

DRUG MISUSE AND TRAFFICKING AMENDMENT (APPOINTED PERSONS) BILL 2023**STATEMENT OF PUBLIC INTEREST****Need: Why is the policy needed based on factual evidence and stakeholder input?**

The Drug Misuse and Trafficking Amendment (Appointed Persons) Bill 2023 will amend the *Drug Misuse and Trafficking Act 1985* (DMT Act) to vest the function of appointing persons under section 43(5) of the DMT Act in the Executive Director of the Royal Botanic Gardens and Domain Trust, or a person prescribed by regulation, and to retrospectively validate appointments made under section 43(5) of the DMT Act prior to the passage of the Bill.

Section 43(3) of the DMT Act provides that any appointed person analysing any plant submitted to the person may give a certificate of the result of the analysis. Section 43(4) provides that in legal proceedings under the DMT Act, the production of a certificate, purporting to be signed by a person appointed under section 43(5), is prima facie evidence of:

- (a) the identity of the plant analysed, and
- (b) the quantity or mass of that plant,

without proof of the signature or appointment of the person appearing to have signed the certificate, but only if the plant identified is cannabis plant or cannabis leaf.

Section 43(5) of the DMT Act gives the Secretary of the Department of Industry, Skills and Regional Development power to appoint persons to give certificates of analysis under section 43. In 2017 that Department's name was changed to the Department of Industry and in 2019 it was abolished and some of its staff were transferred to the Department of Planning, Industry and Environment by the *Administrative Arrangements (Administrative Changes – Public Service Agencies) Order 2019*. References to the Department of Industry were also to be construed as a reference to the Department of Planning, Industry and Environment.

The *Administrative Arrangements (Administrative Changes – Regional NSW and Independent Planning Commission) Order 2020* created the Department of Regional NSW and transferred certain staff from the Department of Planning, Industry and Environment to the Department of Regional NSW. Changes were not made to enable the outdated reference to the Secretary of the Department of Industry, Skills and Regional Development in section 43(5) of the Act to be construed as a reference to the Secretary of the Department of Regional NSW. As a result, appointments of persons under section 43(5) of the *Drug Misuse and Trafficking Act 1985* that were made by the Secretary of the Department of Regional NSW are invalid.

A conviction for an offence under the DMT Act which relies on a certificate given by a person purportedly appointed by the Secretary of the Department of Regional NSW under section 43(5) of the DMT Act may be unsafe and liable to challenge. Accordingly, the Bill retrospectively provides that appointments made under section 43(5) of the DMT Act were validly made.

Given the frequency with which machinery of government changes occur, it would be prudent to vest the appointment function under section 43(5) of the DMT Act in an appropriate public officer who is unlikely to be impacted by future machinery of government changes. Accordingly, the Bill will confer the power to make such appointments on the Executive Director of the Royal Botanic Gardens and Domain Trust under the *Royal Botanic Gardens and Domain Trust Act 1980*, or a person prescribed by regulation.

Section 43(5) of the DMT Act was enacted in 1988 to enable persons trained by the National Herbarium of NSW to botanically identify cannabis plants to be appointed to give certificates under section 43(4) of that Act. The National Herbarium of NSW, which is part of the Royal Botanic Gardens and Domain Trust, continues to train persons to botanically identify cannabis plants for the purposes

of the Drug Misuse and Trafficking Act 1985. This training qualifies a person as suitable to be appointed for the purposes of section 43 of the DMT Act. The Executive Director of the Trust is an appropriate person to make such appointments and is less likely to be impacted by machinery of government changes than a Secretary of a Public Service Department.

Objectives: What is the policy's objective couched in terms of the public interest?

It is in the public interest that convictions for drug offences that were validly and properly obtained should not be overturned on the basis of an error that occurred following a machinery of government change. It is also in the public interest that the appointment function in section 43(5) of the DMT Act be vested in a position that is qualified to determine whether a person is a suitable person to provide certificate evidence about the identity and quantity or mass of cannabis plant or cannabis leaf, and less likely to be impacted by future machinery of government changes.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Only legislative amendment can rectify this issue.

Analysis: What were the pros/cons and benefits/costs of each option considered?

Not applicable.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Bill will commence on assent. The Royal Botanic Gardens and Domain Trust will be responsible for appointing persons to give evidentiary certificates under section 43(5) of the DMT Act.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

The Royal Botanic Gardens and Domain Trust, the NSW Police Force and the Department of Regional NSW were consulted.