# Drug Misuse and Trafficking Regulation 2021

## Regulatory Impact Statement

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# How to make a submission

Interested organisations and individuals are invited to provide submissions on any matter relevant to the proposed Drug Misuse and Trafficking Regulation 2021 (**the Proposed Regulation**), whether or not it is addressed in this Regulatory Impact Statement (**RIS**).

Submissions can be made via email to policy@justice.nsw.gov.au. Submissions can also be mailed to:

A/Director, Law Enforcement and Crime
Policy Reform and Legislation Branch
NSW Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

If you would like to provide comments in an alternative format, please contact us at policy@justice.nsw.gov.au.

**The closing date for submissions is Friday 16 July 2021.**

Copies of the Proposed Regulation and this RIS are available:

- On the NSW Department of Communities and Justice website
- By emailing policy@justice.nsw.gov.au.

Copies of the *Drug Misuse and Trafficking Act 1985* (**DMTA**) and the Drug Misuse and Trafficking Regulation 2011 (**the Existing Regulation**) are available online at www.legislation.nsw.gov.au.

Please note that submissions may be made public, subject to the provisions of the *Government Information (Public Access) Act 2009*. The NSW Department of Communities and Justice will consider any requests for submissions to be treated on a confidential basis, subject to the provisions of the *Government Information (Public Access) Act 2009*.

There is no set format for submissions; however, short comments that refer to the part or clause of the Proposed Regulation are encouraged. Matters covered by the DMTA are not covered by this consultation process. Only comments relating to the Proposed Regulation will be considered. Not all comments may be incorporated into the final regulation.

After the Attorney General has finalised the Proposed Regulation, it will be submitted to the Governor for approval. Once approved by the Governor, the finalised regulation will be published on the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au.

# Summary of abbreviations

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| Existing Regulation | Drug Misuse and Trafficking Regulation 2011 |
| DMTA | *Drug Misuse and Trafficking Act 1985* |
| NSWPF | NSW Police Force |
| Proposed Regulation | Drug Misuse and Trafficking Regulation 2021 |
| RIS | Regulatory Impact Statement |

# Executive summary

The regulation of prohibited plants and drugs in NSW is currently governed by the DMTA and the Existing Regulation.

The DMTA and the Existing Regulation can be viewed and/or downloaded from the NSW Government's legislation website at https://www.legislation.nsw.gov.au/.

The Existing Regulation provides for the sale and storage of precursors and apparatus capable of being used in the manufacture or production of a prohibited drugs. Precursors are substances that can be used in the manufacture of prohibited drugs, but which often have legitimate scientific, industrial, commercial or household uses. The precursors and apparatus listed in the Schedules to the Existing Regulation are not prohibited, but the sale, supply and storage of these items are regulated by Part 2 of the Existing Regulation to ensure they are not misused. The Existing Regulation also provides for how drug exhibits may be dealt with and analysed, and provides for certain people to be exempt from the DMTA to the extent necessary for those people to carry out their duties.

The *Subordinate Legislation Act 1989* provides for regulations to have a limited life and, in most cases, regulations are automatically repealed after five years. The automatic repeal of the Existing Regulation was postponed in 2020. As a result, the Existing Regulation is due for repeal on 1 September 2021.

When a regulation is due for repeal, the responsible agency must review the regulation, its social and economic impacts, and the continuing need for the regulation. A recommendation must then be made about whether the regulation should be remade. The findings of that review with respect to the Existing Regulation are contained in this RIS.

This RIS examines the costs and benefits of the following options against the objectives of the regulatory proposal:

1. Do nothing and allow the Existing Regulation to lapse;
2. Remake the Existing Regulation without change;
3. Remake the Existing Regulation with amendment.

The RIS proposes that the Existing Regulation be remade with some amendments. The Proposed Regulation at **Attachment A** would implement the preferred option.

# Background

The regulation of prohibited plants and drugs in NSW is governed by the DMTA and the Existing Regulation.

The DMTA makes provision for summary and indictable offences related to prohibited drugs, such as possession, manufacture and supply. Part 2A of the DMTA deals with medically supervised injecting centres, while Part 3A outlines procedures for testing and destruction of prohibited drugs in the custody of the New South Wales Police Force (**NSWPF**) or an analyst.

The Existing Regulation is summarised below.

**Precursors and Drug Manufacture or Production Apparatus**

Part 2 of the Existing Regulation provides that the Schedules contain lists of substances characterised as precursors and apparatus characterised as drug manufacture or production apparatus. Precursors are substances that can be used in the manufacture of prohibited drugs, but which often have legitimate scientific, industrial, commercial or household uses.

Part 2 also outlines the rules to be adhered to by suppliers when selling and storing drug manufacture apparatus or precursors. The rules are set out briefly below.

A receiver must have an account with the supplier through which payment is made, and must provide the supplier with an end user declaration and proof of identity. The end user declaration must include the details of the receiver, the name and quantity of the precursor to be supplied, and the receiver's intended use of the precursor.

Schedule 1 precursors can only be supplied 24 hours after receipt of the end user declaration and proof of identity. A supplier of a Schedule 1 precursor must record the name and quantity of the precursor supplied and the date of supply. Schedule 1 precursors must also be stored in a manner that prevents access by anyone other than the supplier or a person authorised in writing by the supplier to access it.

A supplier of a Schedule 1 or Schedule 2 precursor must make any written authorisation, end user declaration, or other record required to be kept, available for inspection on request by a police officer during business hours and retain the record for at least 2 years.

The maximum penalties for failure to comply with any of these requirements are, for a corporation, 100 penalty units for a first offence or 150 penalty units for a subsequent offence; and for an individual,30 penalty units for a first offence or 50 penalty units for a subsequent offence.

**Dealings with and Analysis of Drug Exhibits**

Part 3 of the Existing Regulation concerns the custody and analysis of drug exhibits, and applies to substances that a member of the NSWPF knows or suspects to be any of the following and that is in the custody of a member of the NSWPF in accordance with Part 3A of the DMTA (**Part 3A substances**):

(a) A prohibited plant;

(b) A prohibited drug;

(c) A Schedule 9 substance;[1] or

(d) A psychoactive substance.

A substance is taken to be in the custody of a member of the NSWPF if it is in the custody of an analyst for the purposes of Part 3A of the DMTA, or is being transported for any such purpose.

Clause 11 provides that when a Part 3A substance comes into the custody of the NSWPF, an approved member of the NSWPF should, as soon as practicable, record the quantity or mass of the substance, or provide the substance to an analyst for that purpose. A certificate as to the initial quantity or mass of a substance must be served on the defendant or accused person in any proceedings under the DMTA relating to the substance. The certificate signed by an approved member of the NSWPF or an analyst is prima facie evidence of the quantity or mass of the substance and the matters stated in it.

Similarly, cl 12 requires that, as soon as practicable after a prohibited plant comes into the custody of any member of the NSWPF, a qualified plant identifier or analyst must be given access to, or be provided with a sufficient amount of, the plant to allow the plant to be identified.

Clauses 13-16C provide for the procedures as to the analysis of Part 3A substances. For those that are not less than traffickable quantity, an amount of the substance sufficient to allow analysis must be provided to an analyst for analysis. Clause 13 provides that an amount of the Part 3A substance (other than a plant) sufficient to allow for 3 times the amount required for 2 samples of analysis must be retained by either the NSWPF or an analyst. The initial sampling is known as the 'A sample'.

For prohibited drugs or suspected prohibited drugs of less than traffickable quantity, analysis is only required to be undertaken if the identity of the substance is in dispute, per cl 15. This clause was introduced to allow a presumptive or indicative test (which is less time consuming than a full analysis) to be conducted on exhibits that are less than the traffickable amount.

Presumptive, or indicative testing, is less time consuming than a full analysis and is not prima facie evidence of the identity of a drug exhibit in the same way as a drug analysis certificate. The presumptive test certificate provides a clear indication of the identity of the drug, which may be sufficient for an accused person to determine their plea. This clause is also intended to allow the defence, upon receipt of the presumptive test certificate, to advise the court that the identity of the substance remains in dispute, which will result in proceedings being listed for a defended hearing and for a full analysis to be sought. This full analysis will follow the same procedures for a sample from an exhibit not less than the traffickable amount sent to an analyst.

Clause 16 allows for a defendant or an accused person in proceedings that relate to an offence involving a prohibited drug of not less than the traffickable quantity, a Schedule 9

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[1] A Schedule 9 substance is a substance specified in Schedule 9 of the Poisons Standard (within the meaning of Part 6-3 of the *Therapeutic Goods Act 1989* (Cth)). This is adopted in NSW through the *Poisons and Therapeutic Goods Act 1966*. Schedule 9 substances are substances which may be abused or misused, the manufacture, possession, sale or use of which is prohibited by law except when required for medical or scientific research or for analytical, teaching or training purposes with the approval of the Commonwealth or State or Territory health authorities.

substance or a psychoactive substance to request that an analysis of a further sample (a 'B sample') of the substance be undertaken. This request must be made no later than 28 days after a certificate of analysis of the first sample of the substance is served on the defendant or accused person.

Clause 16A provides that an analyst to whom a substance is given for analysis under this Part may carry out an analysis of the substance to determine whether it is a prohibited drug, Schedule 9 substance or psychoactive substance, and, if it is, to determine:

(a) The identity of the substance;

(b) The quantity or mass of the substance; and

(c) If a substance is a prohibited drug of or more than the commercial quantity, the purity of the substance (if capable of being tested and is reasonably practicable to do so).

An analyst who analyses a substance under this Part may prepare a certificate under s 42(1) of the DMTA that includes the matters listed above. Under the DMTA, this certificate is prima facie evidence of these matters.

Part 3 further provides that, after analysis, the prohibited substance must be sealed, identified and delivered to the person specified by the Commissioner of Police for that purpose. That person must store the package in a secure place determined by the Commissioner. The analyst must also provide a certificate stating his or her findings.

Division 3 of Part 3 provides for matters that must be recorded in relation to a substance under this Part and requirements relating to drug exhibit bags.

Division 4 of Part 3 provides for matters relating to the destruction of substances.

Division 5 of Part 3 provides for matters relating to evidentiary certificates and continuity evidence.

**Exemptions from provisions of the DMTA**

Part 4 provides for exemptions for various specified persons from certain provisions of the DMTA (for example, offences relating to possessing prohibited drugs and equipment) to the extent necessary for those persons to carry out their duties. Those exempted are:

(a) A member of the NSWPF who has been designated by the Commissioner of Police as a Scene of Crime Officer;

(b) An officer of the Law Enforcement Conduct Commission who has been authorised by the Chief Commissioner for the Law Enforcement Conduct Commission;

(c) A person engaged by NSWPF to transport, store or destroy cannabis;

(d) A person authorised by the Director-General of the Department of Health to participate in an approved needle exchange program, or to give out information about the location and hours of operation of such a program; and

(e) A pharmacist acting in the ordinary course of his or her profession, and any person acting under the supervision of the pharmacist.

**Miscellaneous**

Clause 22 provides that the Director-General of the Department of Health may authorise a specified person or class of persons to participate in an approved program to facilitate the supply of sterile hypodermic syringes and needles to intravenous drug users, and to give out information concerning hygienic practices in the use of those syringes and needles.

Clause 23 prescribes the service activity level for licensed injecting centres, which is currently set at a minimum of 208 client visits per day in each month.

Part 5 also makes provision for the recognition of certificate evidence issued by interstate analysts.

**Schedules**

Schedules 1, 2 and 4 prescribe precursor substances for the purposes of ss 24A and 24B of the DMTA.

Schedule 3 prescribes the items characterised as drug manufacture apparatus for the purposes of s 24B of the DMTA.

# Objectives of the regulatory proposal

The objectives of the Existing Regulation are to:

- Regulate precursors and drug manufacture or production apparatus effectively;
- Establish clear procedures to be followed by officers of the NSWPF and analysts, in respect of prohibited drugs in their custody;
- Exempt certain persons from certain provisions of the DMTA to the extent necessary for those persons to carry out their duties;
- Make provision for other matters, including the approval of needle exchange programs, the service activity level for licensed injecting centres and certificate evidence from interstate analysts.

# Options

This RIS examines three options to achieve the objectives of the regulatory proposal:

1. Do nothing and allow the Existing Regulation to lapse;
2. Remake the Existing Regulation without change;
3. Remake the Existing Regulation with amendment.

# Evaluation of options

## Option 1: Do nothing and allow the Existing Regulation to lapse

### Costs

Allowing the automatic repeal of the Existing Regulation would have adverse effects on the operation of the criminal justice system and the NSW Government's ability to maintain law and order in NSW. In this circumstance, it would no longer be possible for law enforcement officers to investigate drug offences effectively, there would be uncertainty as to what constitutes a precursor chemical or drug manufacture apparatus, there would be no effective safeguards for the supply of these items, and legal injecting centres would be unable to operate.

### Benefits

There do not appear to be any readily identifiable benefits of allowing the Existing Regulation to lapse.

### Conclusion

It is proposed that this option not be adopted.

## Option 2: Remake the Existing Regulation without change

### Costs

By remaking the Existing Regulation without substantive change, a number of potential benefits that could be gained by amending the Existing Regulation, identified below, would be lost.

### Benefits

The Existing Regulation has been operating successfully since 2011.

### Conclusion

As the identified costs of this option appear to outweigh any anticipated benefits, it is proposed that this option not be adopted.

## Option 3: Remake the Existing Regulation with amendment

Option 3 would remake the Existing Regulation in its current form, with some amendments, as summarised below.

Adding precursors to Schedule 1

The Proposed Regulation adds the following precursors to Schedule 1.

1. 2-Methyl-3-(3,4-methylenedioxyphenyl)propanamide (helional amide)
2. 2-Methyl-3-(3,4-methylenedioxyphenyl)prop-1-ylidenehydroxylamine (helional aldoxime)
3. alpha-acetylphenylacetic acid
4. 1-phenyl-1,2-propanedione
5. propionyl chloride.

Adding these substances to Schedule 1 would mean that the requirements under cl 5 of the Existing Regulation and the offence under s 24A of the DMTA would apply to these substances.

The Forensic and Analytical Science Service (**FASS**) advises that these substances are used to make, variously, 3,4-Methylenedioxyamphetamine (MDA), 3,4-Methylenedioxy methamphetamine (MDMA, commonly referred to as 'ecstasy'), methamphetamine (commonly referred to as 'ice') and fentanyl.

FASS advises that the Items 1 and 2 above have legitimate uses as a perfume agent, but may also be used to make MDA.

Items 3-5 are all used to make methamphetamine (ice), and FASS advises that these chemicals do not have legitimate uses. Item 4 is also used to make illicit phenyl-2-propanone (P2P) and ephedrine. Finally, Item 5, propionyl chloride, is a key chemical used to make fentanyl. FASS advises that fentanyl cannot be made without propionyl chloride.

DCJ proposes to amend Schedule 1 to include the above list of substances, and would welcome feedback from the industry on these additions.

Amendments to the list of drug manufacture or production apparatus at Schedule 3

The Proposed Regulation modifies the list of drug manufacture or production apparatus at Schedule 3. The effect of these amendments would be that cl 7 of the Existing Regulation and s 24A of the DMTA would apply to this equipment.

First, the Proposed Regulation adds the following items to Schedule 3:

1. Flat bottom reaction flask (capacity 500mL or greater)
2. Separating funnel (capacity 500mL or greater).

The Existing Regulation currently only captures round bottom flasks with a capacity of 500ml or greater. FASS has advised that flat bottom reaction flasks have been used for drug manufacture or production instead of round bottom reaction flasks to evade capture under Schedule 3.

Separating funnels (or separatory funnels) are laboratory glassware used to separate liquids from solutes. Separating funnels are currently listed as 'prescribed equipment' under the Controlled Substances (Controlled Drugs, Precursors and Plants) Regulation 2014 (SA), with offences applying to the possession or supply of this equipment, however, they are not currently regulated in any other Australian jurisdiction.

The Proposed Regulation also amends the listing of Condenser (joint size B19 or greater) to "Condenser (joint size opening 19mm or greater)". FASS advises that B19 refers to a particular company's branding of a 19mm joint size opening. This change would ensure that, irrespective of the brand of glassware used, a condenser with a joint size opening of 19mm or greater is considered a drug manufacture or production apparatus.

DCJ proposes to amend Schedule 3 to include the above matters, and would welcome feedback from the industry.

Enabling the NSWPF to open a sealed drug exhibit bag where required for forensic purposes

The Proposed Regulation amends Existing Regulation cl 16G to enable a member of the NSWPF to open a sealed drug exhibit bag before analysis is undertaken if access is required to obtain forensic material, including DNA material, finger prints and hand prints.

The NSWPF can currently open a sealed drug exhibit bag before analysis is undertaken if access is required for weighing, presumptive testing or taking a sample. If access is required for any other reason, a qualified police officer must provide written approval and be of the opinion that exceptional circumstances warrant the action being taken.

The NSWPF advises that 'exceptional circumstances' is an overly burdensome bar to meet in order to obtain forensic material, which is routinely done when possession is in issue. The Existing Regulation requires police officers to place substances in a drug exhibit bag as soon as practicable after they are received, and the need for forensic examination may only arise after this has occurred. The NSWPF advises that forensic examination must be conducted before substances are provided to FASS for analysis, consistent with best practice to examine exhibits at the earliest opportunity to avoid any unnecessary handling

and any adverse impact on forensic evidence retrieval.

Providing clarity to the definitions of Schedule 1 and Schedule 2 precursors

The Proposed Regulation amends the definitions of Schedule 1 and Schedule 2 precursors under cl 5 and cl 6, to provide greater clarity that the chemicals subject to the sales and storage requirements are those set out in the Schedules.

The definitions of Schedule 1 precursor and Schedule 2 precursor, for the purposes of cl 5 and cl 6 of the Proposed Regulation dealing with sales and storage requirements, expressly exclude (unless otherwise specified) a preparation or admixture containing these substances, all salts, isomers, esters or ethers of those substances, and all salts of those isomers, esters and ethers. This clarification is necessary because a precursor is a 'substance', defined under the DMTA to include all of the matters listed above (i.e. salts, isomers, esters etc.), but the requirements under cls 5 and 6 are not intended to apply to all of these matters.

The current definitions (particularly the definition of Schedule 1 precursor at current cl 5(9)) are unnecessarily complex and could cause doubt as to what matters are intended to be subject to the sales and storage requirements. The amendments to cls 5 and 6 in the Proposed Regulation simplify the definitions without any substantive changes, retaining the policy intent that the preparations, admixtures, salts, isomers, esters or ethers of the chemicals set out in the Schedules are not intended to be subject to the sales and storage requirements unless otherwise specified in the Schedules. This amendment removes any ambiguity that the matters set out in the Schedules are those that are intended to be subject to the requirements.

**Costs**

The addition of new Schedule 1 precursors and drug manufacture or production apparatus may result in an increased administrative burden on retailers and customers of these newly prescribed matters due to the additional requirements that would apply to the sale, supply and storage of these chemicals and equipment.

Removing the requirement for the NSWPF to obtain written approval before opening a sealed drug exhibit bag to conduct DNA sampling and fingerprinting modifies a safeguard to prevent evidence from being compromised.

**Benefits**

There are a number of benefits to remaking the Existing Regulation with the above changes. Amendments to the Schedules to include additional substances and apparatus will better allow the NSWPF to detect and prevent the illicit diversion of items used in the manufacture or cultivation of prohibited drugs.

The amendment to cl 23 will promote greater operational efficiencies by removing an unnecessary administrative requirement on the NSWPF to establish 'exceptional circumstances' and produce written approval to open a sealed drug exhibit bag where forensic examination is required. Figures provided by the NSWPF from two metropolitan sites in 2019 show that almost 76% of the items contained in drug exhibit bags at these sites required fingerprinting. Forensic examination is therefore considered to be just as routine as the current list of reasons why a sealed drug exhibit bag may be opened before analysis (being weighing, presumptive testing or taking a sample). This amendment would

also ensure that forensic examination can take place as soon as possible, in line with best practice, being to avoid any unnecessary handling and possible compromising of evidence.

Finally, amendments to the definitions of Schedule 1 and Schedule 2 precursors will provide greater clarity for retailers and consumers as to the matters that are subject to the sales and storage requirements under cls 5 and 6.

**Conclusion**

The identified benefits of this option outweigh any potential costs. It is therefore proposed this option be adopted.

## Recommended option

Based on the cost benefit analysis of each option outlined above, this RIS recommends Option 3, the Proposed Regulation. The Proposed Regulation aligns with the objectives of the regulatory proposal.

# Consultation

Copies of this RIS and the Proposed Regulation are available online here. In addition, the following stakeholders will be contacted directly about the matter:

- Legal Aid NSW
- Aboriginal Legal Service NSW/ACT
- NSW Police Force
- Law Enforcement Conduct Commission
- NSW Health
- Director of Public Prosecutions
- The Chief Magistrate
- Corrective Services NSW
- NSW Judicial Commission
- The Chief Justice of the Supreme Court of NSW
- The Chief Judge of the District Court of NSW
- President of the Children's Court
- The Senior Judge of the Drug Court of NSW
- Law Society of New South Wales
- New South Wales Bar Association
- Community Legal Centres NSW
- NSW Youth Justice
- Public Defenders Office
- Chemistry Australia
- Science Industry Australia (SIA)
- Protected Cropping Australia
- Sydney Medically Supervised Injecting Centre

# Attachment A: Drug Misuse and Trafficking Regulation 2021