, a Class B controlled drug, a Class C controlled drug (other than a controlled drug analogue), or a precursor substance.</p> <p>A temporary drug class order will provide for immediate control of substances as if it were scheduled under the Act.</p> <p>Any response to synthetic products needs to incorporate a means to quickly and appropriately classify emerging products so they come within new proposed controls. New, and potentially harmful, products are rapidly produced and current classification processes (which occur via legislative amendment) are unable to keep pace. Unless classified, these products will not be subject to whichever new search or enforcement measures are proposed. Without the ability to classify these new substances, any solution will therefore be unsustainable.</p>	

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
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