

Drug Misuse and Trafficking Amendment (Drug Exhibits) Bill 2016 (Proof)

About this Item

Speakers	Clarke The Hon David; Searle The Hon Adam; Shoebridge Mr David
Business	Bill, Second Reading, Third Reading, Motion

DRUG MISUSE AND TRAFFICKING AMENDMENT (DRUG EXHIBITS) BILL 2016

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Second Reading

The Hon. DAVID CLARKE (Parliamentary Secretary) [5.24 p.m.], on behalf of the Hon. John Ajaka: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Drug Misuse and Trafficking Amendment (Drug Exhibits) Bill 2016.

The bill amends the Drug Misuse and Trafficking Act 1985 and Drug Misuse and Trafficking Regulation 2011 to improve and consolidate the testing, transportation and destruction of illegal drugs seized by the NSW Police Force, and decreases the time taken to finalise drug matters in courts, while safeguarding the rights of the accused and community confidence in the justice system.

This bill is designed to improve the process for all those involved in the management of illicit drugs from their seizure, through the criminal justice process, to their destruction.

For Police, a workplace health and safety hazard will be minimised and more police officers freed to carry out their frontline duties. For courts and lawyers on both sides, the criminal trial process for drug related matters will be quicker and establishing the chain of evidence easier. For the Forensic and Analytical Science Service, known as FASS, which is part of NSW Health, the drug analysis backlog will be reduced. For the accused, additional rights of review will be introduced. And for the broader community, stringent best practice procedures for the safe and secure handling of illegal drugs will be formally embedded in legislation.

This bill responds to concerns raised by the New South Wales Auditor-General in a report to Parliament in February 2013, titled "*Managing drug exhibits and other high profile goods: NSW Police Force*". The Auditor-General conducted a performance audit examining how well the NSW Police Force manages the storage and disposal of drug exhibits. The audit looked at police methods of recording exhibits, how they are stored, and their eventual disposal.

Overall, the Auditor-General found that the NSW Police Force manages the recording, storage and tracking of drug exhibits well. However, the Auditor-General did highlight areas where there was scope for improvement to increase safety and efficiency and decrease costs. Those areas for improvement identified by the Auditor-General can be extended to the courts, where the resources of judges and lawyers are tied up in drug related matters which could be resolved in a quicker, simpler manner.

One of the key findings of the Auditor-General was that drug exhibits include chemicals which can deteriorate and become unstable, posing serious health and safety risks to any person handling those drugs or working in the vicinity of where they are stored.

Currently the NSW Police Force usually needs a court order to destroy drugs that are seized. The Auditor-General found that, because court orders are generally not obtained, 25 per cent of drugs held by the NSW Police Force are held for more than two years, with some held more than 10 years, long after court proceedings have concluded. This means our police officers are exposed to health and safety risks as drug exhibits deteriorate and release toxic fumes, becoming very dangerous.

The Auditor General also found that drug exhibits are currently transported by New South Wales police around the State for analysis, taking the equivalent of 1,000 police officers away from the frontline for 2 days each year (particularly regional officers, who travel long distances) at an estimated cost of \$1.2 million per year.

The Auditor-General ultimately made six recommendations relating to the management of drug exhibits. The Legislative

Assembly Public Accounts Committee supported all of the Auditor-General's recommendations and recommended the Government introduce legislation to facilitate the destruction of drugs and improve drug sampling and analysis procedures.

The implementation of the Auditor-General's recommendations has involved a mix of changes to police operational procedures, which have already occurred, and legislative amendments, which are contained in this bill.

This bill will allow for drug exhibits to be destroyed earlier, and without a court order. This process will be similar to the process in force in the Northern Territory, Tasmania, South Australia, Queensland, Western Australia and Commonwealth jurisdictions. This ensures that police are not exposed to dangerous exhibits any longer than is absolutely necessary. It is also more efficient for our justice system as courts will no longer need to spend time considering orders for the destruction of drugs. Stringent destruction procedures are in place to maintain the integrity of the destruction process.

Scientifically trained and certified police from the Forensic Services Group, or FSG, will now be able to weigh all drug exhibits and issue a mass or quantity certificate, and sample drug exhibits which are not less than the traffickable amount. These samples will then be provided to FASS for analysis. The weighing and sampling of drugs by specialist qualified police, or FSG, will reduce the analysis backlog at FASS and speed up the analysis process.

Secure couriers will now be able to transport exhibits that are less than the traffickable quantity and samples of an exhibit taken by an FSG officer to FASS. Police officers will no longer need to transport drugs around the State, allowing them to return to their core duties. Couriers are already used by police for the transportation of other exhibits for analysis, including blood and DNA samples.

The bill provides for new safeguards for the rights of the accused by allowing the accused to seek a second independent drug analysis and apply to the Local Court to have drugs re-weighed.

The bill will codify the existing Presumptive Testing Trial, which was started by the Office of the Chief Magistrate, the NSW Police Force, the Office of the Director of Public Prosecutions and FASS Police in September 2013, by providing that less than traffickable quantities of drugs only need to be analysed by FASS where the drugs are in dispute. This allows an accused to either plea on the basis of a presumptive test, which will be provided to the accused in a shorter time frame, or to seek a full analysis of the exhibit by FASS.

In order to cut down the time taken by prosecutors to prove continuity to the court, the bill creates a presumption, which can be rebutted by an accused, that, where drugs have been sealed in tamper evident bags and entered on the NSW Police Force exhibits management system, the drug that is analysed by FASS is the same as the drug seized by police. This avoids the need for the court to call multiple witnesses to prove continuity. The change will make drug trials more efficient and simpler for the accused, the prosecution and the court.

The bill also ensures that exhibits will continue to be held securely. Current police systems, including the use of drug vaults, drug cabinets, recording and fingerprinting, operate to provide probity and anti-corruption measures in the management of drug exhibits. This system will continue.

The reforms implemented by this bill were developed by a working group comprising the NSW Police Force, the Department of Justice, the Office of the Director of Public Prosecutions and the Forensic Analytical Science Services. Other key stakeholders, including the Law Society of NSW, the New South Wales Bar Association, the Local Court, the District Court, Legal Aid and the Public Defender's Office have been consulted on the reforms.

I join with the Attorney General in thanking all individuals whose work has contributed to these important reforms.

I will now turn to the specific provisions of the bill.

The bill replaces Part 3A of the Drug Misuse and Trafficking Act 1985 and Part 3 of the Drug Misuse and Trafficking Regulation 2011.

Schedule 1 to the bill introduces new exhibits and testing procedures for prohibited plants, prohibited drugs, Schedule 9 substances (as defined in the Act), and other psychoactive substances.

Schedule 2 to the bill amends the regulation and provides for the procedural elements of the dealings with and analysis of drug exhibits.

The proposed structure of amendments to both the Act and regulation is consistent with the existing structure of the Act and regulation and allows for process related matters in the regulation to promptly respond to emerging issues.

The NSW Police Force will be empowered to destroy a prohibited substance under division 3 of Part 3A of the Act without a court order. Under section 39G, a qualified police officer will be empowered to order the destruction of suspected drug exhibits of any quantity, where there is no likelihood of charging a person with an offence relating to the suspected drug, 21 days after the exhibit is seized. For the purposes of Part 3A of the Act, a qualified police officer means a police officer of or above the rank of superintendent. Analysis is not required for an exhibit destroyed under section 39G.

This bill will also improve the way that police handle seizures of prohibited plants. Decaying plants have little evidentiary value and present health risks due to the mould, fungi and spores that grow on them. This is particularly true of moist cannabis that has been stored in conditions which do not allow for rapid drying.

Under section 39H, a qualified police officer will be able to order that a prohibited plant that is seized is destroyed immediately after a certificate identifying the plant is issued and the particulars of the plant. Clause 16E of the regulation provides that the particulars will include a photograph of the plant, if practicable, the height of the plant, and where there are multiple plants, the number of plants seized.

Clause 11 of the regulation provides that as soon as practicable after a substance is seized by the NSW Police Force, the exhibit is to be provided to an approved police officer or an analyst for weighing. The approved police officer will be a member of the Forensic Services Group of the NSW Police Force that is certified by NSW Health to weigh and sample drug exhibits. That officer or analyst will issue a certificate of the mass or quantity of the exhibit, which will be then served on the accused.

Where the exhibit is not less than the traffickable quantity, the approved police officer or analyst will then take two samples from the exhibit for full analysis.

Clause 13 of the regulation will provide that both the "A" and "B" sample must be at least three times the minimum amount required for analysis, where practicable. Samples will be taken in accordance with accepted international standards and the process will be detailed in police standard operating procedures.

The "A" sample will be forwarded to Forensic and Analytical Science Services for full analysis, with the "B" sample and remainder, or bulk, of the exhibit stored by New South Wales police in secure storage at a local area command or within the Surry Hills Exhibit Centre.

Clause 16D allows for the "A" or "B" sample, and exhibits that are less than the traffickable quantity, to be transported by an approved courier. Couriers will be security screened and will only transport small, securely sealed amounts of the prohibited substance in tamper evident bags. This is in line with current arrangements for the transportation of other exhibits for analysis, including blood and DNA.

Clause 16A of the regulation provides that when an analyst receives the "A" sample, the analyst will determine the identity of the substance, quantity or mass of the portion of the substance weighed, and where the substance is capable of being tested, and it is practicable to do so, the purity of the substance. The analyst will then provide an analyst certificate under clause 16B of the regulation.

Under Clause 161, after the analyst certificate is issued a senior FASS officer will authorise the destruction of the remaining portion of the "A" sample.

Section 391 provides that a qualified police officer may order the destruction of the bulk of an exhibit, where the exhibit is not less than the traffickable quantity, after analysis takes place. When police receive the analyst certificate they will serve the analyst certificate and notice of impending destruction of the bulk of the drug exhibit on the defendant. This notice informs the defendant that the 'bulk' of the drug exhibit may be destroyed after 28 days.

However, notwithstanding that a notice of impending destruction of the bulk of the exhibit has been served on the defendant, police will not be able to destroy the exhibit until both the 60 day time period for a mass review application under section 39M, or the 28 days after the written notice of destruction has been served on the defendant, whichever is later.

Section 39M of the bill provides that an accused person may make an application to review the mass listed on a certificate issued by the NSW Police Force or analyst under clause 11 of the regulation. This application cannot be made later than 60 days after the certificate of mass has been served on the accused.

An accused must satisfy the Local Court there has been a substantial failure to comply with the Act or regulation in respect of the substance, or there is a real doubt as to the accuracy of the certificate issued by the approved member of the NSW Police Force or analyst in respect of the mass of the substance, for the substance to be reweighed.

After the 60 day period for a mass review application, or 28 days after the notice of impending destruction has been served, whichever is later, a qualified police officer may authorise destruction of the bulk of the exhibit.

A qualified police officer may only authorise the destruction of the "B" sample 28 days after the completion of court proceedings, including any appeal period.

The "B" sample will continue to be held by police to allow the accused to request a re-analysis of the exhibit if the accused disputes the results of the analysis of the A sample.

Clause 16 of the regulation provides that an accused may request police send the "B" sample to an authorised, independent analyst not later than 28 days after receiving the certificate of analysis of the "A" sample.

The testing of the "B" sample will involve police providing the sample to FASS or another authorised testing facility. The cost of

the independent testing is borne by the defendant, and the sample itself is never provided to the accused. The analyst will then issue a new analyst certificate for the exhibit to both the police and the accused.

Clause 16C of the regulation provides that if a difference occurs between the findings recorded in two or more certificates of any analyst concerning the same drug exhibit and the analyst providing the later or latest certificate is of the opinion that the difference is significant, that analyst must immediately forward a copy of all certificates relating to the drug exhibit to the Director of Public Prosecutions.

Where the exhibit is less than the traffickable quantity, a qualified police officer may authorise the destruction of the exhibit under section 39J not earlier than 28 days after the end of proceedings for an offence relating to that substance, including the end of any appeal proceedings or end of period in which an appeal can be made.

The bill remakes the existing power for qualified police officer to order the destruction of dangerous substances and articles. Section 39K of the bill will allow a qualified police officer to make an order for the destruction of dangerous substances or articles, after an analyst certifies in writing that the substance or article is dangerous. In this situation, a substance or article that is deemed to be dangerous cannot be destroyed prior to 28 days after a notice of impending destruction is served on the accused unless the analyst certifies in writing that, in the interests of health and safety, the substance or article needs to be destroyed earlier.

This provision reflects current powers under section 39PA of the Act and will allow a qualified police officer to order the destruction of dangerous articles used in or associated with the range of offences under the Act, such as toxic waste and dangerous precursors.

Under section 39L of the bill, where a qualified police officer finds that a substance cannot reasonably be securely retained during the period between the notice of impending destruction being served to the accused and the destruction of the substance, the substance can be destroyed by order of a qualified police officer.

The bill introduces new presumptions that will improve the way drug trials are run.

Section 39N of the bill provides that where a legally represented person who has plead guilty appeals from a decision of the Local Court on a drug related charge and the drug exhibit has been destroyed before the appeal is heard, the particulars in the Court Attendance Notice about the drug exhibit are presumed to be true.

This provision will assist the efficiency of appeals from the Local Court by reducing the amount of time and evidence required to prove a matter that is invariably not in issue in an appeal. Further 39N ensures that this presumption is rebuttable by the accused.

Division 5 of the regulation creates a rebuttable presumption to 'chain of custody' of a drug exhibit.

All drug exhibits seized by police will be sealed into barcoded tamper evident bags. Clause 16F of the regulation requires that the details of each bag and its barcode are entered onto the NSW Police Exhibits Management System. Any movement or interaction with that drug exhibit is recorded on the exhibits management system.

This system is a far cry from the old exhibits management book system which required manual updating as well as extensive statements from each police officer involved in the process. This system made proving continuity an unnecessarily arduous task for prosecutors.

The NSW Police Force's computerised exhibits management system was a great leap forward and has ensured the more efficient management and tracking of exhibits. It provides real time tracking of exhibits, and allows better oversight of exhibits. The bill capitalises on its strengths by applying it to drug exhibits.

In recognition of the safeguards provided by barcoded, tamper evident bags, clause 16L provides that a certified copy of a report of the NSW Police Exhibits Management System, which shows chain of custody of the exhibit, will replace the complicated system of statements currently employed in contested drug trials.

Clause 16M of the regulation will also allow for certificates to be issued by the police officer who seals the bag and the analyst who opens the sealed bag for testing to complement the record from the NSW Police Exhibits Management System.

If a courier is used to transport an exhibit that is less than a traffickable quantity, or a sample of a larger drug exhibit, this will be recorded in the exhibits management system, which will be certified by a police officer and is prima facie evidence of the fact that the drug exhibit bag sealed by the police officer is the same exhibit that is received by the analyst where the bag remains sealed.

Clause 16N of the regulation replicates the existing section 43(4) of the Act, providing that the certificates issued under the Regulation are prima facie evidence of the matter stated in them without having to approve the appointment or approval of the person giving the certificate or the signature of the person giving the certificate.

This bill also codifies existing procedures for presumptive testing of exhibits less than the traffickable quantity developed under the presumptive testing trial.

Clause 15 of the regulation provides that for exhibits that are less than the traffickable amount, a presumptive test may be conducted on the drug exhibit.

Presumptive, or indicative testing, is not a conclusive test, and will not provide prima facie evidence of the identity of a drug exhibit in the same way that a drug analysis certificate, which states the results of full analysis, does. What the presumptive test certificate does provide is a clear indication of the identity of the drug, which may be sufficient for an accused person to determine their position with regard to a plea.

Under clause 15 of the regulation, the bill will still allow the defence, upon receipt of the presumptive test certificate, to advise the court that the identity of the substance remains in issue, which will result in proceedings being listed for a defended hearing and for a full analysis to be sought.

If a full analysis is requested for an exhibit that is less than the traffickable quantity, the drug will be sent to an analyst, and will follow the same procedures for a sample from an exhibit not less than the traffickable amount sent to an analyst.

A presumptive test is much less time-consuming than full analysis and can be completed, with a presumptive test certificate issued, within the four week adjournment time frame. Incorporating these procedures into the Act will continue to significantly reduce the drug analysis backlog at FASS.

Section 39O will allow for a court, on application of a person who is legally entitled to a substance to which part 3A of the Act applies, discretion to order that the substance at issue is returned to the person if the substance has not been destroyed. Police will also now be empowered to return substances to the lawful owner under section 39P if the retention of the substance as evidence is not required and it is lawful for the person to have possession of the substance.

Section 39Q remakes the existing section 39RA of the Act to ensure measures introduced by schedule 1 to the bill complement existing anti-corruption measures in the Drug Misuse and Trafficking Act 1985.

This builds on other security measures introduced by this bill.

Clause 16G of the regulation ensures that exhibits are only stored in tamper evident drug exhibit bags. These exhibit bags will provide the details the responsible investigating officer, details of the seizure and accused's name and a barcode, which will be used to track the exhibit in the NSW Police Exhibits Management System.

The exhibit bags used by the NSW Police Force are tamper evident, with heat seals indicating when an exhibit bag has been opened. Under clause 16G, an exhibit bag can only be opened before it is handed to an analyst for weighing, presumptively testing and sampling, or in exceptional circumstances that are approved in writing by a qualified police officer.

The weighing, presumptive testing and sampling will continue to only be carried out by approved police officers, being those from the Forensic Services Group.

Clause 16H provides that the drug exhibits bags can only be stored in secure drug lockers or cabinets, which have dual locking mechanisms that require at least two keys to unlock, or in an approved facility, which includes the Surry Hills Exhibits Centre.

Where a qualified police officer has approved the destruction of an exhibit, and the time frames mandated by the Act have expired, a police officer of or above the rank of inspector must inspect the drug exhibit bag to determine that the drug exhibit bag has not been opened or tampered with. Clause 16J provides a further safeguard to corruption.

A separate police officer is then required to record the particulars of an exhibit that is not less the traffickable quantity before destruction, to ensure that the drug exhibit corresponds with the record of the exhibit in the police exhibits management system. Clause 16E requires that the drug exhibit must be first photographed, and any other relevant identifying information recorded.

Once this inspection has occurred, clause 16K of the regulation requires that the exhibit be destroyed in the presence of a police officer of or above the rank of Inspector, an independent witness, such as a priest or Justice of the Peace, and a member of the NSW Police Force who is capable of identifying the exhibit being destroyed as the substance ordered to be destroyed.

The changes proposed by this bill will ensure that only the amount of drugs that need to be retained is retained. It will improve officer safety by reducing exposure to dangerous and deteriorating exhibits.

The bill empowers the NSW Police Force to get on with tackling drug crime; something that is becoming more important given the increasing prevalence of ice. The changes focus on reducing the time and resources expended to manage and store drug exhibits long after they are required for drug trials. It will cut down the costs borne by police for the storage of drug exhibits.

The bill will also make our justice system more efficient. It slashes unnecessary red tape in the courts. Lawyers and judges will no longer need to spend hours compiling and considering evidence to establish the chain of custody of drugs. The court process will be quicker for an accused who wishes to plead guilty for a drug related charge. Importantly, the rights of the accused will be protected by new review mechanisms.

This bill addresses improved workplace health and safety for police, decreases costs and improves the efficiency of both police

procedures and our criminal justice system when dealing with drug related matters.

I commend the bill to the House.

The Hon. ADAM SEARLE (Leader of the Opposition) [5.25 p.m.]: I lead for the Opposition in debate on the Drug Misuse and Trafficking Amendment (Drug Exhibits) Bill 2016. The Opposition does not oppose the bill. The bill has two objects. The first is:

...to amend the *Drug Misuse and Trafficking Act 1985* ... and the *Drug Misuse and Trafficking Regulation 2011* to update and streamline the system for the retention, analysis and destruction of prohibited plants, prohibited drugs, Schedule 9 substances ... and psychoactive substances ... and suspected relevant substances, that are seized or otherwise come into possession of the NSW Police Force.

The second object is to make consequential and transitional amendments and provisions. The New South Wales Bar Association has advised the Opposition that it has no issue with the legislation. A significant portion of the bill finds its ancestry in a performance audit by the New South Wales Auditor-General entitled "Managing drug exhibits and other high profile goods", dated 28 February 2013. There was also some commentary by the Public Accounts Committee in its report No. 17/55, dated August 2014. The Auditor-General found that police managed drug exhibits well, including the recording, storage and tracking of drug exhibits. The Auditor-General dealt with other high-profile goods as well, but that is not relevant to this debate or to this bill. The Auditor-General did say that there could, nonetheless, be beneficial changes. He said:

However, there is room for improvement, mainly in regard to the effective disposal of drug exhibits and other goods, and improving efficiency by reducing the need to transport drug exhibits for testing.

Nearly 7,000, or around a third, of the drug exhibits recorded in NSW Police's electronic tracking system EFIMS have been on hand for more than a year, and some for over five years.

The Auditor-General also said:

Some drug exhibits could pose a significant risk to the health and safety of officers, and this risk may increase over time. Police in other jurisdictions reduce the risk by documenting, analysing and destroying drug exhibits as soon as possible, with only a sample of the drug exhibit retained for court proceedings. However, in New South Wales, unlike most other jurisdictions, Police must hold onto some drug exhibits until a court order is obtained for their destruction.

The Auditor-General noted the development of legislative changes. He pointed to the tying up of police resources through the transporting of drugs by police. He said:

Some NSW Police practices are also not as efficient or cost effective as they could be. Drug exhibits, as well as the samples taken from the exhibits for analysis, are currently moved around the State, tying up NSW Police resources.

The Auditor-General pointed out that in 2011-12 more than 15,000 of the nearly 40,000 drug exhibits collected in the State were from areas that would require overnight stops in Sydney. The residual drug exhibit samples not used up in the analysis process need to be collected by officers and returned to police storage. An alternative would be for exhibits to be weighed and samples taken locally in the regions, with samples taken to Sydney only by courier and being destroyed during testing. This seems to follow the procedure in other jurisdictions. The driver behind these changes is of course not justice but costs. There is nothing wrong with reducing the costs of the legal system if that is capable of being done without reducing the quality of justice.

The response of the Commissioner of Police to the Auditor-General's recommendation, dated February 2013, noted the proposals for legislative change made by police. Some of those proposals seem at last to have found their way into this bill. The Auditor-General estimated the cost of transporting drug exhibits at \$1.2 million. That is equivalent, he said, to 1,000 police being away from frontline duties two days per annum. However, he conceded that if a trip had to be made from a regional area to Sydney then officers, as a matter of practicality, would link the trip with other tasks. The system of the destruction of drugs is complex. In some circumstances the police can destroy them; in other cases it needs a court order. It is, however, a very complex regime, which is a point that was made graphically by appendix No. 2 of the Auditor-General's report.

Many of the considerations have found their way into this bill, including the issue of how long police retain evidence and the complex issue of how much to destroy. It is not the case that police are unable to destroy drugs without a court order. In some instances that is correct, but it is not correct in all cases. Holding onto exhibits imposes a cost by way of secure storage. Deterioration of the substance can cause health dangers, although the Auditor-General asserted that the police can destroy drugs if they are dangerous. That certainly emerges from appendix No. 2 of his report.

The bill replaces part 3A of the Drug Misuse and Trafficking Act 1985 and part 3 of the Drug Misuse and Trafficking Regulation 2011. Division 3 of the new part 3A deals with destruction of substances. New section 39G provides that a qualified police officer may order the destruction of a substance where there is no likelihood of prosecution, although it must be recorded by a means such as photographing. New section 39H provides for the destruction of prohibited plants by