

**MISUSE OF DRUGS
AMENDMENT BILL 2021**

EXPLANATORY MEMORANDUM

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BACKGROUND

The *Misuse of Drugs Act 1981* currently requires that a court shall, on the application of the Director of Public Prosecution or a police prosecutor, declare a person to be a drug trafficker if they have (a) a quantity of a prohibited drug equal to or in excess of the quantity specified in Schedule VII, or (b) prohibited plants the number of which is not less than the number specified in Schedule VIII. Either of these conditions having been met, the court currently has no discretion, and must, by law, make the declaration as requested.

RECENT REVIEW

The Review of the Criminal Property Confiscation Act 2000 (WA) undertaken by the Honourable Wayne Martin AC QC and tabled in December 2019, examined the relevant clauses in the *Misuse of Drugs Act 1981*, and concluded in regards to the legislation as a whole that:

“the Act as presently drafted has the undeniable potential to inflict injustice, and to operate arbitrarily and unfairly,” in that it contains no measure of judicial discretion.

In terms of specific remedial advice in regards to the *Misuse of Drugs Act 1981*, Recommendation No. 9 of the Martin Review went on suggest that “courts be given a discretion to decline to declare a person to be a drug trafficker if satisfied on the balance of probabilities that the person has not engaged in the trafficking of significant quantities of drugs for commercial reward.”

As recently as 27 May 2021, the Attorney General, in response to a question asked in the Legislative Council, confirmed that the government has no active plans to bring forward legislation to enact any or all of the recommendations made in the Martin Review.

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This amendment tackles any suggestion of injustice, arbitrariness, or unfairness within the *Misuse of Drugs Act 1981*, and can be enacted ahead of a more fulsome reworking of confiscation law in Western Australia in general. In line with Recommendation No. 9 of the Martin Review, it seeks to return discretion to the bench, allowing judges to refuse to make a drug trafficker declaration if and when the court is satisfied that the circumstances of the offences are such that the making of a declaration would be clearly unjust. By way of a check and balance, it will further require that any judge declining to make a declaration state his or her reasons for so doing.

CLAUSE NOTES

1. Short Title

Provides for the short title of the Act, which will be the *Misuse of Drugs Amendment Act 2021*.

2. Commencement

Allows for sections 1 and 2 of the Act to come into operation on the day on which the Act receives the Royal Assent, while the remainder of the Act comes into operation on the day after that day.

3. Act amended

Provides that this Act will amend the *Misuse of Drugs Act 1981*.

4. Section 32A amended

This clause inserts the following after section 32A(1):

- (1A) Despite subsection (1), the court is not required to declare the person to be a drug trafficker if the court is satisfied that it would be clearly unjust to do so, having regard to the circumstances of the commission of the offence and any other matter the court considers relevant.
- (1B) A court that, because of subsection (1A), does not declare a person to be a drug trafficker must give reasons for its decision not to do so.