

2014

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CRIMINAL CODE (CONTROLLED DRUGS) LEGISLATION AMENDMENT
REGULATION 2014 (No 1)**

SL2014—6

EXPLANATORY STATEMENT

**Presented by
Simon Corbell MLA
Attorney-General**

CRIMINAL CODE (CONTROLLED DRUGS) LEGISLATION AMENDMENT REGULATION 2014 (No 1)

Overview

The Criminal Code (Controlled Drugs) Legislation Amendment Regulation 2014 (No 1) amends the *Criminal Code Regulation 2005* and the *Drugs of Dependence Regulation 2009*.

The *Criminal Code Regulation 2005* specifies the substances and plants that are ‘controlled drugs’, ‘controlled plants’ and ‘controlled precursors’ pursuant to the *Criminal Code 2002*. The regulation also specifies the trafficable, commercial and large commercial quantities for each substance and plant.

The Drugs of Dependence Regulation defines ‘drugs of dependence’ and ‘prohibited substances’ for the purposes of the *Drugs of Dependence Act 1989*. It defines these terms with reference to Schedule 1 of the Criminal Code Regulation.

This regulation implements a series of measures to enhance the transparency and efficacy of drug enforcement, including:

- the addition of 44 new illicit substances to the Schedule 1 of the Criminal Code Regulation;
- changing the trafficable quantities of the 5 most common drugs (and their associated substances);
- adopting a uniform multiplier to govern the relationship between trafficable, commercial and large commercial quantities of drugs; and
- the adoption of a ‘mixed weight’ purity regime of drug enforcement.

The regulation makes minor typographical amendments to drug names to ensure greater consistency of nomenclature. The regulation also makes minor consequential amendments to the Drugs of Dependence Regulation arising from the *Criminal Code Amendment Regulation 2010*.

Human rights analysis

Trafficking offences in chapter 6 of the Criminal Code are underpinned by the Criminal Code Regulation. The Regulation prescribes the controlled drugs and the amounts for these offences.

To prove trafficking, the prosecution must prove that the defendant actually trafficked drugs, (i.e. they sold the drug), or they knowingly possessed the drug with the intention of selling it.

Section 604 of the Criminal Code contains a ‘reverse presumption’ for drug trafficking offences. The section provides that if a person possessed a trafficable quantity of a controlled drug it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence.

Statutory presumptions engage and limit ‘rights in criminal proceeding’ (section 22) in the *Human Rights Act 2004*.

The limitations on the right to be presumed innocent by a statutory presumption applying to the possession of controlled precursors was extensively address in the explanatory statement to the *Crimes Legislation Amendment Bill 2012* (No 2). That analysis is relevant to the existing statutory presumption in section 604 of the Criminal Code.

It is important that amounts prescribed in the Criminal Code Regulation properly reflect the seriousness of the conduct because of the rebuttable presumptions for serious criminal offences. Prescribing substances and amounts in the schedule of controlled drugs engages and limits rights in criminal proceeding (section 22) in the *Human Rights Act 2004*.

Section 22(1) of the Human Rights Act provides that “everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.”

The effect of the presumption of innocence in section 22(1) of the Human Rights Act and the proportionality test require that:

- any reverse presumption dealing with trafficable quantities of a controlled drug are rational;
- in practical terms, there must be a ‘strong probability’ that the only reason a person found to be in possession of a trafficable quantity has that drug for the purpose of trafficking it;
- there must be a very low risk that anyone in possession of a trafficable quantity would be in possession of the drug for the purpose of personal use.

The Model Criminal Code Officers Committee of the Standing Council of Attorneys-General addressed the factors that inform the setting of trafficable quantities. The 1998 *Report — Chapter 6, Serious Drug offences* identified the three factors as central to the grade of criminality of the offence:

- the profit expected from illegal activity,
- the damage to the community, including:
 - financial impact through the functioning of a black market and the diversion of funds from legitimate to illegal business enterprises;
 - flow on crime such as property crime to finance use, and crimes of violence resulting from market competition and disputes;
- the damage done to the individual user.

A review of the model drug schedules considered available evidence on these and other factors to assist with the appropriate amounts to be prescribed.

The trafficable thresholds under the Regulation were contrasted against four evidence informed ways of assessing the seriousness of drug offences. The factors considered through the review included:

- market value i.e. amount of money that would be made by traffickers of a particular drug;
- consumption i.e. number of doses of drug that would be trafficked in the ACT market;
- harm to individuals and society i.e. amount of harm that would result to ACT drug users and the community from trafficking in a particular drug;
- social costs i.e. annual cost of healthcare and criminality from each gram of drug that is trafficked in the ACT.

The proposal to prescribe new amounts also considered the substances included in the schedules of the Commonwealth, States and the Northern Territory as well as the model schedule of drugs. Morbidity and mortality evidence was also considered where available.

Prescribing substances and amounts with the benefit of the analysis of the review ensures that the amendments to the Regulation are reasonable and proportionate limitations on the right to be presumed innocent under section 22(1) of the Human Rights Act.

NOTES ON CLAUSES

Part 1 Preliminary

Clause 1 – Name of regulation

This clause states that the name of the regulation is the *Criminal Code (Controlled Drugs) Legislation Amendment Regulation 2014 (No 1)*.

Clause 2 – Commencement

This clause states that the regulation commences on the 7th day after notification.

Clause 3 – Legislation amended

This clause states that the legislation amended is the Criminal Code Regulation (the Regulation) and the Drugs of Dependence Regulation.

Part 2 Criminal Code Regulation 2005

Clause 4 – Section 3, notes

This is a technical clause that removes the reference to ‘associated drugs’ from the notes in section 3 of the Regulation. This term was consolidated into a wider definition of ‘controlled drugs’ by the Criminal Code Amendment Regulation 2010.

Clause 5 – Section 9

This clause substitutes section 9 and replaces the existing ‘pure weight’ system of drug enforcement with a ‘mixed weight’ adopted in other Australian jurisdictions. The ability to charge based on the ‘pure weight’ is still available to prosecutors in the event that an offence requires this calculation.

A mixed-weight system is a more transparent way of calculating the amount of prohibited drugs. It is also much more practical for law enforcement.

Clause 6 – New part 10

This clause inserts transitional provisions to clarify that the amended regulation will apply to offences committed on or after the commencement day of the regulation, or to offences which have been committed between dates if either of those dates is on or after the commencement date.

These transitional provisions expire 2 years after the commencement of the amendments to the Regulation.

Clause 7 – Schedules 1 to 3

This clause substitutes Schedule 1 and Schedule 2 of the Regulation.

The new section adds 44 new substances to Schedule 1. These substances are:

NO.	Proposed new Substance	Common Name	Traf. Amt
1	Alpha-Pyrrolidinovalerophenone	(a-PVP)	6g
2	N-acetylmethylamphetamine		6g
3	N-formylmethylamphetamine		6g
4	N-acetylamphetamine		6g
5	N-formylamphetamine		6g
6	Methcathinone		6g
7	1-(3-Chlorophenyl)-piperazine	mCPP	6g
8	1-(4-Methoxyphenyl)piperazine	pMPP	6g
9	4-Bromo-2,5-dimethoxyamphetamine	DOB	10g
10	4-Fluoro-N-methylamphetamine	4-FMA	10g
11	2,5-Dimethoxy-4-ethylamphetamine	DOET	10g
12	4-Methoxymethylamphetamine	PMMA	10g
13	Phenethylamines (not otherwise listed in this schedule)		300g
14	2,5-Dimethoxy-4-ethylthiophenethylamine	2C-T-2	10g
15	2,5-Dimethoxy-4-iodophenethylamine	2C-I	10g
16	2,5-Dimethoxy-4-(N)-propylthiophenethylamine	2C-T-7	10g
17	1-(8-Bromobenzo[1,2-b;4,5-b]difuran-4-yl)-2-aminopropane	Bromo- Dragonfly	10g
18	3,4-Methylenedioxyprovalerone	MDPV	10g
19	4-Methylmethcathinone	Mephedrone	6g
20	3,4-Methylenedioxymethcathinone	Methylone	10g
21	Nalbuphine		0.05g
22	Cannabinomimetics (Synthetic) except when separately specified in these Schedules		300g
23	Benzoylindoles except when separately specified in these Schedules		300g
24	1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole	AM-694	300g
25	Dibenzopyrans except when separately specified in these Schedules		2g
26	Cyclohexylphenols except when separately specified in these Schedules		300g
27	2-[(1r,3s)-3-Hydroxycyclohexyl]-5-(2-methylnonan-2-yl)phenol (Cannabicyclohexanol or CP 47, 497 C8 homologue)		3g
28	2-[(1r,3s)-3-Hydroxycyclohexyl]-5-(2-methyloctan-2-yl)phenol (CP 47,497)		3g
29	Naphthoylindoles except when separately specified in these Schedules		3g
30	1-Pentyl-3-(4-methyl-1-naphthoyl)indole	JWH-122	3g

NO.	Proposed new Substance	Common Name	Traf. Amt
31	1-Pentyl-3-(1-naphthoyl)indole (JWH-018)	JWH-018	3g
32	Naphthylmethylindoles except when separately specified in these Schedules		300g
33	Napthalen-1-yl-(1-butylyndol-3-yl)methanone	JWH-073	3g
34	(1-(2-Morpholin-4-ylethyl)indol-3-yl)-napthalen-1-ylmethanone	JWH-200	3g
35	2-(2-Methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone (JWH-250)	JWH-250	3g
36	Naphthoylpyrroles except when separately specified in these Schedules		300g
37	Naphthylmethylindenes except when separately specified in these Schedules		300g
38	Phenylacetylindoles except when separately specified in these Schedules		300g
39	5-Methoxy-alpha-methyltryptamine	5-MeO-AMT	10g
40	N-(2-Methoxybenzyl)-2,5-dimethoxy-4-chlorophenethylamine	25C-NBOMe	10g
41	N-(2-Methoxybenzyl)-2,5-dimethoxy-4-iodophenethylamine	25I-NBOMe	10g
42	N-(2-Methoxybenzyl)-2,5-dimethoxy-4-bromophenethylamine	25B-NBOMe	10g
43	N-(2-Methoxybenzyl)-2,5-dimethoxy-4-methylphenethylamine	25D-NBOMe	10g
44	N-(2-Methoxybenzyl)-2,5-dimethoxyphenethylamine 25H-NBOMe	25H-NBOMe	10g

In reforming the threshold quantities, the Amendment Regulation also adopts a broadly uniform multiplier. The commercial quantity of a substance is now 500 times the trafficable quantity. The large commercial quantity is 2 times the commercial quantity. Cannabis will use its own multipliers to reflect the characteristics of trafficking in that drug.

The new section modifies the trafficable amounts of the 5 most common controlled drugs and all 118 of their associated substances. The new amounts for the 5 most common drugs are as follows:

Controlled Drug	Old trafficable amount (pure)	New trafficable amount (mixed)
Heroin	2g	5g
Methamphetamine	2g	6g
Cocaine	2g	6g
MDMA	0.5g	10g
Cannabis	300g	300g

The new schedules also consolidate a small number of chemicals to avoid duplication for compounds where different names can be used.

While 44 new chemicals have been added to the schedule, the total number of listed substances in schedule 1.2 is now 185 (previously 145 substances), an overall difference of 39 substances.

Minor typographical amendments to existing substances to ensure greater consistency have also been made.

Part 3 Drugs of Dependence Regulation 2009

Part 3 makes a number of minor amendments to the Drugs of Dependence Act to give effect to the Criminal Code Amendment Regulation 2010.

Clause 8 – Section 4(b)

This clause replaces the reference to ‘associated drugs’ with ‘related drugs’. This operates with clause 9 to remove the term ‘associated drugs’ from section 4.

Clause 9 – Section 4(c)

This clause removes section 4(c). This operates with clause 8 to remove the term ‘associated drugs’ from section 4.

Clause 10 – Section 5(b)

This clause replaces the reference to ‘associated drugs’ with ‘related drugs’. This operates with clause 11 to remove the term ‘associated drugs’ from section 4.

Clause 11 – Section 5(c)

This clause removes section 5(c). This operates with clause 10 to remove the term ‘associated drugs’ from section 5.