

## MEMORANDUM ON THE OBJECTS OF THE CANNABIS FOR PRIVATE PURPOSES BILL

### 1. PURPOSE OF BILL

1.1 In *Minister of Justice and Constitutional Development and Others v Prince*: 2018 (6) SA 393 (CC) (the Judgment), the Constitutional Court declared that—

- (a) section 4(b) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992) (the Drugs Act), read with Part III of Schedule 2 of that Act, is unconstitutional and therefore invalid to the extent that it criminalises the use or possession of cannabis by an adult in private for that adult’s personal consumption in private;
- (b) section 5(b) of the Drugs Act, read with Part III of Schedule 2 and with the definition of “deal in” (“cultivation” is regarded as to “deal in”) in section 1 of that Act, is unconstitutional and therefore invalid to the extent that it criminalises the cultivation of cannabis by an adult in a private place for that adult’s personal consumption in private; and
- (c) section 22A(9)(a)(i) of the Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965) (the Medicines Act), read with Schedule 7 of Government Notice No. R. 509 of 2003, is unconstitutional and therefore invalid to the extent that it criminalises the use or possession of cannabis by an adult in private for that adult’s personal consumption in private.

1.2 The Constitutional Court held that the aforementioned provisions limited the right to privacy entrenched in section 14 of the Constitution of the Republic of South Africa (the Constitution) and that the State did not satisfy the Court that these provisions are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution. The Constitutional Court suspended its order of invalidity for a period of 24 months to give Parliament an opportunity to correct the constitutional defects in the Drugs Act and the Medicines Act and granted interim relief by way of a reading-in to the provisions of the two Acts to ensure that during the period of suspension of invalidity it would not be a criminal offence for an adult person –

- (a) to use or be in possession of cannabis in private for his or her personal consumption in private; and
- (b) to cultivate cannabis in a private place for his or her personal consumption in private.

1.4 The link between hemp, as a variety of cannabis, and cannabis has resulted in several restrictions on the production of hemp. The wide scale commercial production of hemp is prohibited in terms of the Drugs Act and the Medicines Act. The Department of Agriculture, Land Reform and Rural Development has requested that the Drugs Act and the Medicines Act, be amended to provide for the commercial production of hemp in South Africa.

1.5 The Cannabis for Private Purposes Bill (the Bill), aims to—

- (a) respect the right to privacy of an adult person to possess cannabis plant cultivation material; to cultivate a prescribed quantity of cannabis plants; to possess a prescribed quantity of cannabis; and to consume cannabis;
- (b) regulate the possession of cannabis plant cultivation material; the cultivation of cannabis plants; the possession of cannabis; and the consumption of cannabis by an adult person;
- (c) protect adults and children against the harms of cannabis;
- (d) provide for the expungement of criminal records of persons convicted of possession or use of cannabis;
- (e) delete and amend provisions of certain laws; and
- (f) provide for matters connected therewith.

## **2. OBJECTS OF BILL**

### **2.1 *Clause 1: Definitions and interpretation***

2.1.1 **Clause 1(1)** contains various definitions aimed at facilitating the interpretation of the Bill. Some of the more important definitions that are applicable to other clauses of the Bill are the following:

#### **(a) *Cannabis plant cultivation material***

*Cannabis plant cultivation material* is defined as seeds of a cannabis plant and seedlings. *Seedling* is further defined as a non-flowering cannabis plant that is

not taller than 15 centimetres or wider than 15 centimetres, measured according to the criteria prescribed by regulation. A seedling is further not a class of a "cannabis plant" or "cannabis" for purposes of the Bill.

(b) ***Cannabis plant and cannabis plant equivalent***

A *cannabis plant* is defined as a plant of the genus *Cannabis*, but excludes hemp, and for purposes of this Bill, an immature cannabis plant and a flowering cannabis plant are classes of a cannabis plant. An *immature cannabis plant* is defined as a non-flowering cannabis plant that is taller than 15 centimetres or wider than 15 centimetres, measured according to the criteria prescribed by regulation. A *flowering cannabis plant* is in turn defined as the gametophytic or reproductive state of a cannabis plant in which the plant produces flowers, trichomes and cannabinoids characteristic of cannabis. To regulate the quantity of the different classes of a cannabis plant, the Bill makes use of a concept of "*cannabis plant equivalent*", in terms of which two immature cannabis plants are deemed to be the equivalent of one flowering cannabis plant. In the discussion of the clauses of the Bill, a reference to a flowering cannabis plant includes a reference to its cannabis plant equivalent.

(c) ***Cannabis, cannabis equivalent and THC***

*Cannabis* is defined as the flowering or fruiting tops and the leaves of a cannabis plant that has been separated from the plant (but excludes any seed, seedling, the stalk and branches without any leaf, fruit or flower, and the roots of a cannabis plant) and any substance which contains *THC* ((-)-trans-delta-9-tetrahydrocannabinol). For purposes of this definition fresh cannabis, dried cannabis and cannabis concentrate are classes of cannabis. *Dried cannabis* is defined as the flowering or fruiting tops and the leaves of a cannabis plant that have been separated from the plant and that have been subjected to a drying process. *Fresh cannabis* is defined as the flowering or fruiting tops and the leaves of a cannabis plant that have been separated from the plant and that have not been subjected to a drying process. *Cannabis concentrate* is in turn defined as cannabis that has undergone a process to concentrate the THC content and cannabis solid concentrates and cannabis liquid concentrates are classes of cannabis concentrate. To regulate the quantity of cannabis that may be possessed at any given time, the Bill makes use of the concept of "*cannabis*

*equivalent*" in terms of which five grams of fresh cannabis, 0,25 gram cannabis solid concentrates or 0,25 gram cannabis liquid concentrates is deemed to be equivalent to one gram of dried cannabis. In the discussion of the clauses of the Bill, a reference to dried cannabis includes a reference to its cannabis equivalent.

(d) **Hemp**

*Hemp* is defined as a plant of the genus *Cannabis* which—

- (i) has a concentration of THC in the leaves and flowering heads that does not exceed the percentage as may be prescribed in terms of; and
- (ii) is cultivated under authority of,  
a law that regulates its cultivation.

(e) **Cultivate and harvest**

"*Cultivate*" is defined as to include to plant, propagate, nurture, tend, grow or harvest a cannabis plant and "*harvest*" is in turn defined as to obtain and process cannabis from a cannabis plant.

(f) **Deal in**

"*Deal in*" is broadly defined as to provide for consideration, receive for consideration, sell, buy, offer for sale, offer to purchase, import, advertise for sale, have in possession for the purposes of sale, export and any other conduct to facilitate selling.

(g) **Prescribed quantity, trafficable quantity and commercial quantity**

The "*prescribed quantity*" is a quantitative limitation of cannabis plant cultivation material or dried cannabis that may be possessed or provided, or flowering cannabis plants that may be cultivated, possessed or provided as contemplated in clause 2(1) or (3), read with the definition of "prescribed quantity" in clause 1 and *Schedule 3* (see paragraph 2.2.1 below). In terms of clauses 3 (see paragraph 2.3 below) and 4 (see paragraph 2.4 below), it is either a Class C or Class D offence to exceed the prescribed quantities contemplated in clause 2(1) and (3). A Class C offence is punishable with a fine or imprisonment for a period not exceeding four years or with both a fine and such imprisonment and a Class D offence is punishable with a fine or imprisonment for a period not exceeding two years or with both a fine and such imprisonment. Clauses 3 and 4, respectively, read with the definitions of "*trafficable quantity*" and "*commercial*

*quantity*" and *Schedule 4* to the Bill, also ensure that increased penalties can be imposed by a court that are proportional to the quantity by which the "prescribed quantity" is exceeded. Trafficable quantity offences are punishable with a fine or imprisonment for a period not exceeding six years or with both a fine and such imprisonment (Class B offence). Commercial quantity offences are punishable with a fine or imprisonment for a period not exceeding 15 years or with both a fine and such imprisonment (Class A offence). Trafficable and commercial quantity offences are aimed at curbing illicit dealing in cannabis.

(h) ***Personal use, private place, public place, possession in private and public view***

"*Personal use*" means for the exclusive use of an adult person. "*Private place*" means any place, including a building, house, room, shed, hut, tent, mobile home, caravan, boat or land or any portion thereof, to which the public does not have access as of right. "*Public place*" means any place to which the public has access as of right. "*Possess in private*" means to keep, store, transport or be in control of cannabis or a cannabis plant, respectively, in a public place in a manner that conceals it from public view.

2.1.2 **Clause 1(2)** provides that clauses 3(1), (4), (5), (6), (7) and (8) and 4(1), (2), (4) and (5) of the Bill do not apply to any person who is permitted or authorised in terms of any other Act of Parliament to—

- (a) deal in cannabis plant cultivation material, cannabis plants, cannabis or a cannabis product; or
- (b) cultivate cannabis plants.

A "*cannabis product*" is defined as anything that is intended for human or animal consumption which contains THC or any other phytocannabinoid or chemical found in a cannabis plant.

**2.2 Clause 2** respects the right of privacy of an adult person to use and possess cannabis and to cultivate cannabis plants as reflected in the Judgment. The clause is however subject to clauses 3, 4, 5 and 6, which impose justifiable limitation on this right, to protect other persons, including children, against the harms of cannabis.

2.2.1 In terms of clause 2(1) and (3), an adult person may for personal use—

- (a) possess unlimited cannabis plant cultivation material (clause 2(1)(a) and item (a) of Schedule 3);
- (b) cultivate four flowering cannabis plants per adult or eight flowering cannabis plants per dwelling which is occupied by two or more adults, in a private place (clause 2(1)(b) and item (b) of Schedule 3);
- (c) possess in private, 100 grams dried cannabis, in a public place (clause 2(1)(c) and item (c) of Schedule 3);
- (d) possess 600 grams dried cannabis per adult or 1200 grams dried cannabis per dwelling which is occupied by two or more adults, in a private place (clause 2(1)(d) and item (d) of Schedule 3);
- (e) possess in private, one flowering cannabis plant, in a public place (clause 2(1)(e) and item (e) of Schedule 3);
- (f) provide to, or obtain from, another adult person, without the exchange of remuneration—
  - (i) 30 seeds or seedlings or any combination thereof (clause 2(3)(a) and item (f) of Schedule 3);
  - (ii) one flowering cannabis plant (clause 2(3)(b) and item (g) of Schedule 3);  
and
  - (iii) 100 grams dried cannabis (clause 2(3)(c) and item (h) of Schedule 3).

2.2.2 In terms of clause 2(2), an adult person may consume cannabis in a private place.

**2.3 Clause 3** criminalises aspects pertaining to the cultivation, possession, provisioning and dealing in cannabis plants and cannabis plant cultivation material. In terms of—

- (a) clause 3(1), an adult person who in a private place, cultivates a quantity of cannabis plants that—
  - (i) exceed the prescribed quantity (more than four flowering cannabis plants per adult or eight flowering cannabis plants per dwelling which is occupied by two or more adults), is guilty of a Class C offence (clause 3(1)(a));

- (ii) are a trafficable quantity (more than six flowering cannabis plants per adult person or 12 flowering cannabis plants per dwelling which is occupied by two or more adults), is guilty of a Class B offence (clause 3(1)(b) and item (a) of Schedule 4); or
  - (iii) are a commercial quantity (more than nine flowering cannabis plants per adult person or 18 flowering cannabis plants per dwelling which is occupied by two or more adults), is guilty of a Class A offence (clause 3(1)(c) and item (b) of Schedule 4);
- (b) clause 3(2), an adult person who cultivates a cannabis plant at any place and who fails to—
- (i) take reasonable measures to ensure that the cannabis plant is inaccessible to a child; or
  - (ii) comply with any requirement or standard regarding the cultivation of cannabis plants in a private place for personal use as prescribed by regulation,
- is guilty of a Class C offence;
- (c) clause 3(3), an adult person who cultivates a cannabis plant in a public place, is guilty of a Class B offence;
- (d) clause 3(4), an adult person who provides to, or obtains from, an adult person without the exchange of remuneration—
- (i) more than one flowering cannabis plant, is guilty of a Class C offence (clause 3(4)(a));
  - (ii) two or more flowering cannabis plants, is guilty of a Class B offence (clause 3(4)(b) and item (c) of Schedule 4); or
  - (iii) four or more flowering cannabis plants, is guilty of a Class A offence (clause 3(4)(c) and item (d) of Schedule 4);
- (e) clause 3(5), an adult person who is in possession in a public place of—
- (i) more than one flowering cannabis plant, is guilty of a Class C offence (clause 3(5)(a));
  - (ii) more than two flowering cannabis plants, is guilty of a Class B offence (clause 3(5)(b) and item (e) of Schedule 4); or
  - (iii) more than four flowering cannabis plants, is guilty of a Class A offence (clause 3(5)(c) and item (f) of Schedule 4);

- (f) clause 3(6), any person who deals in—
  - (i) an immature cannabis plant, is guilty of a Class C offence; or
  - (ii) a flowering cannabis plant, is guilty of a Class A offence;
- (g) clause 3(7), any person who deals in cannabis plant cultivation material, is guilty of a Class D offence;
- (h) clause 3(8), an adult person who provides to, or obtains from, an adult person without the exchange of remuneration more than 30 seeds or seedlings or any combination thereof, is guilty of a Class D offence; and
- (i) clause 3(9), any person who is in possession in a public place of cannabis plant cultivation material or a cannabis plant that is not concealed from public view, is guilty of a Class D offence.

**2.4 Clause 4** criminalises aspects pertaining to the possession, provisioning and dealing in cannabis. In terms of—

- (a) clause 4(1), any person who is in possession in a public place of a quantity that exceeds—
  - (i) 100 grams dried cannabis, is guilty of a Class C offence (clause 4(1)(a));
  - (ii) 200 grams dried cannabis, is guilty of a Class B offence (clause 4(1)(b) and item (g) of Schedule 4); or
  - (iii) 300 grams dried cannabis, is guilty of a Class A offence (clause 4(1)(c) and item (h) of Schedule 4);
- (b) clause 4(2), an adult person who is in possession in a private place of a quantity that exceeds—
  - (i) 600 grams dried cannabis per adult or 1200 grams dried cannabis per dwelling which is occupied by two or more adults, is guilty of a Class C offence (clause 4(2)(a));
  - (ii) 800 grams dried cannabis per adult or 1500 grams dried cannabis per dwelling which is occupied by two or more adults, is guilty of a Class B offence (clause 4(2)(b) and item (i) of Schedule 4); or
  - (iii) 1000 grams dried cannabis per adult or 2000 grams dried cannabis per dwelling which is occupied by two or more adults, is guilty of a Class A offence (clause 4(2)(c) and item (j) of Schedule 4);

- (c) clause 4(3), an adult person who is in possession of cannabis at any place and who—
  - (i) fails to store such cannabis in a secure space that is inaccessible to a child; or
  - (ii) stores such cannabis in a manner that does not comply with any requirement or standard regarding the storing of cannabis prescribed by regulation,
 is guilty of a Class C offence;
- (d) clause 4(4), an adult person who provides to or obtains from an adult person without the exchange of remuneration a quantity that exceeds—
  - (i) 100 grams dried cannabis, is guilty of a Class C offence (clause 4(4)(a));
  - (ii) 200 grams dried cannabis, is guilty of a Class B offence (clause 4(4)(b) and item (j) of Schedule 4); or
  - (iii) 300 grams dried cannabis, is guilty of a Class A offence (clause 4(4)(c) and item (k) of Schedule 4);
- (e) clause 4(5), any person who deals in cannabis, is guilty of a Class A offence;
- (f) clause 4(6), an adult person who transports cannabis in a vehicle on a public road in a manner that does not comply with any requirement or standard regarding the transportation of cannabis that may be prescribed by regulation, is guilty of a Class C offence; and
- (g) clause 4(7), any person who is in possession in a public place of cannabis that is not concealed from public view, is guilty of a Class C offence.

**2.5 Clause 5** criminalises aspects pertaining to consumption of cannabis. In terms of clause 1, "*consumption*" is defined as to smoke, eat, drink or otherwise to self-administer cannabis and "*smoke*" is in turn defined as to inhale or exhale the smoke produced by ignited cannabis or holding or otherwise having control of ignited cannabis or any device or object that contains ignited cannabis. In terms of—

- (a) clause 5(1), any person who smokes cannabis in a public place, is guilty of a Class D offence;
- (b) clause 5(2), any person who smokes cannabis in the immediate presence of any non-consenting adult person, is guilty of a Class D offence;

- (c) clause 5(3), any person who smokes cannabis in the immediate presence of a child, is guilty of a Class C offence;
- (d) clause 5(4), any person who smokes cannabis in a private place—
  - (i) within a distance prescribed by regulation from a window of, ventilation inlet of, doorway to or entrance into another place; or
  - (ii) forming part of any place where persons congregate within close proximity of one another and where the smoke is likely to cause a hindrance to any person at that place,is guilty of a Class D offence;
- (e) clause 5(5), any person who consumes cannabis in, at or near any place prescribed by regulation where the consumption of cannabis is prohibited, is guilty of a Class C offence; and
- (f) clause 5(6), any person who consumes cannabis in a vehicle on a public road, is guilty of a Class C offence ("vehicle" and "public road" have the meaning assigned to it in section 1 of the National Road Traffic Act, 1996).

**2.6 Clause 6** creates offences involving children. A child is defined as a person who is under the age of 18 years. In terms of—

- (a) clause 6(1), the guardian of a child (which is defined as a guardian referred to in section 1 of the Children's Act, 2005), who permits a child to—
  - (i) possess cannabis plant cultivation material, a cannabis plant or cannabis;
  - (ii) deal in cannabis plant cultivation material, a cannabis plant or cannabis;
  - (iii) cultivate a cannabis plant (unless the child assists with the cultivation of cannabis plants which the guardian may lawfully possess in the presence and under the supervision of that guardian); or
  - (vi) consume cannabis,is guilty of a Class D offence;
- (b) clause 6(2), any person who engages a child, whether for remuneration to the child or a third person or not, to deal in cannabis plant cultivation material, a cannabis plant or cannabis, is guilty of a Class A offence;
- (c) clause 6(3), any person who provides to a child, whether for remuneration or not cannabis plant cultivation material, a cannabis plant or cannabis, is guilty of a Class A offence;

- (d) clause 6(4), an adult person who engages a child, whether for remuneration to the child or a third person or not, in the cultivation of a cannabis plant, is guilty of a Class A offence; and
- (e) clause 6(5), any person who administers cannabis to a child, is guilty of a Class A offence.

**2.7 Clause 7** provides for sentences which a court may impose for the offences provided for in clauses 3, 4, 5 and 6.

**2.8 Clause 8** provides for the expungement of criminal records of persons who were convicted under section 2(b) of the repealed Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (Act No. 41 of 1971), section 4(b) of the Drugs Act and any law of the former Republics of Transkei, Bophuthatswana, Ciskei or Venda, or in any former self-governing territory, as provided for in the repealed Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), of the use or possession of cannabis.

**2.9 Clause 9** provides for regulations to be made to further regulate aspects provided for in the Bill.

**2.10 Clause 10** and **Schedule 5** to the Bill provide for the repeal or amendment of certain provisions of the laws discussed in paragraphs 2.10.1 to 2.10.3, below.

#### **2.10.1 Drugs Act**

- (a) Part III of Schedule 2 to the Drugs Act, is amended by the deletion of the words:
  - (i) "Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol]"; and
  - (ii) "Tetrahydrocannabinol".
- (b) The Bill therefore removes the entire issue of cannabis from the purview or scope of the Drugs Act, making way for cannabis to be regulated under its own separate legislation, as the Bill does.

### 2.10.2 ***National Road Traffic Act, 1996 (Act No. 93 of 1996) (the NRTA)***

(a) Various provisions of the NRTA refer to a "drug having a narcotic effect" without defining this expression. Section 1 of the NRTA is amended to define—

- (i) a "drug having a narcotic effect" as any substance or a combination of substances that have an impairing effect on a person's ability to control his or her actions, but excludes THC; and
- (ii) "THC" as any substance containing (-)-trans-delta-9-tetrahydrocannabinol.

(b) Section 15(1)(g) of the NRTA provides that a person will be disqualified from obtaining or holding a learner's or driving licence if the person is addicted to the use of any drug having a narcotic effect, or the excessive use of intoxicating liquor. Section 15(1)(g) is amended to provide that a person will be so disqualified if that person is addicted to the use of any drug having a narcotic effect, or the excessive use of intoxicating liquor or THC.

(c) Section 61(1)(g) of the NRTA imposes obligations on the driver of a vehicle involved in or which contributes to an accident, not to take any intoxicating liquor or drug having a narcotic effect unless he or she has complied with the provisions of paragraph (f), where it is his or her duty to do so, and has been examined by a medical practitioner if such examination is required by a traffic officer. This section is amended to also prohibit the taking of THC under the circumstances provided for in that section.

(d) Section 65 of the NRTA criminalises the driving of a vehicle or to occupy the driver's seat of a motor vehicle whose engine is running, on a public road, while under the influence of intoxicating liquor or a drug having a narcotic effect or while the concentration of alcohol in any specimen of blood taken from any part of his or her body or breath is not less than a specified concentration. This section is amended to also criminalise the driving of a vehicle or to occupy the driver's seat of a motor vehicle whose engine is running, on a public road, while—

- (i) under the influence of THC or THC in combination with alcohol or a drug having a narcotic effect; or

(ii) the concentration of THC or drug having a narcotic effect in any specimen of blood or a combination of THC, alcohol or a drug having a narcotic effect in any specimen of blood or breath is not less than a specified concentration, and incidental matters thereto.

(e) Section 75 of the NRTA is amended, by the insertion of a new subsection (1A) to provide that, the Cabinet member responsible for transport may, in consultation with the Cabinet member responsible for health, prescribe any drug or category or class of such drugs having a narcotic effect and the concentration thereof for purposes of section 65(10) or (11).

### **2.10.3 *Child Justice Act, 2008 (Act No. 75 of 2008)***

Schedule I to the Child Justice Act, is amended by the addition of item 19, to ensure that the offences contemplated in clauses 3(6), (7) and (9), 4(7) and 5 of the Bill is included in the Schedule. This amendment aims to ensure that the offences in question are subject to a level one diversion as contemplated in section 53(2)(a) of that Act and that the child offender may, unless exceptional circumstances are present, not be arrested or be detained for these offences.

### **3. DEPARTMENTS/BODIES CONSULTED**

The Department of Social Development; Department of Health; Department of Agriculture, Land Reform and Rural Development; Department of Trade, Industry and Competition; Department of International Relation and Cooperation; Department of Transport; South African Police Service; and the National Prosecuting Authority, was consulted on the Bill. Comments received were accommodated where possible.

### **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—

- (a) that 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) that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.