



*Tonga*

**ILLICIT DRUGS CONTROL  
(AMENDMENT) ACT 2020**

**Act 15 of 2020**





# ILLICIT DRUGS CONTROL (AMENDMENT) ACT 2020

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## AN ACT TO AMEND THE ILLICIT DRUGS CONTROL ACT 2003

I assent,  
TUPOU VI,  
26<sup>th</sup> November 2020.

**BE IT ENACTED** by the King and Legislative Assembly of Tonga in the Legislature of the Kingdom as follows:

### 1 Short Title and Interpretation

- (1) This Act may be cited as the Illicit Drugs Control (Amendment) Act 2020 .
- (2) In this Act, the Illicit Drugs Control Act 2003, as amended, shall be referred to as the “Principal Act”.

### 2 Section 2 amended

Section 2 of the Principal Act is amended —

- (a) by inserting the following words and their definitions in the appropriate places:  
“**analogue drugs**” means a substance, however obtained, that is —
  - (a) a structure modification of an illicit drug or controlled chemical obtained in one or more of the following ways —
    - (i) by the replacement of one or more of its functional groups with another;

- (ii) by the replacement of up to two ring structures with any other ring structure;
- (iii) by the addition of hydrogen atoms to one or more unsaturated bonds; or
- (b) a homologue of the illicit drug or controlled chemical; or
- (c) a derivative or isomer of a substance referred to in paragraphs (a) or (b) but does not include a substance that is itself specified in Schedule 1;”

“**Commissioner**” means the Commissioner of Tonga Police;”

“**controlled purchase**” means the investigative technique described in section 11A for gathering evidence to identify any person involved in any offence or to facilitate prosecution of that offence;”

“**export**” means the transporting or causing to be transported beyond Tonga;”

“**import**” means to bring or cause to be brought into Tonga;”.

- (b) by deleting the words “**cultivate**”, “**manufacture**” and “**utensil**” and their definitions and replacing them with the following —
  - “**cultivate**” includes farming, fertilizing, harvesting, planting, sowing, tending, tilling, working, guarding or concealing and the separation of opium, coca leaves, cannabis and its extracts from the plants from which they are obtained;
  - “**manufacture**” means to carry out any process by which an utensil, illicit drug or controlled chemical is produced, and includes extracting, refining, formulating, preparing, mixing, compounding, making an illicit drug, controlled chemical or analogue drugs into dosage form, and packing or transforming it into another drug or chemical and also to control, direct or finance any part of the process;
  - “**utensils**” includes any article associated with the manufacture, use, possession and supply of an illicit drug or controlled chemical, and includes test tubes, weighing scales and dealer packs;
- (c) in the definition of “authorised officer” by deleting the words “Minister of Police” and replacing it with “Commissioner of Tonga Police”;
- (d) in the definition of “**controlled chemical**” by inserting after the number “2” the words “, controlled chemical analogue”;
- (e) in the definition of “**evidence in relation to commission of an offence**” by inserting after the word evidence the words “or property”;
- (f) in the definition of “**illicit drug**” by inserting after the “Schedule I” the words “, illicit drug analogue”; and
- (g) by deleting the word monitor and its definition.

### 3 Section 3 amended

Section 3 of the Principal Act is amended by deleting paragraph (c) and replacing it with the following new paragraphs (c), (d) and (e) —

- “(c) in respect of a Class A drug in the quantity of less than 1 gram, to a fine not exceeding \$10,000 or imprisonment for a term not exceeding 3 years or both;
- (d) in respect of a Class A drug in the quantity of 1 gram or more, to a fine not exceeding \$1,000,000 or to imprisonment for any period not exceeding life or both; or
- (e) in respect of a Class A drug in the quantity of 28 grams or more, to life imprisonment.”

### 4 Section 4 amended

Section 4 of the Principal Act is amended —

- (a) by deleting sub-paragraph (iii) and replacing it with the following new sub-paragraphs (iii) and (iv) -
  - “(iii) in respect of a Class A drug in the quantity of less than 1 gram, to a fine not exceeding \$10,000 or imprisonment for a term not exceeding 3 years or both; or
  - (iv) in respect of a Class A drug in the quantity of 1 gram or more, to a fine not exceeding \$1,000,000 or to imprisonment for any period not exceeding life or both.”;
- (b) by numbering the current provision as sub-section (1) and inserting the following new sub-section (2) —
  - “(2) For the purposes of this Act and any other enactment, if any person under section 3 or 4 of this Act is in possession —
    - (a) in respect of a Class B drug in the quantity of 7 grams or more; or
    - (b) in respect of a Class A drug in the quantity of 0.25 grams or more,such person shall be deemed to be supplying such Class B or Class A drugs.

### 5 Section 5A and 5B inserted

The Principal Act is amended by inserting the following new sections 5A and 5B immediately after section 5 —

- “**5A Unlawful import, export, possession, manufacture, use and supply of utensils**

Any person who knowingly without lawful excuse, the proof of which shall lie on him, imports, exports, possesses, manufactures, uses or supplies utensils or any equipment or article that is capable of being used in the commission of an offence under this Act commits an offence and shall be liable upon conviction to a fine not exceeding \$10,000 or imprisonment for a term not exceeding 3 years or both.

**5B Permitting use of place, premises, vehicle, craft or other conveyance**

Any person that knowingly permits any place, premises, vehicle, craft or other mode of conveyance to be used for the commission of an offence under this Act shall be liable upon conviction to fine not exceeding \$10,000 or imprisonment for a term not exceeding 3 years or both.”.

**6 Section 6 amended**

Section 6 of the Principal Act is amended by inserting after the words “illicit drug” the words “or utensils”.

**7 Section 7 amended**

Section 7 of the Principal Act is amended by deleting the words “or controlled equipment” wherever appearing and replacing them with “, controlled equipment or utensils”.

**8 Section 9 amended**

Section 9 of the Principal Act is amended —

- (a) in sub-section (1) by deleting the current paragraphs (a) and (b), and replacing it with the following new paragraphs —
  - “(a) if the circumstances are such that time does not allow for a written application, make an oral application to a Magistrate or Supreme Court Judge for express authority to enter a place and covertly monitor and record, by any means, the conduct and communications, including telecommunications, of any person; or
  - (b) make a written application to a Magistrate’s Court or Supreme Court for express authority to enter a place and covertly monitor and record, by any means, the conduct and communications including telecommunications, of the person.”;
- (b) in sub-section (4) by deleting the number “48” and replacing it with “72”;
- (c) in sub-section (5) by deleting “\$1,000” and replacing it with “\$50,000” and by deleting “6 months” and replacing it with “7 years”; and
- (d) by inserting the following new sub-section (6) —
  - “(6) For the avoidance of doubt, “covert monitoring” does not include —

- (a) the physical observation of any individual, place, premises, vehicle or craft in the course of conducting surveillance;
- (b) the taking of photographs or video recordings of any individual, place, premises, vehicle or craft in the course of conducting surveillance;
- (c) the use of a drone or any other aerial device to observe, take photographs or record any individual, place, premises, vehicle or craft in the course of conducting surveillance; or
- (d) any other form of overt monitoring.

## 9 Section 10 amended

Section 10 of the Principal Act is amended —

- (a) in sub-section (2) by inserting the words “or Supreme Court” after the words “Magistrate’s Court”; and
- (b) in sub-section (3) —
  - (i) by deleting “2” and replacing it with “3”; and
  - (ii) by deleting the word “Minister” and replacing it with the word “Commissioner”.

## 10 Section 11 amended

Section 11(1) of the Principal Act is amended in the Tongan version only by inserting after the words “ma’olunga hake ai” the words “pe ‘ofisa ‘oku pule ‘i ha ‘apitanga polisi,”.

## 11 New section 11A inserted

The Principal Act is amended by in inserting the following new section 11A immediately after section 11 —

### “11A Controlled Purchase

- (1) If a police officer of or above the rank of sergeant or officer in charge of a police station suspects on reasonable grounds that any person has committed, is committing or is about to commit an offence against this Act, he may give written approval for —
  - (a) a controlled purchase to be carried out; and
  - (b) name persons to carry out or participate in the controlled purchase.
- (2) Notwithstanding any law to the contrary, activities which may be undertaken in the course of and for the purposes of a controlled purchase include allowing a person approved under sub-section (1) to purchase illicit drugs, controlled chemicals, controlled equipment or utensils.”

**12 Section 12 amended**

Section 12(2) of the Principal Act is amended —

- (a) by removing the full stop immediately after paragraph (c) and replacing it with “; or”; and
- (b) by inserting the following new paragraph (d) —
  - “(d) seize anything found in any vehicle, craft, person in that vehicle or craft or any goods carried within the vehicle or craft relating to the commission of an offence under this Act.”.

**13 Section 13 amended**

Section 13 of the Principal Act is amended by inserting the following new subsection (3) —

- “(3) A female shall not be searched except by a female police officer and a male shall not be searched except by a male police officer.”.

**14 Section 15 repealed**

Section 15 of the Principal Act is repealed.

**15 Section 22A inserted**

The Principal Act is amended by inserting the following new section 22A immediately after section 22 —

**“22A Powers of Police Officer under this Division**

- (1) A Police Officer, upon authorisation by the Commissioner, may exercise all of the powers of a Customs Officer under this Division or under the Customs and Excise Management Act.
- (2) A Police Officer may access —
  - (a) a craft that has arrived in or is about to depart from the Tonga;
  - (b) a Customs Area, Crown Warehouse or Customs Warehouse; and
  - (c) an approved place under the Customs and Excise Management Act; and
  - (d) any goods subject to customs control under the Customs and Excise Management Act.
- (3) A Police Officer may direct items in a Customs Area, Crown Warehouse and Customs Warehouse, approved place or goods subject to customs control under the Customs and Excise Management Act to be secured for the purposes of a search, and

such items shall not be cleared from the Customs Area, Crown Warehouse, Customs Warehouse and approved place or from customs control unless the Police Officer has directed to do so.

- (4) Any person who fails to comply with a direction by a Police Officer under this section commits an offence and shall be liable upon conviction to imprisonment for a term not exceeding 10 years.

## 16 Section 23 is amended

Section 23(1) of the Principal Act is amended —

- (a) by deleting the words “on oath” and replacing them with the words “on affidavit in Form 1 in Schedule 4”; and
- (b) by inserting after the first appearance of the word “warrant” the words “in Form 2 in Schedule 4”;
- (c) in the English version only, by inserting the words “or Supreme Court Judge” after the word “Magistrate” wherever appearing; and
- (d) in the Tongan version only by —
  - (i) deleting the words “fakamaau polisi” wherever appearing and replacing it with the words “Fakamaau Polisi pe Fakamaau ki he Fakamaau’anga Lahi”; and
  - (ii) inserting the words “‘e he Fakamaau Polisi pe Fakamaau ki he Fakamaau’anga Lahi” after the word “fakamahino”.

## 17 Section 26 amended

Section 26 of the Principal Act is amended —

- (a) by numbering the current provision as sub-section (1);
- (b) by inserting the following proviso after sub-section (1) —

“Provided that the use of force against an individual is reasonable and proportionate force.”
- (c) by inserting the following new sub-section —

“(2) The use of force under sub-section (1) includes —

  - (a) use of force to prevent the escape of individuals or the concealment, loss or destruction of anything capable of being used as evidence in relation to commission of an offence;
  - (b) use of force that is likely to cause death or grievous bodily harm to a person if it is necessary to prevent the death or serious injury to a police officer or any other person;

- (c) use of force to restrain and detain persons for the purposes of securing a place, premises, vehicle or craft prior to conducting a search with or without a warrant;
- (d) use of force to enter and clear a place, premises, vehicle or craft prior to conducting a search with or without warrant;
- (e) use of force to disable a vehicle or craft for the purposes of preventing the escape of individuals or the concealment, loss or destruction of anything capable of being used as evidence in relation to commission of an offence;
- (f) use of force to remove anything from any place, premises, vehicle or craft capable of being used as evidence in relation to commission of an offence;
- (g) use of force to arrest persons under this Act; and
- (h) the use of arms and tactical equipment to execute the powers in paragraphs (a) – (g), and the use of force incidental or consequential to the execution thereof.

## 18 New section 28A inserted

The Principal Act is amended by inserting the following new section 28A —

### “28A Use of vehicles for Police Operations under the Act

Notwithstanding the Traffic Act or any other enactment, Police Officers may with the approval of the Commissioner, use unauthorised plates or licences on any vehicle for the purposes of exercising any power under this Act.”.

## 19 Section 30 amended

Section 30 of the Principal Act is amended —

- (a) in sub-section (1)(a) by inserting the following new sub-paragraph (iii) —
  - “(iii) any information or statements made by the informer or undercover police officer, customs officer or authorised officer to the witness;”;
- (b) in sub-section (1) by repealing the current sub-paragraph (b) and replacing it with the following new sub-paragraph —
  - “(b) to answer any question if the answer would lead, or would tend to lead, to the discovery of the name, address or identity of such informer or undercover officer or any information under sub-section (1)(a)(iii), where the informer or officer is not a witness in the proceedings.”; and

- (c) in sub-section (2) by repealing the current sub-section (2) and replacing it with the following new sub-paragraph —
- “(2) If any record which is in evidence or liable to inspection in any proceedings contains an entry in which any such informer or undercover officer is named or described or which might lead to his discovery and includes any information under sub-section (1)(a)(iii), such entry shall be concealed from view or obliterated so far as may be necessary to protect the information or person from discovery.”.

## 20 Section 31 amended

Section 31 of the Principal Act is amended by deleting the word “Minister” wherever it appears and replacing it with the word “Commissioner”.

## 21 Section 32 is amended

Section 32(1) of the Principal Act is amended by —

- (a) deleting the words “Commander of Police” and replacing them with “Commissioner”; and
- (b) renumbering the current sub-section (2) as sub-section (3) and by inserting the following new sub-section (2) —
- “(2) The Commissioner upon receiving a copy of the scientist’s certificate may direct, in writing, for the destruction of the illicit drugs, controlled chemicals, controlled equipment and utensils where the Commissioner has deemed that it would not be reasonable to continue storage of the illicit drug, controlled chemicals, controlled equipment and utensils.”.

## 22 Section 33 amended

Section 33 of the Principal Act is repealed and replaced with the following —

### “33 Forfeiture

- (1) Where a person is convicted of an offence under this Act all articles, goods or property if any, in respect of which the offence was committed and in the possession of such person and includes evidence in relation to commission of an offence, shall be forfeited in addition to any penalty imposed under this Act.
- “Provided that the article, goods or property has not been forfeited to the Crown pursuant to section 157 of the Tonga Police Act.”;
- (2) Articles, goods or property forfeited under sub-section (1) may be sold, destroyed, or otherwise disposed of as the Commissioner directs.

- (3) If, on the conviction of any person for an offence under this Act and the Court is satisfied, on a balance of probability, that money found in the possession of that person was received by that person in the course of or consequent upon the commission of that offence, or was in the possession of that person for the purpose of facilitating the commission of an offence against the Act, or is evidence in relation to commission of an offence, the Court shall, in addition to any other penalty imposed pursuant to this Act, order that that money be forfeited to the Crown.
- (4) If, on the conviction of any person for an offence under this Act, the Court is satisfied that any goods, property, vehicle or craft owned by the convicted person (whether solely or as joint tenant or tenant in common with any other person or persons) or in which he has any interest (whether pursuant to a hire purchase agreement, leasing agreement, or otherwise) at the time of his conviction was used by the convicted person in the commission of the offence (whether or not he was the driver or person in charge), or is evidence in relation to commission of an offence, the court shall, order, in addition to any other penalty imposed under this Act, that the goods, property, vehicle or craft be forfeited to the Crown.
- (5) Where, on any application for the exercise of the court’s power under sub-sections (3) and (4), the court is satisfied that the Accused has committed any previous offences under this Act, and the Accused fails to explain to the Court’s satisfaction the source of any money, goods, property, vehicle or craft owned by him, the Court may accept that as evidence that the money, goods, property, vehicle or craft was or were derived by the offender from those previous offences.
- (6) Where, in any case to which this section applies, it appears to the Court that any disposition of money, goods or property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of the Accused to defeat the exercise of the Court’s power under this section, the Court may, on the application of the prosecutor or of its own motion, treat the money or assets as belonging to the Accused for the purposes of this section.”.

## 23 Section 34 is amended

Section 34 of the Principal Act is amended by —

- (a) deleting the word “presumed” and replacing it with “deemed”; and
- (b) numbering the current provision as subsection (1) and by inserting the following new subsection (2) —
  - “(2) If in any prosecution for an offence under this Act it is proved that an illicit drug or controlled chemical is mixed with another substance or article, the entire mixture shall be deemed to be illicit drugs or controlled chemicals, as the case may be, for the purposes of this Act.”.

**24 Section 36 is amended**

Section 36 of the Principal Act is repealed and replaced with the following —

**“36 Analyst certificate**

- (1) In any proceedings under this Act, the production of a certificate purporting to be signed by an analyst shall be prima facie evidence of the facts therein stated.
- (2) Such a certificate shall only be admissible under sub-section (1) if a copy of the analyst’s certificate has been served by or on behalf of the prosecution on the accused or his counsel and at the same time the accused or his counsel has been served with a written notice that the prosecution does not propose to call the analyst as a witness.
- (3) Should the Accused engage new counsel it will be the responsibility of the counsel in sub-section (2) to ensure the documents served in sub-section (2) are delivered to the accused or his newly engaged counsel.
- (4) The accused shall give written notice to the prosecution not more than 30 days after being served with the analyst’s certificate that he requires the person who made the analysis to be called by the prosecution as a witness and provide reasonable grounds as to why the analyst is required to be called as a witness.
- (5) If the Accused challenges the facts in the analyst certificate in sub-section (1), and requires further analysis or testing, the Accused shall bear the costs of such further analysis or testing, if he is subsequently convicted of any offence to which the analyst certificate relates.
- (6) If the Accused required the person who made the analysis or the analysts certificate to give evidence pursuant to subsection (4), the Accused shall bear the costs of the analyst giving evidence, if he is subsequently convicted of any offence to which the analyst certificate relates.”.

**25 New section 37A and 37B inserted**

The Principal Act is amended by inserting the following new section 37A and 37B —

**“37A Destruction of evidence in relation to commission of an offence**

- (1) Any person who knowingly conceals or destroys any article, substance, goods or property capable of being used as evidence in relation to commission of an offence under this Act, shall be liable upon conviction to imprisonment for a term not exceeding 15 years.

- (2) An attempt or abetment to commit an offence under subsection (1), is an offence under subsection (1).
- (3) For the purposes of subsection (1), “conceals” or “destroys” includes the ingesting or dissolving or disposing in liquid of any article, substance, goods or property.

**37B Prosecutions**

In any proceedings against any person in respect of any offence against this Act in which it is proved that he had in his possession any illicit drug, controlled chemical or equipment, or utensil, or did any act in relation to any illicit drug, controlled chemical or equipment, or utensil which would have amounted to that offence, the burden of proof shall lie on him.”.

**26 New Schedule 4 inserted**

The Principal Act is amended by inserting the following new Schedule 4 —

**“SCHEDULE 4**

**FORM 1  
AFFIDAVIT TO GROUND SEARCH WARRANT  
(Section 22)**

No..... Magistrate’s/Supreme Court,

I ..... of ..... make oath and say—

- 1. That this deponent has reasonable cause to suspect that ..... of ..... has committed an offence under this Act and that there is evidence relating to the commission of such an offence.
- 2. That the reasonable cause to suspect is based on the following —

Sworn on the..... day of ..... 20.....at .....

Before me ..... Magistrate for the above mentioned district or Supreme Court Judge.

**FORM 2  
SEARCH WARRANT**

NO ..... Magistrate’s Court/Supreme Court,

To .....Inspector / Sergeant of Police

Whereas it appears on the affidavit of ..... of  
.....

You are therefore hereby commanded in the King’s name to enter the .....  
of the said ..... in the day or night time and there diligently search  
for evidence relating to the commission of an offence under the Act and if the same or any  
of them or any items whether or not shown on this warrant shall be found upon such search  
to bring the items so found and the persons in whose possession they are found before me.

Dated the..... day of ..... 20.....

.....  
Magistrate for the above mentioned district or Supreme Court Judge.”.

Passed by the Legislative Assembly this **20<sup>th</sup>** day of **October** 2020.