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).