

Explanatory note

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

Overview of Bill

The objects of this Bill are as follows:

(a) to amend the *Criminal Procedure Act 1986*:

(i) to clarify the circumstances in which less serious offences may be dealt with on indictment, and

(ii) to make further provision for pre-trial disclosure, and

(iii) to ensure that the withdrawal of a matter by the prosecution does not prevent later proceedings in respect of the same matter against the same person, and

(iv) to extend the period at the end of which the Ombudsman is to provide a report on the impact of the penalty notice scheme on Aboriginal and Torres Strait Islander communities,

(b) to amend the *Criminal Appeal Act 1912* to make further provision for Crown appeals that are dealt with in the absence of the respondent, including by allowing the Court of Criminal Appeal to issue a warrant for the arrest of an absent respondent in certain circumstances,

(c) to amend the *Crimes Act 1900*:

(i) to make further provision with respect to proof of recklessness, and

(ii) to extend the offence of possessing or making explosives for an unlawful purpose so that it also applies to the supply of explosives for an unlawful purpose, and to increase the penalty for that offence, and

(iii) to make further provision with respect to the offence of perjury, so as to recognise the possibility that the offence may be tried summarily (in the absence of a jury), and

(iv) to make further provision with respect to the liability of accessories,

(d) to amend the *Drug Misuse and Trafficking Act 1985*:

(i) to prohibit the possession of instructions about how to make prohibited drugs, any apparatus intended to be used in the making of prohibited drugs and any substance capable of being used to make a prohibited drug, and

(ii) to provide a legitimate purpose defence for a person who manufactures, produces, possesses or supplies certain products or substances that are listed as prohibited drugs but are mostly used in connection with industry, and

(iii) to remake uncommenced provisions of the *Drug Misuse and Trafficking Amendment Act 2006*.

The Bill also makes other minor and consequential amendments, and provides for savings and transitional matters.

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.

Clause 3 is a formal provision that gives effect to the amendments to the Acts specified in Schedules 1–4.

Clause 4 provides for the repeal of the *Drug Misuse and Trafficking Amendment Act 2006* which contains uncommenced amendments that will be remade by Schedule 4 to the proposed Act.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Criminal Procedure Act 1986

Indictable offences

At present, sections 5 and 6 of the *Criminal Procedure Act 1986* set out the general principles for determining whether an offence may be dealt with on indictment or summarily. Under section 6, the general principle for offences involving a maximum penalty of imprisonment for 2 years or less is that they should be dealt with summarily. This does not apply if an Act requires the offence to be dealt with on indictment.

Schedule 1 [1] amends section 6 to clarify that the general principle that such lesser offences be dealt with summarily does not apply if the offence is permitted to be dealt with on indictment under another Act, or is listed in Table 1 or 2 to Schedule 1 to the Act. Offences set out in Schedule 1 to the Act may be dealt with on indictment if the prosecutor or the person charged makes an election for the offence to be dealt with on indictment under Chapter 5 of the Act (regardless of the maximum penalty).

Schedule 1 [11] also makes it clear that all offences listed in Schedule 1 to the Act are indictable offences, subject to the provisions of the Act that require them to be dealt with summarily in certain circumstances.

Pre-trial disclosure requirements

Part 3 of Chapter 3 of the *Criminal Procedure Act 1986* imposes various requirements on parties to criminal proceedings being dealt with on indictment, in order to facilitate pre-trial disclosure of relevant matters.

Schedule 1 [2] and [3] make minor amendments to make it clear that a court, when deciding whether to require pre-trial disclosure, is not required to be satisfied of all the criteria that are listed in the Act as being relevant to a decision to order pre-trial disclosure. It is sufficient that the court considers pre-trial disclosure is warranted on the basis of one or more of the criteria.

Schedule 1 [4], [6] and [8] require certain notices that must be given by parties to criminal proceedings under pre-trial disclosure requirements to be filed with the court (in addition to being served on the other party).

Schedule 1 [5] exempts any matters that have already been disclosed by the prosecution in a brief of evidence served on an accused person from certain pre-trial disclosure requirements that are imposed on the prosecution under the Act.

Schedule 1 [7] requires a notice of alibi to be given 42 days before the relevant trial is listed for hearing, rather than 21 days before the trial is listed for hearing.

Withdrawal of matters by prosecution

Currently section 205 of the *Criminal Procedure Act 1986* allows a court to issue a certificate that certifies that criminal proceedings against a person have been dismissed. The certificate prevents any later proceedings in respect of the matter from being taken against the same person. **Schedule 1 [9] and [10]** clarify that the certification procedure does not apply in respect of a matter that is taken to be dismissed because the prosecution is withdrawn. The amendments make it clear that the withdrawal of a matter by the prosecutor does not prevent later proceedings in respect of the same matter against the same person.

Review of penalty notice scheme

Section 344A of the *Criminal Procedure Act 1986* requires the Ombudsman to review the impact, on Aboriginal and Torres Strait Islander communities, of the penalty notice scheme under that Act, including provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* that allow a police officer who serves a penalty notice on a person to require the person to submit to having his or her finger-prints taken. A report on the review is to be provided by 30 November 2008.

Schedule 1 [12] extends that date to 31 May 2009.

Savings, transitional and other matters

Table 1 to Schedule 1 to the *Criminal Procedure Act 1986* prescribes those indictable offences that are to be dealt with summarily unless the prosecutor or person charged elects otherwise. **Schedule 1 [13]** inserts section 24B of the *Drug Misuse and*

Trafficking Act 1985 (Offences involving possession of prohibited drug precursors) into that Table (so that it must be prosecuted summarily unless the prosecutor or person charged elects otherwise).

Schedule 1 [14] requires the offence under section 93FA (2) of the *Crimes Act 1900*, which will become an indictable offence as a result of the amendments made by Schedule 3 that increase the maximum penalty for that offence, to be prosecuted summarily unless the prosecutor otherwise elects.

Schedule 1 [15] enables savings and transitional regulations to be made as a consequence of the amendments made by the proposed Act.

Schedule 1 [16] makes provision for savings and transitional matters in relation to the amendments described above.

Schedule 2 Amendment of Criminal Appeal Act 1912

Currently section 14A of the *Criminal Appeal Act 1912* allows the Court of Criminal Appeal to dispose of certain Crown appeals (including Crown appeals against sentence) in the absence of the respondent in certain circumstances. **Schedule 2 [2]** will allow the Court of Criminal Appeal, if it decides to impose a sentence of imprisonment by way of full-time detention on a respondent in the respondent's absence, and the respondent is not in custody, to defer specifying a commencement date for the sentence until the respondent appears before the Court. This avoids the possibility that the sentence will start to run before the respondent is taken into custody. The amendment will also allow the Court of Criminal Appeal to issue a warrant for the arrest of a respondent if the respondent fails to appear before the Court.

Schedule 2 [1] is a consequential amendment.

Schedule 2 [3] extends the amendments to proceedings commenced, but not finally disposed of, before the amendments commence.

Schedule 3 Amendment of Crimes Act 1900

Schedule 3 [1] puts it beyond doubt that recklessness (when it is an element of an offence) may also be established by proof of intention or knowledge (in line with the Commonwealth Criminal Code).

At present, section 93FA of the *Crimes Act 1900* makes it an offence to possess or make explosives in circumstances that give rise to a reasonable suspicion that the person did not possess or make the explosive for a lawful purpose. **Schedule 3 [2]** extends that offence to the supply of explosives in the same circumstances. The amendment also increases the maximum penalty for the offence from imprisonment for 2 years to imprisonment for 3 years. As a result of the increased penalty, the offence will become an indictable offence. However, an amendment to the *Criminal Procedure Act 1986* made by Schedule 1 will require the offence to be prosecuted summarily unless the prosecutor elects otherwise.

Schedule 3 [3] changes a reference to the jury, in a provision that relates to the offence of perjury, so as to recognise the possibility that the offence may be tried summarily (in the absence of a jury).

Schedule 3 [4]–[6] make minor changes to provisions of the *Crimes Act 1900* that make accessories to the commission of an offence liable to the same penalty as the person who commits the principal offence. The purpose of the amendments is to remove any argument that an accessory, when sentenced, should be sentenced on the same basis as the principal offender would have been sentenced rather than on the basis of the circumstances of the accessory.

Schedule 4 Amendment of Drug Misuse and Trafficking Act 1985

Schedule 4 [1] creates a new offence that prohibits a person from possessing instructions for the manufacture or production of prohibited drugs. It is a defence to a prosecution for such an offence if the person is authorised under the *Poisons and Therapeutic Goods Act 1966*, has an authority from the Director-General of the

Department of Health, is not involved in any unlawful activity or otherwise has a reasonable excuse for possessing the instructions.

Schedule 4 [2] and [3] create a new offence that prohibits a person from possessing a drug manufacture apparatus (as specified or described in the regulations) or precursor intended by the person for use in the manufacture or production of a prohibited drug.

Schedule 4 [4] creates a new offence that prohibits a person from possessing a substance (referred to in the proposed section as a **precursor**) capable of being used to manufacture or produce a prohibited drug and that is specified or described in the regulations. It is a defence to a prosecution for such an offence if the person establishes that the precursor is used in connection with an activity that is not unlawful or otherwise has a reasonable excuse for possessing the precursor.

Schedule 4 [5] enables the offence (which is indictable) to be dealt with summarily.

Schedule 4 [6] provides that the penalty for such an offence is a fine of 1,000 penalty units (\$110,000) or 5 years imprisonment, or both.

Schedule 4 [7] provides that it is not an offence against the *Drug Misuse and Trafficking Act 1985* for a person to manufacture, produce, possess or supply a product containing a substance listed in proposed Schedule 2 if that substance cannot be readily extracted. If such a substance can be readily extracted, it is not an offence if the substance is not for human consumption and the product containing the substance has been manufactured, produced, possessed or supplied in connection with an activity that is not unlawful. It is also not an offence to possess or supply a product containing such a substance so as to dispose or destroy the product.

Schedule 4 [8] provides that the onus of proving that an activity is not unlawful rests on the accused person.

Schedule 4 [9]–[12] remake uncommenced provisions of the *Drug Misuse and Trafficking Amendment Act 2006*. **Schedule 4 [9]** enables the Governor to amend, by regulation, proposed Schedule 2. **Schedule 4 [10]** inserts 1,4-Butanediol and Gamma butyrolactone into Schedule 1 to the *Drug Misuse and Trafficking Act 1985* as prohibited drugs (along with their corresponding traffickable, small, indictable, commercial and large commercial amounts). **Schedule 4 [12]** inserts proposed Schedule 2 (Industry use defence substances) into the *Drug Misuse and Trafficking Act 1985*. That Schedule contains certain substances generally used in industry, being 1,4-Butanediol (also known as hydroxybutanol or 1,4 BD) and Gamma butyrolactone (also known as 4-hydroxybutanoic acid lactone or GBL).

Schedule 4 [11] is a consequential amendment.