



New South Wales

Drug Misuse and Trafficking Amendment Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to make miscellaneous amendments to the *Drug Misuse and Trafficking Act 1985* (*the Principal Act*) and other legislation relating to the operation of drug law in New South Wales as set out in the Outline below.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the Principal Act set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Young Offenders Act 1997* and the *Young Offenders Regulation 2004* set out in Schedule 2.

Schedule 1 Amendment of Drug Misuse and Trafficking Act 1985

Schedule 1 [1] amends the Principal Act to provide that it does not apply to persons conducting clinical trials of prohibited drugs who are acting under an authority granted by the Director-General of the Department of Health.

Schedule 1 [2]–[4] amend section 11A of the Principal Act to extend the operation of that section (which relates to the prohibition of the sale, supply and display of waterpipes—also known as bongos) to ice pipes (also known as crack pipes), being devices capable of being used for smoking or inhaling the smoke or fumes resulting from the heating or burning of a prohibited drug in a crystal or powder form.

Schedule 1 [5] amends section 22 (1) of the Principal Act as a matter of statute law revision.

Schedule 1 [6] inserts proposed section 24 (1A) into the Principal Act to create a new offence that prohibits a person, who manufactures or produces, or who knowingly takes part in the manufacture or production of, a prohibited drug, exposing a child to that manufacturing or production process, or to substances being stored for use in that manufacturing or production process. **Schedule 1 [9]** inserts proposed section 24 (5) into the Principal Act to provide that in section 24 of that Act *child* means a person who is under the age of 16 years. **Schedule 1 [7]** inserts proposed section 24 (2A) into the Principal Act to create an aggravated form of the offence under proposed section 24 (1A) where the amount of prohibited drug manufactured or produced is not less than the commercial quantity applicable to that drug. **Schedule 1 [8]** replaces section 24 (3) of the Principal Act with proposed section 24 (3)–(3B) to provide:

- (a) for alternative verdicts of lesser offences if certain elements of the new offences are not made out during a trial, and
- (b) that it is a defence to a prosecution for the proposed new offences if the defendant establishes that the exposure of the child to the prohibited drug manufacturing or production process, or to substances being stored for use in that manufacturing or production process, did not endanger the health or safety of the child.

Schedule 1 [10] amends section 24A (2A) of the Principal Act to provide that the regulations under the Principal Act may make provision for or with respect to prohibiting or regulating the sale and storage of certain drug precursors.

Schedule 1 [11] inserts proposed section 25 (2C)–(2E) into the Principal Act. Proposed section 25 (2C) makes it an offence for a person of or above the age of 18 years to procure a person under the age of 16 years to supply, or take part in the supply of, a prohibited drug (other than cannabis leaf) to another person. Proposed section 25 (2D) similarly makes it an offence for a person of or above the age of 18 years who procures a person under the age of 16 years to supply, or take part in the supply of, an amount of a prohibited drug (other than cannabis leaf) which is not less than the commercial quantity applicable to the prohibited drug. Proposed section 25

(2E) provides that it is a defence to a prosecution for an offence under proposed section 25 (2C) or (2D) if the defendant establishes that he or she had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the person who was procured to supply, or take part in the supply of, the prohibited drug was of or above the age of 16 years.

Schedule 1 [12]–[15] make consequential amendments.

Schedule 1 [16] inserts proposed section 33AC into the Principal Act to provide for maximum penalties for the proposed new offences referred to above. The penalty for an offence under proposed section 24 (1A) or 25 (2C) is a fine of 2,400 penalty units (currently \$264,000) or imprisonment for 18 years, or both. The penalty for an offence under section 24 (2A) or 25 (2D) is a fine of 4,200 penalty units (currently \$462,000) or imprisonment for 25 years, or both. However, if the court concerned is satisfied that an offence under section 24 (2A) or 25 (2D) involved not less than the large commercial quantity of the prohibited drug concerned, the penalty for the offence is a fine of 6,000 penalty units (currently \$660,000) or imprisonment for life, or both.

Schedule 1 [17], [23] and [28] insert proposed sections 35A and 44A and proposed Schedule 2 into the Principal Act to provide that it is not unlawful under the Principal Act to manufacture, produce, possess or supply a substance listed in Schedule 2 (being two substances that are to be listed as prohibited drugs by **Schedule 1 [28]**) if the manufacture, production, possession or supply is done for certain legitimate purposes by manufacturers, distributors and other users of those substances or products that contain those substances. Proposed section 44A provides that the Governor may, from time to time, by regulation amend Schedule 2 by adding or amending names or descriptions of substances. **Schedule 1 [21]** is a consequential amendment.

Schedule 1 [18] replaces section 39A of the Principal Act to provide that, for the purposes of Division 1 of Part 3A of the Principal Act (that relates to pre-trial orders for the destruction of seized prohibited drugs), the *minimum amount* of heroin that has been seized by the police that may be the subject of an order for destruction is the traffickable quantity in relation to heroin, being 3 grams, instead of 1 gram as is currently the case.

Schedule 1 [19] inserts proposed Division 2B (Order for disposal of substances when no likely prosecution) into Part 3A of the Principal Act. The proposed Division contains one section, proposed section 39PB, which provides that a police officer of or above the rank of Superintendent may order that a prohibited drug, or a substance that the officer reasonably suspects is a prohibited drug, seized by a member of NSW Police be destroyed if:

- (a) the amount of the prohibited drug (or of the prohibited drug that the officer reasonably suspects the substance to be) is less than the traffickable quantity of the drug, and

- (b) no person has been charged with an offence with respect to the prohibited drug or substance and the officer is of the opinion that no person is likely to be charged.

Schedule 1 [20] inserts proposed section 39RA (5) into the Principal Act. Section 39RA of the Principal Act permits the Commissioner of Police to direct that any prohibited plant or prohibited drug that has been seized by a police officer be retained for use in connection with a controlled operation under the *Law Enforcement (Controlled Operations) Act 1997* or an integrity testing program under Part 10A of the *Police Act 1990*. Currently section 39RA (5) provides that functions of the Commissioner of Police under this section may not be delegated except to a Deputy Commissioner of Police. The proposed new section 39RA (5) provides that those functions may also be delegated to a person holding a NSW Police Senior Executive Service position to whom the function under section 6 (1) of the *Law Enforcement (Controlled Operations) Act 1997* of authorising the conduct of a controlled operation has been delegated in accordance with that Act.

Schedule 1 [22] amends section 43 (6) of the Principal Act to provide that certain evidence relating to the analysis of plants and substances may be given by certificate by a person who is an analyst (however described) under a law of another State or Territory that corresponds to the Principal Act and who is, or belongs to a class, prescribed by the regulations under that Act for the purposes of this provision.

Schedule 1 [24] replaces section 45 (3) of the Principal Act. Section 45 (3) of the Principal Act provides that a regulation may impose a penalty not exceeding 10 penalty units for any contravention of the regulation. Proposed new section 45 (3) provides that a regulation may create an offence punishable by a penalty, including a distinct penalty in the case of a second or subsequent offence, not exceeding:

- (a) 150 penalty units in the case of a corporation, or
(b) 50 penalty units in the case of an individual.

Schedule 1 [25] inserts 1,4-Butanediol and Gamma butyrolactone into Schedule 1 to the Principal Act as prohibited drugs (along with their corresponding traffickable, small, indictable, commercial and large commercial amounts). **Schedule 1 [25]** also inserts Methadone in oral liquid form (with its corresponding traffickable, small, indictable, commercial and large commercial amounts in millilitres and litres) into the Schedule. Methadone in a form measurable in grams and kilograms is already listed in the Schedule. **Schedule 1 [26] and [27]** are consequential amendments.

Schedule 2 Amendment of other legislation

Schedule 2.1 [1] and [2] amend section 8 of the *Young Offenders Act 1997* by way of law revision to make it clear that the provisions of that Act (including the provisions relating to the cautioning of young offenders) apply to offences under Division 1 of Part 2 of the Principal Act relating to cannabis leaf if:

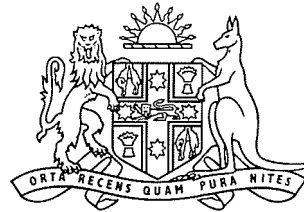
- (a) the offence involves not more than half the small quantity applicable to cannabis leaf under the Principal Act, or

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- (b) there are exceptional circumstances in that:
 - (i) the offence involves more than half, but not more than the total, small quantity of cannabis leaf within the meaning of the Principal Act, and
 - (ii) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under the *Young Offenders Act 1997*.

Schedule 2.2 omits clause 16 from the *Young Offenders Regulation 2004* as a consequence of the amendments made by Schedule 2.1 [1] and [2] as referred to above.



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Drug Misuse and Trafficking Amendment Bill 2005

No. , 2005

A Bill for

An Act to amend the *Drug Misuse and Trafficking Act 1985* to make further provision in relation to the prohibition of the manufacture, supply, possession and use of certain drugs; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Drug Misuse and Trafficking Amendment Act 2005</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5
3 Amendment of Drug Misuse and Trafficking Act 1985 No 226	6
The <i>Drug Misuse and Trafficking Act 1985</i> is amended as set out in Schedule 1.	7 8
4 Amendment of other legislation	9
The <i>Young Offenders Act 1997</i> and the <i>Young Offenders Regulation 2004</i> are amended as set out in Schedule 2.	10 11

Schedule 1	Amendment of Drug Misuse and Trafficking Act 1985	1
		2
	(Section 3)	3
[1]	Sections 10 (2) (b), 23 (4) (b), 24 (4) (b), 24A (2) (b), 25 (4) (b), 25A (9) (b) and 39J	4
	Insert “or a clinical trial” after “study” wherever occurring.	5
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[2]	Section 11A Sale, supply and display of waterpipes and ice pipes	7
	Insert in alphabetical order in section 11A (1):	8
	<i>ice pipe</i> means:	9
	(a) a device capable of being used for the administration of a prohibited drug by means of the smoking or inhaling of the smoke or fumes resulting from the heating or burning of the drug in a crystal or powder form, or	10
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	(b) a device that is apparently intended to be such a device but that is not capable of being so used because it needs an adjustment, modification or addition,	14
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	and includes a device known as an ice pipe or a crack pipe, but does not include a device of a class or description prescribed by the regulations as not being an ice pipe for the purposes of this section.	17
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[3]	Section 11A (2) (a) and (b) and (3)	21
	Insert “or an ice pipe” after “waterpipe” wherever occurring.	22
[4]	Section 11A (4)	23
	Insert “or ice pipe” after “waterpipe”.	24
[5]	Section 22 Indictable prosecution	25
	Omit section 22 (1). Insert instead:	26
	(1) Subject to the provisions of this Division and the <i>Criminal Procedure Act 1986</i> , an offence under this Division is to be prosecuted on indictment.	27
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[6]	Section 24 Manufacture and production of prohibited drugs	30
	Insert after section 24 (1):	31
	(1A) A person who:	32
	(a) manufactures or produces, or who knowingly takes part in the manufacture or production of, a prohibited drug, and	33
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(b)	exposes a child to that manufacturing or production process, or to substances being stored for use in that manufacturing or production process,	1
	is guilty of an offence.	2
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[7]	Section 24 (2A)	5
	Insert after section 24 (2):	6
(2A)	A person who:	7
(a)	manufactures or produces, or who knowingly takes part in the manufacture or production of, an amount of a prohibited drug which is not less than the commercial quantity applicable to the prohibited drug, and	8
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(b)	exposes a child to that manufacturing or production process, or to substances being stored for use in that manufacturing or production process,	12
	is guilty of an offence.	13
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[8]	Section 24 (3)–(3B)	16
	Omit section 24 (3). Insert instead:	17
(3)	If, on the trial of a person for an offence under subsection (2) or (2A), the jury are not satisfied that the amount of prohibited drug involved is equal to or more than the commercial quantity applicable to the prohibited drug, the jury may acquit the person of the offence charged and find the person guilty of an offence under subsection (1) or (1A), respectively, and the person is liable to punishment accordingly.	18
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(3A)	It is a defence to a prosecution for an offence under subsection (1A) or (2A) if the defendant establishes that the exposure of the child to the prohibited drug manufacturing or production process, or to substances being stored for use in that manufacturing or production process, did not endanger the health or safety of the child.	25
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(3B)	If, on the trial of a person for an offence under subsection (1A) or (2A), the jury:	31
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(a)	is not satisfied that a child was exposed to a prohibited drug manufacturing or production process, or to substances being stored for use in such a manufacturing or production process, or	33
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(b)	is satisfied that the defence referred to in subsection (3A) has been made out,	37
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	the jury may acquit the person of the offence charged and find the person guilty of an offence under subsection (1) or (2), respectively, and the person is liable to punishment accordingly.	1 2 3
[9]	Section 24 (5)	4
	Insert after section 24 (4):	5
	(5) In this section, <i>child</i> means a person who is under the age of 16 years.	6 7
[10]	Section 24A Possession of precursors for manufacture or production of prohibited drugs	8 9
	Omit “cash sale” from section 24A (2A). Insert instead “sale and storage”.	10
[11]	Section 25 Supply of prohibited drugs	11
	Insert after section 25 (2B):	12
	(2C) A person of or above the age of 18 years who procures a person under the age of 16 years to supply, or take part in the supply of, a prohibited drug (other than cannabis leaf) to another person is guilty of an offence.	13 14 15 16
	(2D) A person of or above the age of 18 years who procures a person under the age of 16 years to supply, or take part in the supply of, an amount of a prohibited drug (other than cannabis leaf) which is not less than the commercial quantity applicable to the prohibited drug is guilty of an offence.	17 18 19 20 21
	(2E) It is a defence to a prosecution for an offence under subsection (2C) or (2D) if the defendant establishes that the defendant had, at the time the offence is alleged to have been committed, reasonable cause to believe, and did in fact believe, that the person who was procured to supply, or take part in the supply of, the prohibited drug was of or above the age of 16 years.	22 23 24 25 26 27
[12]	Section 25 (3)	28
	Insert “or (2D)” after “subsection (2)”.	29
[13]	Section 25 (3)	30
	Insert “or (2C), respectively” after “subsection (1)”.	31
[14]	Sections 30 (1) (b) and (e) and 31 (1) (b) and (e)	32
	Insert “or (1A)” after “24 (1)” wherever occurring.	33

[15] Sections 30 (1) (c) and (e) and 31 (1) (c) and (e)	1
Omit “25 (1) or (1A)” wherever occurring.	2
Insert instead “25 (1), (1A) or (2C)”.	3
[16] Section 33AC	4
Insert after section 33AB:	5
33AC Penalties for offences involving manufacture or production in presence of children or procuring children to supply prohibited drugs	6
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(1) This section applies to the following offences:	9
(a) an offence under section 24 (1A) or (2A) or 25 (2C) or (2D),	10
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(b) an offence under section 26 of conspiring to commit an offence referred to in paragraph (a),	12
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(c) an offence under section 27 of aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence referred to in paragraph (a),	14
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(d) an offence under section 28 of conspiring to commit, or of aiding, abetting, counselling, procuring, soliciting or inciting the commission of, an offence under a law in force outside New South Wales which corresponds to section 24 (1A) or (2A) or 25 (2C) or (2D).	17
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(2) The penalty for an offence under section 24 (1A) or 25 (2C), or an offence referred to in subsection (1) (b)–(d) that relates to an offence under section 24 (1A) or 25 (2C), is a fine of 2,400 penalty units or imprisonment for 18 years, or both.	22
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(3) The penalty for an offence under section 24 (2A) or 25 (2D), or an offence referred to in subsection (1) (b)–(d) that relates to an offence under section 24 (2A) or 25 (2D), is a fine of 4,200 penalty units or imprisonment for 25 years, or both.	26
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(4) Despite subsection (3), if the court is satisfied that an offence referred to in that subsection involved not less than the large commercial quantity of the prohibited drug concerned, the penalty for the offence is a fine of 6,000 penalty units or imprisonment for life, or both.	30
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(5) In this section:	35
<i>large commercial quantity</i> , in relation to a prohibited drug, means the number or amount, if any, specified opposite the drug in Column 5 of Schedule 1.	36
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[17] Section 35A	1
Insert after section 35:	2
35A Defence in relation to certain substances used in industry	3
(1) Despite any other provision in this Act, it is not an offence against this Act for:	4
(a) a person to manufacture, produce, possess or supply an industrial product for the purpose of the manufacture or distribution of an industrial product or final stage industrial product, or	5
(b) a person to manufacture, produce, possess or supply a final stage industrial product, or	6
(c) a person to possess or supply a Schedule 2 substance for the purpose of its disposal as waste or its destruction.	7
(2) In this section:	8
<i>distribution</i> means any process or operation necessary for distributing a substance or product to a manufacturer or other distributor.	9
<i>final stage industrial product</i> means:	10
(a) an article or substance that does not contain any Schedule 2 substance or any other prohibited drug, or	11
(b) an industrial product:	12
(i) from which a Schedule 2 substance cannot be readily extracted or readily synthesized, or	13
(ii) contains less than the concentration of Schedule 2 substance prescribed by the regulations,	14
and that does not contain any other prohibited drug.	15
<i>industrial product</i> means an article or substance:	16
(a) that is not for human consumption, and	17
(b) that is or contains a Schedule 2 substance.	18
<i>manufacture</i> means any process or operation necessary for manufacturing a substance or product.	19
<i>Schedule 2 substance</i> means any substance listed in Schedule 2.	20
(3) In this section, a reference to the manufacture, production, possession or supply of a substance or product includes taking part in the manufacture, production, possession or supply of the substance or product.	21
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[18] Section 39A	1
Omit the section. Insert instead:	2
39A Meaning of “minimum amount”	3
In this Division, <i>minimum amount</i> , in relation to a prohibited drug, means the traffickable quantity of the prohibited drug.	4 5
[19] Part 3A, Division 2B	6
Insert after Division 2A of Part 3A:	7
Division 2B Order for disposal of substances when no likely prosecution	8 9
39PB Order for disposal of substances by certain senior police officers when no likely prosecution	10 11
(1) A police officer of or above the rank of Superintendent may order that a prohibited drug, or a substance that the officer reasonably suspects is a prohibited drug, seized by a member of NSW Police be destroyed if:	12 13 14 15
(a) the amount of the prohibited drug (or of the prohibited drug that the officer reasonably suspects the substance to be) is less than the traffickable quantity of the drug, and	16 17 18
(b) no person has been charged with an offence with respect to the prohibited drug or substance and the officer is of the opinion that no person is likely to be charged.	19 20 21
(2) Before any prohibited drug or substance is destroyed in accordance with such an order:	22 23
(a) evidence of the substance or article is to be recorded, whether by photographing or otherwise, and	24 25
(b) if the police officer concerned determines that it is appropriate, two samples of the drug or substance are to be taken and retained, each of a sufficient quantity to allow its analysis.	26 27 28 29
(3) Subject to subsection (2), any prohibited drug or substance (whether seized before or after the commencement of this section) may be destroyed in accordance with an order under this section.	30 31 32 33

[20] Section 39RA Use of prohibited plants and prohibited drugs in controlled operations and integrity testing programs	1
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Omit section 39RA (5). Insert instead:	3
(5) Despite any other Act or law to the contrary, the functions of the Commissioner of Police under this section may not be delegated except to:	4
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(a) a Deputy Commissioner of Police, or	7
(b) a person holding a NSW Police Senior Executive Service position to whom the function under section 6 (1) of the <i>Law Enforcement (Controlled Operations) Act 1997</i> of authorising the conduct of a controlled operation has been delegated in accordance with that Act.	8
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[21] Section 40A Proof of certain matters	13
Omit “24 (4) or 25 (4)” from section 40A (2).	14
Insert instead “24 (4), 25 (4) or 35A”.	15
[22] Section 43 Certificate evidence	16
Insert at the end of paragraph (b) of the definition of <i>analyst</i> in section 43 (6):	17
, and	18
(c) a person who:	19
(i) is an analyst (however described) under a law of another State or Territory that corresponds to this Act, and	20
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(ii) is, or belongs to a class, prescribed by the regulations for the purposes of this definition.	23
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[23] Section 44A	25
Insert after section 44:	26
44A Amendment of Schedule 2	27
The Governor may, from time to time, by regulation amend Schedule 2:	28
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(a) by adding the name or description of or relating to a substance, or	30
	31
(b) by amending a name or description of or relating to a substance for the purpose of more accurately describing the substance.	32
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[24] Section 45 Regulations	1
Omit section 45 (3). Insert instead:	2
(3) A regulation may create an offence punishable by a penalty, including a distinct penalty in the case of a second or subsequent offence, not exceeding:	3
(a) 150 penalty units in the case of a corporation, or	4
(b) 50 penalty units in the case of an individual.	5
[25] Schedule 1	6
Insert in appropriate order:	7
1,4-Butanediol 30.0g 10.0g 50.0g 1.0kg 4.0kg —	
Gamma butyrolactone 30.0g 10.0g 50.0g 1.0kg 4.0kg —	
Methadone in oral liquid form 600ml 200ml 1L 100L 400L —	
[26] Schedule 1	8
Omit “, except 4-Hydroxy-butanoic acid lactone (also known as gamma butyrolactone as referred to in Schedule 2 to the <i>Drug Misuse and Trafficking Regulation 2000</i>)” from the matter relating to 4-Hydroxybutanoic acid.	9
[27] Schedule 1	10
Insert “except in oral liquid form” after “Methadone” in the matter relating to Methadone.	11
[28] Schedule 2	12
Insert after Schedule 1:	13
Schedule 2 Legitimate purpose defence substances	14
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Schedule 2	Amendment of other legislation	1
	(Section 4)	2
2.1	Young Offenders Act 1997 No 54	3
[1]	Section 8 Offences covered by Act	4
	Omit section 8 (2) (e1). Insert instead:	5
	(e1) the offence is an offence under Division 1 of Part 2 of the <i>Drug Misuse and Trafficking Act 1985</i> other than an offence to which subsection (2A) applies, or	6 7 8
[2]	Section 8 (2A)	9
	Insert after section 8 (2):	10
	(2A) An offence under Division 1 of Part 2 of the <i>Drug Misuse and Trafficking Act 1985</i> is covered by this Act if in the opinion of the investigating official or prosecuting authority:	11 12 13
	(a) in relation to an offence relating to a prohibited drug other than cannabis leaf within the meaning of the <i>Drug Misuse and Trafficking Act 1985</i> —the offence involves not more than the small quantity applicable to that drug under that Act, or	14 15 16 17 18
	(b) in relation to an offence relating to cannabis leaf:	19
	(i) the offence involves not more than half the small quantity of cannabis leaf within the meaning of the <i>Drug Misuse and Trafficking Act 1985</i> , or	20 21 22
	(ii) there are exceptional circumstances in that:	23
	(A) the offence involves more than half, but not more than the total, small quantity of cannabis leaf within the meaning of that Act, and	24 25 26 27
	(B) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under this Act.	28 29 30

2.2 Young Offenders Regulation 2004	1
Clause 16 Offence for which caution may not be given	2
Omit the clause.	3