

## **Drug Misuse and Trafficking Amendment Bill 2005**

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
- (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.