GENERAL NOTICES • ALGEMENE KENNISGEWINGS

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

NOTICE 1196 OF 2022

PUBLICATION OF EXPLANATORY SUMMARY OF THE DRUGS AND DRUG TRAFFICKING AMENDMENT BILL, 2022

1. Notice is hereby given in terms of Rule 276(1)(b) of the Rules of the National Assembly that the Minister of Justice and Correctional Services intends to introduce the Drugs and Drug Trafficking Amendment Bill, 2022 (the Bill), in the National Assembly shortly.

2. The explanatory summary of the Bill is hereby published in accordance with Rule 276(1)(c) of the Rules of the National Assembly.

3.1 The Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992) (the Act), criminalises the manufacturing and supplying of any substance included in Schedule 1 to the Act; and the use, possession and dealing in any drug included in Schedule 2 to the Act. In terms of section 63 of the Act, the Cabinet member responsible for the administration of justice (the Minister) may, by notice in the *Gazette*, amend Schedules 1 and 2 to the Act. The Minister has in terms of section 63 of the Act, by means of Government Notices No. R. 1765 of 1 November 1996; No. R. 344 of 13 March 1998; No. R. 760 of 11 June 1999; No. R. 521 of 15 June 2001; No. R. 880 of 8 October 2010; and No. R. 222 of 28 March 2014, effected amendments to the Schedules to the Act.

3.2 In ***Jason Smit v Minister of Justice and Constitutional Development and Others*** [2020] ZACC 29, the Constitutional Court held that -

(a) section 63 of the Act, to the extent that it purports to delegate plenary legislative power to the Minister to amend the Schedules to the Act, is inconsistent with the Constitution and therefore invalid; and

(b) the amendments (see paragraph 3.1 above) that have been effected in terms of section 63 to the Schedules to the Act, are invalid.

The Constitutional Court suspended the orders of invalidity for a period of 24 months to give Parliament an opportunity to cure the defect.

3.3 The Bill seeks to:

(a) Repeal section 63 of the Act;

(b) substitute Schedules 1 and 2 to the Act to effect the amendments referred to in paragraph 3.1 above, thereto; and

(c) provide for matters connected therewith.

4. A copy of the Bill can be found on the websites of the Parliamentary Monitoring Group at http://www.pmg.org.za and the Department of Justice and Constitutional Development at www.justice.gov.za and, after introduction, may also be obtained from the Government Printers: Cape Town (Telephone number: (021) 465-7531).

DEPARTEMENT VAN JUSTISIE EN STAATKUNDIGE ONTWIKKELING

KENNISGEWING 1196 VAN 2022

PUBLIKASIE VAN VERDUIDELIKENDE OPSOMMING VAN DIE WYSIGINGSWETSONTWERP OP DWELMMIDDELS EN DWELMSMOKKELARY, 2022

1. Kragtens Reël 276(1)(b) van die Reëls van die Nasionale Vergadering word hiermee kennis gegee dat die Minister van Justisie en Korrektiewe Dienste beoog om die Wysigingswetsontwerp op Dwelmmiddels en Dwelmsmokkelary, 2022 (die Wetsontwerp), eersdaags in die Nasionale Vergadering in te dien.

2. Die verduidelikende opsomming van die Wetsontwerp word hierby ooreenkomstig Reël 276(1)(c) van die Reëls van die Nasionale Vergadering gepubliseer.

3.1 Die Wet op Dwelmmiddels en Dwelmsmokkelary, 1992 (Wet No. 140 van 1992) (die Wet) kriminaliseer die vervaardiging en verskaffing van enige stof in Bylae 1 tot die Wet gemeld; en die gebruik, besit en handeldryf in enige dwelmmiddel in Bylae 2 tot die Wet gemeld. Ingevolge artikel 63 van die Wet kan die lid van die Kabinet verantwoordelik vir die regspleging (die Minister) by kennisgewing in die *Staatskoerant* Bylaes 1 en 2 tot die Wet wysig. Die Minister het ingevolge artikel 63 van die Wet, by wyse van Goewermentskennisgewings No. R. 1765 van 1 November 1996; No. R. 344 van 13 Maart 1998; No. R. 760 van 11 Junie 1999; No. R. 521 van 15 Junie 2001; No. R. 880 van 8 Oktober 2010; en No. R. 222 van 28 Maart 2014, die Bylaes tot die Wet gewysig.

3.2 Die Konstitusionele Hof het in ***Jason Smit v Minister of Justice and Constitutional Development and Others*** [2020] ZACC beslis dat -

(a) artikel 63 van die Wet, tot die mate dat dit voorgee om volledige wetgewende gesag aan die Minister te delegeer om die Bylaes tot die Wet te wysig, onbestaanbaar is met die Grondwet en derhalwe ongeldig is; en
(b) die wysigings (sien paragraaf 3.1 hierbo) wat kragtens artikel 63 aan die Bylaes tot die Wet gemaak is, ongeldig is.

Die Konstitusionele Hof het die bevele van ongeldigheidsverklaring vir 'n tydperk van 24 maande opgeskort ten einde Parlement die geleentheid te bied om die gebrek reg te stel.

3.3 Die Wetsontwerp beoog om:

(a) Artikel 63 van die Wet te herroep;
(b) Bylaes 1 en 2 tot die Wet te vervang ten einde die wysigings in paragraaf 3.1 hierbo na verwys, daartoe aan te bring; en
(c) om voorsiening te maak vir aangeleenthede wat daarmee in verband staan.

4. ’n Afskrif van die Wetsontwerp kan op die webtuistes van die Parlementêre Moniteringsgroep by http://www.pmg.org.za en die Departement van Justisie en Staatkundige Ontwikkeling by www.justice.gov.za gevind word en, na indiening, ook verkry word van die Staatsdrukkers: Kaapstad (Telefoonnommer: (021) 465-7531).

REPUBLIC OF SOUTH AFRICA

DRUGS AND DRUG TRAFFICKING AMENDMENT BILL

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(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 47193 of 4 August 2022)
(The English text is the official text of the Bill)

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B —2022]

GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments
_____	Words underlined with a solid line indicate insertions in existing enactments

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BILL

To amend the Drugs and Drug Trafficking Act, 1992 so as to—

* **repeal the Minister's delegated plenary legislative powers to amend Schedules 1 and 2;**
* **amend Schedule 1 and Schedule 2; and**
* **provide for matters connected therewith.**

PARLIAMENT of the Republic of South Africa enacts as follows:—

Repeal of section 63 of Act 140 of 1992

1. Section 63 of the Drugs and Drug Trafficking Act, 1992 (hereinafter referred to as "the principal Act"), is hereby repealed.

Substitution of Schedules 1 and 2 to Act 140 of 1992

2. The following Schedules are hereby substituted for Schedules 1 and 2 to the principal Act, respectively:

"Schedule 1

SCHEDULED SUBSTANCES

SUBSTANCES USEFUL FOR THE MANUFACTURE OF DRUGS

PART I

1. The following substances, namely—

N-Acetylanthranilic acid.

Ephedrine.

Ergometrine.

Ergotamine.

Isosafrole.

Lysergic acid.

3,4-Methylenedioxyphenyl-2-propanone.

Norephedrine, including its optical isomers.

1-phenyl-2-propanone.

Piperonal.

Pseudoephedrine.

Safrole.

2. The salts of all substances included in this Part, where the existence of such salts is possible.

PART II

1. The following substances, namely—

Acetic anhydride.

Acetone.

Anthranilic acid.

Ethyl ether.

Hydrochloric acid.

Methyl ethyl ketone.

Ortho-toluidine.

Phenylacetic acid.

Piperidine.

Potassium permanganate.

Sulphuric acid.

Toluene.

2. The salts of all substances included in this Part, except hydrochloric acid and sulphuric acid, where the existence of such salts is possible.

Schedule 2

PART I
DEPENDENCE-PRODUCING SUBSTANCES

1. The following substances, namely—

Amobarbital, cyclobarbital and pentobarbital, except preparations and mixtures containing not more than 30 milligrams per minimum recommended or prescribed dose when intended for continued use in asthma, or containing not more than 50 milligrams per minimum recommended or prescribed dose when intended for continued use in epilepsy.

Buprenorphine.

Butalbital.

Cathine ((+) - norpseudoephedrine), except preparations and mixtures containing 50 milligrams or less of cathine per dosage unit.

Chlorphentermine.

Diethylpropion (amfepramone).

Flunitrazepam.

Gluthethimide.

Meptazinol.

Pentazocine.

[Tiletamine]

2. Unless expressly excluded, all substances included in this Part include the following:

(a) The salts and esters of the specified substances, where the existence of such salts and esters is possible; **[and]**

(b) all preparations and mixtures of the specified substances; and

(c) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is

similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.

PART II

DANGEROUS DEPENDENCE-PRODUCING SUBSTANCES

1. The following substances or plants, namely—

Acetorphine.

Acetyldihydrocodeine, except preparations and mixtures containing not more than 20 milligrams of acetyldihydrocodeine per recommended or prescribed dose.

Acetylmethadol.

Alfentanil.

Allylprodine.

Alphacetylmethadol.

Alphameprodine.

Alphamethadol.

Alphaprodine.

Anileridine.

Benzethidine.

Benzphetamine.

Benzylmorphine.

Betacetylmethadol.

Betameprodine.

Betamethadol.

Betaprodine.

Bezitramide.

Butorphanol.

Chlorodyne (Chloroform and Morphine Tincture BP 1980) or any preparation or mixture thereof described as chlorodyne, except preparations and mixtures containing not more than 5,0 per cent of chlorodyne in combination with other active medicinal substances.

Clonitazene.

Coca leaf and any salt, compound, derivative or preparation of coca leaf, and any salt, compound, derivative or preparation thereof that is chemically equivalent or identical to any of these substances, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis, except decocainized coca leaf and extractions of coca leaf where such extractions contain no cocaine or ecgonine.

Codeine (methylmorphine), except preparations and mixtures containing not more than 20 milligrams of codeine per recommended or prescribed dose.

Codoxime.

Desomorphine.

Dextromoramide.

Dextropropoxyphene, except preparations and mixtures for oral use containing not more than 135 milligrams dextropropoxyphene, calculated as the base, per dosage unit, or with a concentration of not more than 2,5 per cent in undivided preparations.

Diampromide.

Diethylthiambutene.

Difenoxin (or diphenoxylic acid), except mixtures containing, per dosage unit, not more than 0,5 milligrams of difenoxin, calculated as the base, and a quantity of atropine sulphate equal to at least 5,0 per cent of the quantity of difenoxin, calculated as the base, which is present in the mixture.

Dihydrocodeine, except preparations and mixtures containing not more than 20 milligrams of dihydrocodeine per recommended or prescribed dose.

Dihydroetorphine.

Dihydromorphine.

Dimenoxadol.

Dimepheptanol.

Dimethylthiambutene.

Dioxaphetylbutyrate.

Diphenoxylate, except preparations containing not more than 2,5 milligrams of diphenoxylate, calculated as the base, and not less than 25 micrograms of atropine sulphate per dosage unit.

Dipipanone.

Dronabinol [(-)-transdelta-9-tetrahydrocannabinol].

Drotebanol.

Ecgonine and the esters and derivatives thereof which are convertible to ecgonine and cocaine.

Ethylmethylthiambutene.

Ethylmorphine, except preparations and mixtures containing not more than 20 milligrams of ethylmorphine per recommended or prescribed dose.

Etonitazene.

[Etorphine.]

Etorphine and analogues.

Etoxeridine.

Fenproporex.

Fentanyl.

Furethidine.

Hydrocodone (dihydrocodeinone).

Hydromorphinol (14-hydroxydihydromorphine).

Hydromorphone (dihydromorphinone).

Hydroxypethidine.

Isomethadone.

Ketobemidone.

Levomoramide.

Levophenacylmorphan.

Levorphanol.

Mecloqualone.

Mefenorex.

Metazocine.

Methadone.

Methadone-intermediate.

Methorphan, including levomethorphan and racemethorphan, but excluding dextromethorphan.

Methyldesorphine.

Methyldihydromorphine.

Methylphenidate and the derivatives thereof.

Metopon.

Moramide-intermediate.

Morpheridine.

Morphine, except preparations and mixtures of morphine containing not more than 0,2 per cent of morphine, calculated as anhydrous morphine.

Morphine methobromide and other pentavalent nitrogen morphine derivatives.

Morphine-N-oxide and the derivatives thereof.

Myrophine (myristylbenzylmorphine).

Nicocodine.

Nicodicodine.

Nicomorphine.

Noracymethadol.

Norcodeine, except preparations and mixtures containing not more than 20 milligrams norcodeine per recommended or prescribed dose.

Norlevorphanol.

Normethadone.

Normorphine (demethylmorphine or N-demethylated morphine).

Norpipanone.

Opium and opiates and any salt, compound, derivative or preparation of opium or opiates, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis, except mixtures containing not more than 0,2 per cent of morphine, calculated as anhydrous morphine.

Opium-poppy and poppy straw, whether obtained directly or indirectly by extraction from material or substances obtained from plants, or whether obtained independently by chemical synthesis, or by a combination of extraction and chemical synthesis.

Oxycodone (14-hydroxydihydrocodeinone or dihydrohydroxycodeinone).

Oxymorphone (14-hydroxydihydromorphinone or dihydrohydroxymorphinone).

Pethidine, pethidine-intermediate A, pethidine-intermediate B and pethidine-intermediate C.

Phenadoxone.

Phenampromide.

Phenazocine.

Phendimetrazine.

Phenomorphan.

Phenoperidine.

Pholcodine, except preparations and mixtures containing not more than 20 milligrams of pholcodine per recommended or prescribed dose.

Piminodine.

Piritramide.

Proheptazine.

Properidine.

Propiram.

Racemoramide.

Racemorphan.

Remifentanil.

Secobarbital.

Sufentanil.

Thebacon.

Thebaine.

Tilidine.

Trimeperidine.

Zipeprol.

2. Unless expressly excluded, all substances or plants included in this Part include the following:

(a) The isomers of the specified substances or plants, where the existence of such isomers is possible;

(b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph *(a)*, as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;

(c) the salts of the specified substances or plants, of the isomers referred to in subparagraph *(a)* and of the esters, ethers and isomers referred to in subparagraph *(b)*, as well as the isomers of such salts, where the existence of such salts and isomers is possible; **[and]**

(d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph; and

(e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is

similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.

PART III

UNDESIRABLE DEPENDENCE-PRODUCING SUBSTANCES

1. The following substances or plants, namely—

Amphetamine.

Brolamfetamine.

4-bromo-2,5-dimethoxyphene-thylamine (2C-B), (Nexus).

Bufotenine (N,N-dimethylserotonin).

Cannabicyclohexanol.

Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol].

Cathinone.

CP-47,497.

CP 47, 497-C6.

CP 47, 497-C7.

CP 47, 497-C8.

CP 47, 497-C9.

Dexamphetamine.

Diethyltryptamine [3-(2-(diethylamino)-ethyl)-indole].

2,5-dimethoxyamphetamine (DMA).

2,5-dimethoxy-4-ethylamphetamine (DOET).

(±)-N,-dimethyl-3,4-(methylenedioxy) phenethylamine (3,4-methylenedioxymetamfetamine) (MDMA).

3-(1,2-dimethylheptyl)-7,8,9,10-tetrahydro-6,6,9-trimethyl-6*H*-dibenzo [*b,d*] pyran-1-ol (DMHP).

Dimethyltryptamine [3-(2-(dimethylamino)-ethyl)-indole].

Etilamfetamine (N-ethylamphetamine).

Etryptamine (3-(2 -aminobutyl)indole).

Fenetylline.

Fentanyl-analogues:

acetyl-alpha-methyl-fentanyl;

alpha-methyl-fentanyl;

alpha-methyl-fentanyl-acetanilide;

alpha-methyl-thio-fentanyl;

benzyl-fentanyl;

beta-hydroxy-fentanyl;

beta-hydroxy-3-methyl-fentanyl;

3-methyl-fentanyl and the two isomeric forms thereof, namely, cis-N-(3-methyl-1-(2-phenethyl)-4-piperidyl) propionanilide and trans-N-(3-methyl-1-(2-phenethyl)-4-piperidyl) propionanilide;

3-methyl-thio-fentanyl;

para-fluoro-fentanyl; and

thiofentanyl.

Gamma-hydroxybutyrate (GHB).

Harmaline (3,4-dihydroharmine).

Harmine [7-methoxy-1-methyl-9H-pyrido (3,4-b)-indole].

Heroin (diacetylmorphine).

HU-210.

JWH-018.

JWH-073.

JWH-200.

Levamphetamine.

Levomethamphetamine.

Lysergide (lysergic acid diethylamide).

Mescaline (3,4,5-trimethoxyphenethylamine).

Methamphetamine and methamphetamine racemate.

Methaqualone, including Mandrax, Isonox, Quaalude, or any other preparation containing methaqualone and known by any other trade name.

Methcathinone (2-(methylamino)-1-phenylpropan-1-one).

2-methoxy-4,5-methylenedioxyamphetamine (MMDA).

4-methylaminorex.

4-methyl-2,5-dimethoxyamphetamine (DOM) and the derivatives thereof.

Methylenedioxyamphetamine (MDA):

N-ethyl-methylenedioxyamphetamine; and

N-hydroxy-methylenedioxyamphetamine.

Nabilone.

Parahexyl.

Paramethoxyamphetamine (PMA).

Phencyclidine and the congeners thereof, namely, N-ethyl-1-phenylcyclohexylamine (PCE), 1-(1-phenylcyclohexyl) pyrrolidine (PHP or PCPY) and 1-[1-(2-thienyl) cyclohexyl] piperidine (TCP).

Pethidine-analogues:

1-methyl-4-phenyl-4-propionoxy-piperidine (MPPP);

1-methyl-4-phenyl-1,2,5,6-tetrahydropiperidine (MPTP); and

1-phenylethyl-4-phenyl-4-acetyloxy-piperidine (PEPAP).

Phenmetrazine.

Psilocin (4-hydroxydimethyltryptamine).

Psilocybin (4-phosphoryloxy-N,N-dimethyltryptamine).

Tetrahydrocannabinol.

3,4,5-trimethoxy amphetamine (TMA).

2. Unless expressly excluded, all substances or plants included in this Part include the following:

(a) The isomers of the specified substances or plants, where the existence of such isomers is possible;

(b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph *(a)*, as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;

(c) the salts of the specified substances or plants, of the isomers referred to in subparagraph *(a)* and of the esters, ethers and isomers referred to in subparagraph *(b)*, as well as the isomers of such salts, where the existence of such salts and isomers is possible; **[and]**

(d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph; and

(e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is

similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.".

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Short title and commencement

3. This Act is called the Drugs and Drug Trafficking Amendment Act, 2022.

SLA 10 June 2022

MEMORANDUM ON THE OBJECTS OF THE DRUGS AND DRUG TRAFFICKING AMENDMENT BILL

1. BACKGROUND TO BILL

1.1 The Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol (the "1961 Convention"), the Convention on Psychotropic Substances, 1971 (the "1971 Convention"), and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the "1988 Convention"), together form the international drug control framework (the "Drug Conventions"). The Drug Conventions aim to establish a system of controls in respect of narcotic drugs, psychotropic substances and chemicals often used in the illicit manufacturing of narcotic drugs and psychotropic substances ("drug precursor substances"). South Africa acceded to the Drug Conventions.

The 1961 Convention consolidated the treaties concluded before World War II on opiates, cannabis and cocaine. The various narcotic drugs that are subject to the 1961 Convention are listed in the four Schedules to the Convention according to their dependence potential, abuse liability and therapeutic usefulness, each Schedule being subject to different levels of control. The 1972 Protocol further tightens controls on the production, use and distribution of illicit narcotics and highlights the need for treatment and rehabilitation of drug addicts.

The 1971 Convention extends international control to include numerous psychotropic substances, such as stimulants, depressants and hallucinogens, which are not subject to the controls of the 1961 Convention. These substances are, depending on their risk of abuse, threat to public health and therapeutic value, listed in the four Schedules to the 1971 Convention, each Schedule being subject to different levels of control. The 1971 Convention also contains detailed provisions concerning the international trade of the substances, including measures that strictly control their export and import.

The 1988 Convention is intended to complement the 1961 Convention and the 1971 Convention through measures aimed at the illicit traffic of narcotics under international

control. The aims of the 1988 Convention are improved international law enforcement cooperation and strengthened domestic criminal legislation. The 1988 Convention contains provisions on money laundering, the freezing of financial and commercial records, extradition of drug traffickers, transfer of criminal proceedings, and mutual legal assistance. The 1988 Convention also provides for the strict monitoring of drug precursor substances listed in Table I and Table II to the Convention.

The Drug Conventions provide for detailed procedures to be followed and criteria to be considered, to change the scope of control of substances (article 3 of the 1961 Convention; articles 2 and 3 of the 1971 Convention; and article 12 of the 1988 Convention).

The Drug Conventions require parties to take appropriate measures to—

(a) limit the production, cultivation, supply, distribution, import, export, possession and use of narcotic drugs and psychotropic substance to medical and scientific purposes;

(b) prevent drug precursor substances from being used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances; and

(c) criminalise any contravention of a law adopted in pursuance of a its obligations under the Drug Conventions.

1.2 The Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992) (the "Drugs Act"), the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965) (the "Medicines Act"), the Prevention of and Treatment for Substance Abuse Act, 2008 (Act No. 70 of 2008) and the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), give effect to South Africa’s obligations under the Drug Conventions.

1.3.1 Section 13, read with section 17 of the Drugs Act, criminalises—

(a) the manufacturing and supplying of scheduled substances which can be used in, or for the unlawful manufacture of, any drug (section 3);

(b) the use and possession of any dependence-producing substance or any dangerous dependence-producing substance or any undesirable dependence-producing substance (section 4); and

(c) the dealing in any dependence-producing substance or any dangerous dependence-producing substance or any undesirable dependence-producing substance (section 5).

1.3.2 Section 1(1) of the Drugs Act defines—

(a) a "scheduled substance" as any substance included in Part I or II of Schedule 1 to the Act;

(b) a "dependence-producing substance" as any substance or any plant from which a substance can be manufactured included in Part I of Schedule 2 to the Act;

(c) a "dangerous dependence-producing substance" as any substance or any plant from which a substance can be manufactured included in Part II of Schedule 2 to the Act; and

(d) an "undesirable dependence-producing substance" as any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2 to the Act.

1.3.3 Section 63 of the Drugs Act provides that the Minister of Justice and Correctional Services (the "Minister") may, by notice in the *Gazette* and after consultation with the Minister of Health—

(a) include any substance or plant in Schedule 1 or 2;

(b) delete any substance or plant included in those Schedules; or

(c) otherwise amend Schedule 1 or 2.

1.3.4 In terms of section 63 of the Drugs Act the Minister effected the amendments discussed in paragraphs 2.2.1 to 2.2.5 below, by means of Government Notices No. R. 1765 of 1 November 1996; No. R. 344 of 13 March 1998; No. R. 760 of 11 June 1999; No. R. 521 of 15 June 2001; No. R. 880 of 8 October 2010; and No. R. 222 of 28 March 2014, to Schedules 1 and 2 to the Drugs Act.

1.4.1 In ***Jason Smit v Minister of Justice and Constitutional Development and Others*** [2020] ZACC 29 (the "Judgment"), the Constitutional Court declared—

(a) section 63 of the Drugs Act unconstitutional and invalid to the extent that it purports to delegate plenary legislative power to the Minister to amend the Schedules to the Drugs Act; and

(b) the amendments that the Minister effected in terms of section 63, to Schedules 1 and 2 to the Drugs Act (discussed in paragraph 1.3.4 above), invalid.

1.4.2 According to the Judgment:

(a) Plenary power is the authority to pass, amend or repeal an Act of Parliament (paragraph [31]);

(b) the legislative authority of the national sphere of government is, in terms of the Constitution, vested in Parliament which confers on the National Assembly the power to pass legislation with regard to any matter (paragraphs [32] to [34]);

(c) the Legislature may not assign plenary legislative power to another body, including the power to amend an Act of Parliament (paragraph [35]);

(d) "Section 63 confers on the Minister plenary legislative power to amend the Schedules. As the Schedules are essentially part and parcel of the Act, it in effect delegates original power to amend the Act itself. This is a complete delegation of original legislative power to the Executive and there is no clear and binding framework for the exercise of the powers. This is constitutionally impermissible." (paragraph [36]);

(e) section 63 also undermines the doctrine of separation of powers (paragraphs [37] – [38];

(f) ".... A declaration that section 63 is inconsistent with the Constitution means that only the purported amendments made under section 63 should be set aside." (paragraph [43]; and

(g) ".... as the Minister was not competent to exercise plenary legislative powers to amend the Schedules, any purported amendments were of no effect on the Schedules and therefore invalid. The consequence, therefore, is that there were no Schedules created by the Minister....." (paragraph [44]).

1.4.3 The Constitutional Court suspended the orders of invalidity for a period of 24 months, until 17 December 2022, to give Parliament an opportunity to cure the defects.

1.5 The Drugs and Drug Trafficking Amendment Bill (the "Bill"), seeks to amend the Drugs Act to address the constitutional invalidity of section 63 and the purported amendments that were effected, in terms of section 63, to Schedule 1 and Schedule 2.

2. OBJECTS OF THE BILL

2.1 **Clause 1** repeals section 63 of the Drugs Act, to ensure that any amendment to Schedule 1 and Schedule 2 (which Schedules are considered as a part of the Drugs Act), must be effected in terms of an Act of Parliament.

2.2 **Clause 2** substitutes Schedule 1 and Schedule 2 to the Drugs Act to effect the amendments referred to in paragraph 1.3.4 above, thereto.

2.2.1 *Amendments to Part I of Schedule 1*

(a) Part I of Schedule 1 is amended by the insertion in Item 1, of the following substances:

(i) N-Acetylanthranilic acid – (inserted by Government Notice No. R. 344 of 13 March 1998);

(ii) isosafrole - (inserted by Government Notice No. R. 344 of 13 March 1998);

(iii) 3,4-methylenedioxyphenyl-2-propanone - (inserted by Government Notice No. R. 344 of 13 March 1998);

(iv) norephedrine, including its optical isomers - (inserted by Government Notice No. R. 521 of 15 June 2001);

(v) piperonal - (inserted by Government Notice No. R. 344 of 13 March 1998); and

(vi) safrole - (inserted by Government Notice No. R. 344 of 13 March 1998).

(b) The substances in paragraph *(a)* are listed in Table I to the 1988 Convention.

2.2.2 *Amendments to Part II of Schedule 1*

(a) Part II of Schedule 1 is amended—

(i) by the insertion in Item 1 of the following substances:

(aa) Hydrochloric acid - (inserted by Government Notice No. R. 344 of 13 March 1998);

(bb) methyl ethyl ketone - (inserted by Government Notice No. R. 344 of 13 March 1998);

(cc) ortho-toluidine - (inserted by Government Notice No. R. 880 of 8 October 2010);

(dd) potassium permanganate - (inserted by Government Notice No. R. 344 of 13 March 1998);

(ee) sulphuric acid - (inserted by Government Notice No. R. 344 of 13 March 1998); and

(*ff*) toluene - (inserted by Government Notice No. R. 344 of 13 March 1998); and

(ii) by the substitution for Item 2 of the following Item:

"2. The salts of all substances included in this Part, except hydrochloric acid and sulphuric acid, where the existence of such salts is possible." - (Item 2 substituted by Government Notice No. R. 344 of 13 March 1998).

(b) Acetic anhydride and potassium permanganate are listed in Table I to the 1988 Convention. Hydrochloric acid; methyl ethyl ketone and sulphuric acid are listed in Table II to the 1988 Convention. Although ortho-toluidine is not included in Table I or Table II to the 1998 Convention, it is frequently used in the synthesis of methaqualone (included in Part III of Schedule 2) and mecloqualone (included in Part II of Schedule 2). The amended Item 2 is in line with Table II of the 1998 Convention, which excludes the salts of hydrochloric acid and sulphuric acid.

2.2.3 *Amendments to Part I of Schedule 2*

(a) Part I of Schedule 2 is amended—

(i) by the insertion in Item 1, of the following substances:

(aa) Butalbital - (inserted by Government Notice No. R. 760 of 11 June 1999);

(bb) cathine((+)-norpseudoephedrine), except preparations and mixtures containing 50 milligrams or less of cathine per dosage unit - (inserted by Government Notice No. R. 760 of 11 June 1999); and

(cc) flunitrazepam - (inserted by Government Notice No. R. 760 of 11 June 1999);

(ii) by the deletion in Item 1, of the substance tiletamine - (deleted by Government Notice No. R. 521 of 15 June 2001); and

(iii) by the addition to Item 2, of the following paragraph:

"*(c)* all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2." - (Item 2 substituted by Government Notice No. R. R222 of 28 March 2014, to add paragraph *(c)*).

(b) The substances butalbital, cathine and flunitrazepam are listed in Schedule III of the 1971 Convention. The amendment to Item 2 (see paragraph *(a)*(iii) above), is discussed in paragraph 2.2.5*(c)*, below.

2.2.4 *Amendments to Part II of Schedule 2*

(a) Part II of Schedule 2 is amended—

(i) by the insertion in Item 1, of the following substances:

(aa) Butorphanol - (inserted by Government Notice No. R. 760 of 11 June 1999);

(bb) dihydroetorphine- (inserted by Government Notice No. R. 521 of 15 June 2001);

(cc) etorphine and analogues – ("Etorphine." substituted by Government Notice No. R. 521 of 15 June 2001, for "Etorphine and analogues.");

(dd) remifentanil - (inserted by Government Notice No. R. 521 of 15 June 2001); and

(ee) zipeprol - (inserted by Government Notice No. R. 760 of 11 June 1999); and

(ii) by the addition to Item 2, of the following paragraph:

" (e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their

structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2." – (Item 2 substituted by Government Notice No. R. 222 of 28 March 2014, to add paragraph *(e)*).

(b) The substances dihydroetorphine, etorphine and remifentanil are listed in Schedule I of the 1961 Convention. The substance zipeprol is listed in Schedule II of the 1971 Convention. The substance Butorphanol (l-N-cyclobutylmethyl-3,14-dihydroxymorphinan) is a central acting opioid analgesic with agonist-antagonist activities at the opiate receptors in the central nervous system. It is listed in Schedule IV of the US Controlled Substances Act, Schedule IV of the Canadian Controlled Drugs and Substances Act, and Schedule 6 to the Medicines Act. The amendment to Item 2 (see paragraph *(a)*(ii) above), is discussed in paragraph 2.2.5*(c)*, below.

2.2.5 *Amendments to Part III of Schedule 2*

(a) Part III of Schedule 2 is amended—

(i) by the insertion in Item 1, of the following substances:

(aa) 4-bromo-2,5-dimethoxyphene-thylamine (2C-B), ('Nexus') - (inserted by Government Notice No. R. 1765 of 1 November 1996);

(bb) cannabicyclohexanol - (inserted by Government Notice No. R. 222 of 28 March 2014);

(cc) CP-47,497; CP 47; 497-C6; CP 47, 497-C7; CP 47, 497-C8; and CP 47, 497-C9 - (inserted by Government Notice No. R. 222 of 28 March 2014);

(dd) (±)-N,-dimethyl-3,4-(methylenedioxy) phenethylamine (3,4-methylenedioxymetamfetamine) (MDMA) - (inserted by Government Notice No. R. 760 of 11 June 1999);

(ee) etilamfetamine (N-ethylamphetamine) – (inserted by Government Notice No. R. 222 of 28 March 2014);

(ff) etryptamine (3-(2-aminobutyl)indole) - (inserted by Government Notice No. R. 760 of 11 June 1999);

(gg) gamma-hydroxybutyrate (GHB) - (inserted by Government Notice No. R. 521 of 15 June 2001);.

(hh) HU-210 - (inserted by Government Notice No. R. 222 of 28 March 2014);

(ii) JWH-018; JWH-073; and JWH-200 - (inserted by Government Notice No. R. 222 of 28 March 2014); and

(jj) methcathinone (2-(methylamino)-1-phenylpropan-1-one) - (inserted by Government Notice No. R. 760 of 11 June 1999); and

(ii) by the addition to Item 2, of the following paragraph:

"(e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2." - (Item 2 substituted by Government Notice No. R. 222 of 28 March 2014, to add paragraph *(e)*).

(b) The substances (±)-N,-dimethyl-3,4-(methylenedioxy) phenethylamine 3,4-methylenedioxymetamfetamine) (MDMA); etryptamine (3-(2 -aminobutyl)indole); and methcathinone (2-(methylamino)-1-phenylpropan-1-one), are included in Schedule I of the 1971 Convention. The substances 4-bromo-2,5-dimethoxyphene-thylamine (2C-B), gamma-hydroxybutyrate (GHB), and JWH-018, are included in Schedule II of the 1971 Convention. The substance etilamfetamine (N-ethylamphetamine), is included in Schedule IV of the 1971 Convention. The synthetic cannabinoids cannabicyclohexanol; CP-47,497; CP 47, 497-C6; CP 47, 497-C7; CP 47, 497-C8; CP 47, 497-C9; HU-210; JWH-073; and JWH-200 are similar to (-)-Δ^9-trans-tetrahydrocannabinol (THC), the psychoactive ingredient of cannabis and referred to as synthetic cannabinoids. Despite being considered to pose a signification risks to life and health, synthetic cannabinoids are not yet under international control in terms of the Drug Conventions. Many countries amended their drug control legislation to regulate synthetic cannabinoids.

(c) In recent years there has been a proliferation of substances that have similar effects as the substances under the control of the 1961 Convention and 1971 Convention and substances that are produced by introducing slight modifications to their chemical structure to circumvent drug control legislation. A number of countries extended the scope of the list of individually named substances in their drug control legislation to cover a substance which is structurally similar to and/or has a similar or greater effect on the central nervous system as a controlled substance. The amendments to Items 2 of Part I (see paragraph 2.2.3*(a)*(iii) above), Part II (see paragraph 2.2.4*(a)*(ii) above) and Part III (see paragraph *(a)*(ii) above) of Schedule 2, similarly extend the scope of the substances listed in Item 1 of Parts I, II and III of Schedule 2 to the homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances).

2.3 **Clause 3** contains the short title of the Bill.

3. DEPARTMENTS/BODIES CONSULTED

3.1 The Bill was not subjected to a consultation process, for the following reasons:

(a) The repeal of section 63 is to ensure that Schedule 1 and Schedule 2 to the Drugs Act, must be amended by an Act of Parliament as is required by the Constitution.

(b) The amendments which the Bill aim to effect to Schedule 1 and Schedule 2 to the Drugs Act, are the amendments referred to in paragraph 1.3.4 above, which are subject to the suspended order of invalidity in terms of the Judgment.

4. FINANCIAL IMPLICATIONS FOR STATE

There is no financial implication for the State.

5. PARLIAMENTARY PROCEDURE

The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that—

(*a*) the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies; and

(*b*) it is not necessary to refer the Bill to the National House of Traditional Leaders as the Bill contains no provisions which directly affect customary law or the customs of traditional or Khoi-San communities as envisaged in section 39(1)(*a*)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019).