

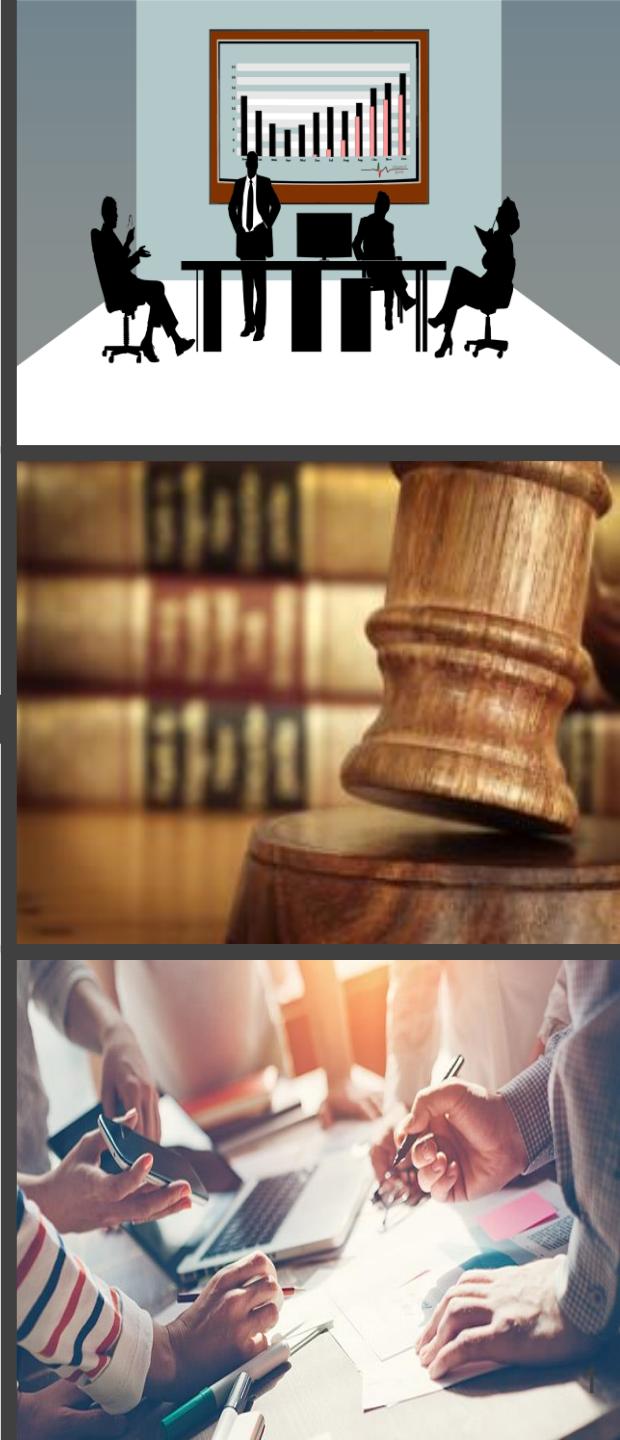
INPUTS TO THE CANNABIS FOR PRIVATE PURPOSES BILL

CCRB LEGAL INPUTS

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Department:
Trade, Industry and Competition
REPUBLIC OF SOUTH AFRICA



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PURPOSE

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- The purpose of this presentation is to submit inputs to the Cannabis for Private Purposes Bill on behalf of the Department of Trade, Industry and Competition (**the dtic**) in response to an initiation from the Portfolio Committee on Justice and Correctional Services (DoJCS) dated 17 August 2021.
- The inputs towards the Cannabis for Private Purposes Bill as contained in this presentation are inclusive of inputs canvassed by the Departmental Cannabis Task Team that has been set-up to discuss all matters relating to cannabis.

INTRODUCTION AND BACKGROUND

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- The mandate regarding development of the Cannabis Bill for Private Purposes resides in the Department of Justice and Constitutional Development (DoJCD).
- The Bill was proposed in order to give effect to the Constitutional Court judgment of 18 September 2018 which was handed down, which judgement declared as unconstitutional some legislation that are criminalising the use, possession, purchase and cultivation of cannabis in South Africa.
- The legislation referred to above and related provisions included section 22A(9)(a)(i) of the Medicines and Related Substances Control Act 101 of 1995, which resides under the Department of Health as well as section 4(b) and 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, which is administered by the South African Police Service.
- The Constitutional Court declared the order of invalidity for a period of 24 months from 31 March 2017 in order to give effect to Parliament of South Africa to cure the constitutional defects in the legislations referred above.
- The Cannabis for Private Purposes Bill is therefore proposed in order to decriminalise the use, possession and cultivation of cannabis by an adult person in a private dwelling.

INPUTS TO THE BILL

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Input 1

Clause 1

Definitions

- **Definition of the word ‘person’**

The legal definition of person is inclusive of both natural persons and juristic persons. The Constitutional Court judgement on cannabis sought to address cultivation, possession and use for private individuals. Juristic persons are therefore excluded, so it will be in the interest of smooth implementation to define this word in the Bill and to specifically exclude juristic persons. The Bill does not define the word “person”. It may create complications in implementation, especially as it is legally known that the word ‘person’ is also inclusive of juristic persons.

Recommendations

It is advisable that the word ‘person’ must be defined in the draft legislation and that the definition must exclude juristic persons.

INPUTS TO THE BILL

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Input 2

- **Cultivation Offences**

Clause 3

For cultivation offences to be properly and effectively implemented, the Bill must also expressly and clearly provide limit in terms of quantity per person per designated space that should be used for cultivation purposes. Care must also be exercised that those who cultivate do not exceed the maximum amount allowed or use private space belonging to others. In other words, it is advisable that areas that are used for cultivation of cannabis as per the Bill are clearly demarcated.

Recommendations

It is advisable that the Bill make provision relating to requirements that should be complied with for demarcation of areas for cultivation. This could best be addressed by Regulations or schedules which must be developed in accordance with Clause 9 of the Bill.

INPUTS TO THE BILL

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Input 3

Clause 4

- Cannabis Offences**

The Bill has created cannabis offences under Clause 4. Enforcement of some of the offences may create a problem, especially in instances where it can be established that children were involved. It is advisable that the Bill must make provision such as reasonable steps being taken to ensure that there is no misuse of children in transactions involving cannabis. Such steps may include producing a form of formal identification; or the Bill can create a further clause wherein those selling cannabis need to verify the age of individuals through a form of formal identification before selling or supplying cannabis.

Recommendations

This could be addressed by Regulations which must be developed in accordance with Clause 9 of the draft Bill.

GENERAL COMMENTS

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- **Enhancement of the Structure of the Bill as Principal Legislation: Regulations and Schedules**

The structure of the Bill must be enhanced by making sure that matters that would be dealt with through schedules and regulations, should be dealt with in the body of the Bill, as principal legislation. This will alleviate possible contention that may happen where crucial matters are dealt with by subordinate legislation and are not covered by the principal legislation.

Recommendations

As it stands now, the body of the Bill seem empty and focuses on offences. The schedules provides measures required to give effect to the Act and those should be included in the main Bill. The Bill should seek to address key issues in the body of the Bill and deal with administrative and procedural matters to the Regulations, as contained in Clause 9 of the Bill. The risk is that the schedules may be taken as by the way.

- **Investigations and Inspectorate Functions**

The Bill, in its current form, is devoid of any enforcement mechanisms that will ensure that the legislation will be implemented effectively and successfully. It is imperative that inspections should be conducted by inspectorate units to ensure that there is maximum compliance with the legislation, especially with regard to possession and cultivation for private use.

Whilst the Regulations will prescribe limits with regard to possession and cultivation by adults, it is essential that there should be regular inspections that should be conducted to ensure that people possess and cultivate within the prescribed limits.

Recommendations

It is recommended that the Bill must make provisions for investigative and inspectorate functions for the enforcement of the legislation.

GENERAL COMMENTS

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- **Establishment of a Multi-Disciplinary Structure to Consider Expungement of Criminal Records**

Clause 8 on expungement of criminal records gives authority to the Director-General and/or the head of the SAPS. This authority may be abused, given the nature of the offences that are committed that are related to cannabis.

Recommendations

To avert the abuse of power, it is recommended that a structure or committee of officials with specialized skills including enforcement agencies be established to jointly consider applications made for expungement of criminal records. The Bill must also lay down requirements that must be met for an individual to qualify for expungement. It should not be a blanket approach.

- **Application of the Expungement of Criminal Records with Retrospective Effect**

It appears the expungement of criminal records in terms of Clause 8 will operate with retrospective effect, which undermines the rule of law. This is so because the expungement will also cover related cannabis offences that happen before this Bill could become law.

Recommendations

It is recommended that the expungement of criminal records should not apply with retrospective effect, but rather to cases which happen after the Bill has been enacted into law and promulgated. This provision may have constitutional implications.

GENERAL COMMENTS

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- **Harm Reduction and Management of Cannabis Consumption**

Whilst the Bill attempts to address the right to privacy by ensuring that adults may cultivate, possess and use cannabis for private purposes, the harm that can result from the consumption of cannabis can never be overlooked. It should be mentioned in this case that cannabis, just like liquor or gambling, may have devastating effects on the lives of ordinary people, and as such it has to be properly regulated. There is a potential catastrophic harm to society, with significant unintended consequences, that may be difficult to reverse in the long term, that can result from this Bill including exacerbating gender based violence, youth substance abuse and addictions in communities that will not easily be curbed.

The Bill has created various offences, but does not make provisions that will reduce possible harm to individuals. A serious and well established and sustainable harm reduction programme involving various stakeholders needs consideration.

Recommendations

It is advisable that the Bill must make provision for mechanisms that should be implemented to manage consumption of cannabis and reduce possible harm, especially in instances where consumption can be abused.

- **Establishment of Structure To Oversee Cannabis Cultivation, Possession and Use (Oversight)**

There is a need to declare cannabis in the legislation as a regulated product, and as such a structure with oversight role must be established to oversee its cultivation, possession and use (Oversight). This structure can be in a form of a regulator.

Recommendations

It is recommended that a structure must be established to oversee cultivation, possession and use of cannabis.

GENERAL COMMENTS

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Potential illicit trade

- It is **the dtic's** view that the Cannabis for Private Purposes Bill must specifically restrict itself on regulatory issues pertaining to cannabis for private use only to the extent that commercial or trade-related issues do not find their way in the implementation of the legislation and that any commercial or trade-related activities be left to the mentioned departments of Trade, Industry and Competition , Health, Social Development and Agriculture. Issues of illicit trade and how to combat them must be given consideration.
- The Cannabis for Private Purposes Bill is silent on products containing Tetrahydrocannabinol (THC) / Cannabinol (CBD), including transportation of such products, and it is recommended that this must be specifically clarified in the Bill.

RECOMMENDATIONS

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- Effective and efficient enforcement of the legislation is very crucial during implementation, and it is therefore recommended that enforcement authorities to specifically deal with cannabis offences must be strengthened.

Thank You