



New South Wales

# Drug Supply Prohibition Order Pilot Scheme Act 2020 No 39

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New South Wales

# **Drug Supply Prohibition Order Pilot Scheme Act 2020 No 39**

Act No 39, 2020

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An Act to establish a pilot scheme for drug supply prohibition orders. [Assented to 25 November 2020]

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**The Legislature of New South Wales enacts—**

**1 Name of Act**

This Act is the *Drug Supply Prohibition Order Pilot Scheme Act 2020*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Definitions**

(1) In this Act—

*authorised magistrate*—see section 16.

*drug supply prohibition order* means an order made under section 9.

*eligible person*—see section 5.

*function* includes a power, authority or duty, and *exercise* a function includes perform a duty.

*oversight commissioner* means the oversight commissioner appointed under section 15.

*pilot scheme area* means the following as at 1 July 2020—

- (a) Bankstown Police Area Command,
- (b) Coffs-Clarence Police District,
- (c) Hunter Valley Police District,
- (d) Orana Mid-Western Police District.

*pilot scheme period* means the period of 2 years after the commencement of this Act.

*prohibited drug* has the same meaning as in the *Drug Misuse and Trafficking Act 1985* and includes a prohibited plant within the meaning of that Act.

*Secretary* means the Secretary of the Department of Communities and Justice.

*serious drug offence*—see section 5.

*subject*, of an order, means the person against whom a drug supply prohibition order is made.

*vehicle* includes a vessel or an aircraft.

**Note.** The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.

(2) Notes included in this Act do not form part of this Act.

**4 Effect of drug supply prohibition order**

(1) If a drug supply prohibition order is in force against a person, a police officer may, without a warrant, do one or more of the following—

- (a) stop, detain and search the person, and no other person,
- (b) enter and search the following premises (*searchable premises*)—
  - (i) a dwelling at which the person resides,
  - (ii) premises that the police officer reasonably suspects are owned by the person or under the direct control or management of the person,
  - (iii) premises that the police officer reasonably suspects are being used by the person for an unlawful purpose involving the manufacture or supply of a prohibited drug,
- (c) stop, detain and search a vehicle—

- (i) being driven by or otherwise under the control or management of the person or occupied by the person, or
  - (ii) parked on an area that is part of, or provided for the use of, searchable premises, but not if the area is shared with another dwelling or premises, or
  - (iii) parked on an area that is part of, or provided for the use of, searchable premises and that is shared with another dwelling or premises, but only if the police officer reasonably suspects that the vehicle is being used by the person in relation to the manufacture or supply of a prohibited drug.
- (2) The police officer may, in the exercise of powers under subsection (1), seize and detain all or part of a thing that the police officer suspects on reasonable grounds—
  - (a) may provide evidence of the commission of a drug-related offence, or
  - (b) is stolen or otherwise unlawfully obtained, or
  - (c) may provide evidence of the commission of a relevant offence within the meaning of Part 4, Division 1 of the *Law Enforcement (Powers and Responsibilities) Act 2002* or an offence involving a prohibited drug, or
  - (d) is a dangerous article within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- (3) The police officer may exercise a power under subsection (1) or (2) only if—
  - (a) the power is exercised in a pilot scheme area or an area that the police officer reasonably believes to be in a pilot scheme area, and
  - (b) the exercise of the power, other than a power exercised under subsection (2), is reasonably required to decide whether the person is involved in the commission of an offence involving a prohibited drug.
- (4) The Commissioner of Police must ensure that the subject of a drug supply prohibition order is given written notice about a search as soon as practicable after the search if—
  - (a) a police officer searches premises or a vehicle under the order, and
  - (b) the subject of the order is not present during that search.
- (5) The notice under subsection (4) must specify the date on which the search took place and the address or other description of the premises or vehicle searched.
- (6) The *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a search carried out under this Act.

**Note.** See section 32 and Part 15 of that Act for additional limitations on the exercise of the powers under this section.
- (7) Despite subsection (6), a strip search of a person must not be carried out when exercising a power under this section unless it is authorised under Part 4, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

## **5 Persons who may be subject to drug supply prohibition order**

- (1) A drug supply prohibition order may be made against an *eligible person*, being a person who—
  - (a) has been convicted of a serious drug offence within 10 years before the application day, and
  - (b) is at least 18 years of age on the application day.
- (2) In this section—

*application day* means the day on which the application for the drug supply prohibition order was made.

**serious drug offence** means—

- (a) an offence against section 11B, 23(2)(a) or (b), 24(2) or (2A), 24A(1), 24B(1), 25A(1) or 36Z(2)(b) of the *Drug Misuse and Trafficking Act 1985*, or
- (b) a second or subsequent offence against section 36Z(1) of the *Drug Misuse and Trafficking Act 1985*, or
- (c) an offence against section 23(1)(a) or (b) or (1A), 24(1) or (1A) or 25(1), (1A), (2), (2A) or (2C) of the *Drug Misuse and Trafficking Act 1985*, but not if the offence relates only to less than an indictable quantity within the meaning of that Act, or
- (d) an offence against section 26 or 28 of the *Drug Misuse and Trafficking Act 1985* that relates to an offence referred to in paragraphs (a)–(c), or
- (e) an offence committed in another jurisdiction that would constitute an offence referred to in paragraphs (a)–(d) if it were committed in New South Wales.

## **6 Application for drug supply prohibition order**

- (1) A police officer, or another person on the police officer's behalf, may apply to an authorised magistrate for a drug supply prohibition order to be made against an eligible person.
- (2) The application may be made if the police officer reasonably believes the eligible person is likely to engage in the manufacture or supply of a prohibited drug.
- (3) The application must not be made within—
  - (a) 2 weeks after an authorised magistrate has refused to grant a previous application against the eligible person, unless it contains material evidence or information not included in the previous application, or
  - (b) 6 months after the revocation of a previous drug supply prohibition order against the eligible person.

## **7 Form and content of application**

- (1) An application for a drug supply prohibition order must—
  - (a) if a form is prescribed by the regulations for the application, be in the prescribed form, and
  - (b) be made in writing, and
  - (c) specify the period for which the drug supply prohibition order is sought.
- (2) The application must also set out the following—
  - (a) the identity of the eligible person,
  - (b) each pilot scheme area in which the order is likely to be used,
  - (c) details of each serious drug offence committed by the eligible person within the previous 10 years that forms the basis for seeking the order,
  - (d) any practicable alternative means that may be reasonably available to prevent, or obtain evidence of, the eligible person engaging in the manufacture or supply of a prohibited drug,
  - (e) details of attempts made to use the alternative means,
  - (f) details of other drug supply prohibition orders against the eligible person that are currently or have previously been in force,
  - (g) if a previous drug supply prohibition order against the eligible person has been revoked, the changed circumstances that justify the making of a new order,

- (h) details of unsuccessful applications for drug supply prohibition orders against the eligible person.
- (3) The application must be accompanied by a document signed by a police officer of the rank of Superintendent or higher authorising the applicant to seek the drug supply prohibition order against the eligible person.
- (4) The application must be accompanied by an affidavit that supports the application and sets out—
  - (a) the grounds on which the drug supply prohibition order is sought, and
  - (b) evidence that the person is likely to engage in the manufacture or supply of a prohibited drug.
- (5) The affidavit must, as far as reasonably practicable, identify persons who may be incidentally affected by the order.
- (6) The affidavit must also include—
  - (a) information known to the applicant that may be adverse to the application for the order, or  
**Example.** Steps that the eligible person has taken to stop or reduce the risk of the person committing drug-related offences.
  - (b) if no adverse information is known, a statement to that effect.

#### **8 Notice of application to oversight commissioner**

- (1) The Commissioner of Police is to ensure that the oversight commissioner is given a notice containing the information set out in—
  - (a) an application for a drug supply prohibition order, and
  - (b) the document and affidavit that accompany the application.
- (2) The notice must be given as far in advance of the application being made as is reasonably practicable.
- (3) After deciding the application, the authorised magistrate must ensure that the application and accompanying document and affidavit are forwarded to the oversight commissioner.
- (4) The oversight commissioner must keep the application and accompanying document and affidavit in a way that ensures that they are not accessible to anyone who is not authorised to have access to them.

#### **9 Drug supply prohibition order may be made by authorised magistrate**

- (1) An authorised magistrate may, on the application of a police officer, make a drug supply prohibition order against a person if the magistrate is satisfied that the person—
  - (a) is an eligible person, and
  - (b) is likely to engage in the manufacture or supply of a prohibited drug.
- (2) The authorised magistrate—
  - (a) is not to make a drug supply prohibition order unless satisfied that the oversight commissioner has been given a reasonable opportunity to make a submission in relation to the making of the order, and
  - (b) may request advice from the oversight commissioner on any matter relating to the application or the making of the order.
- (3) The person who is to be the subject of the drug supply prohibition order—
  - (a) is not entitled to be told about the application, and

- (b) is not permitted to make a submission.
- (4) The application is not required to be decided in a courtroom.
- (5) The authorised magistrate may question, or ask for additional information about an application from a police officer with knowledge of the application or the oversight commissioner—
  - (a) at any time, and
  - (b) in any way that the authorised magistrate considers appropriate, including by audio link or audio visual link.
- (6) A drug supply prohibition order must not be made against a person when sentencing the person for an offence and must instead be the subject of a separate application made in accordance with this Act.
- (7) If an authorised magistrate decides to make a drug supply prohibition order, the magistrate must make a record of the reasons for making the order and the evidence used to support the decision to make the order.
- (8) Except as otherwise provided for in this Act, a person, including the subject of the order—
  - (a) is not entitled to know the reasons for the decision to make the order, and
  - (b) is not to be given access to, or provided with, a document (or a copy of a document) that formed part of the application.
- (9) In this section—

**audio link** means technology that enables continuous and contemporaneous audio communication between persons at different places, including telephones.

**audio visual link** means technology that enables continuous and contemporaneous audio and visual communication between persons at different places, including video conferencing.

#### 10 Matters to be taken into account by authorised magistrate

- (1) The authorised magistrate may, in deciding whether a person is likely to engage in the manufacture or supply of a prohibited drug, take any matter into account that the authorised magistrate considers relevant, including the following—
  - (a) information that may be adverse to the application for the order, including steps that the eligible person has taken to stop or reduce the risk of the person committing drug-related offences,
  - (b) whether the person associates with other persons, other than in relation to a lawful drug treatment or rehabilitation program, who are involved in the manufacture or supply of a prohibited drug,
  - (c) whether the person is a member of, or associates with, a criminal group within the meaning of section 93S of the *Crimes Act 1900*,
  - (d) whether the person has cash or assets that are significantly out of proportion to the person's income,
  - (e) relevant criminal intelligence,
  - (f) whether the person has been convicted of—
    - (i) an offence against section 11, 11A, 11C, 18A, 18B, 19, 20, 36X(1), 36Y(1) or (2), 36Z(2)(a), 36ZF(1) or (2) or 36ZG of the *Drug Misuse and Trafficking Act 1985*, or
    - (ii) a second or subsequent offence against section 36Z(1) of the *Drug Misuse and Trafficking Act 1985*.

- (2) In deciding whether to make a drug supply prohibition order, an authorised magistrate may take into account whether there are other practicable alternative means that may be reasonably available that could be used to reduce the risk that the person will engage in the manufacture or supply of a prohibited drug.

#### **11 Form of drug supply prohibition order**

- (1) A drug supply prohibition order must—
  - (a) if a form is prescribed by the regulations for the order, be in the prescribed form, and
  - (b) be signed by the authorised magistrate who made the order.
- (2) A drug supply prohibition order must include the following information—
  - (a) the name of the authorised magistrate,
  - (b) the name of the subject of the order,
  - (c) the date on which the order was made,
  - (d) that the order has been made under this Act because the subject of the order has been found to be likely to engage in the manufacture or supply of a prohibited drug,
  - (e) the period for which the order is due to remain in force,
  - (f) the effect of the order,
  - (g) the way in which the subject of the order may seek to have the order revoked.

#### **12 Commencement and duration of drug supply prohibition order**

- (1) A drug supply prohibition order commences when it is made.
- (2) No power may be exercised under a drug supply prohibition order before a copy of the order has been served personally on the subject of the order.
- (3) A drug supply prohibition order remains in force for whichever of the following is the lesser—
  - (a) until the end of the period specified by the authorised magistrate as the period for the order, being a period of not less than 6 months,
  - (b) until the end of the pilot scheme period,
  - (c) until the order is revoked.
- (4) The Commissioner of Police must ensure that a record is kept of the date on which a drug supply prohibition order is served on the subject of the order.

#### **13 Revocation of drug supply prohibition order**

- (1) The subject of a drug supply prohibition order may apply to the Local Court to have the order revoked.
- (2) The Commissioner of Police is the respondent to the application.
- (3) The Local Court may require the applicant to provide it with a copy of the drug supply prohibition order.
- (4) The Local Court may affirm the drug supply prohibition order, vary the term of the order or revoke the order.
- (5) The Local Court may revoke the drug supply prohibition order only if satisfied that—
  - (a) the order is unreasonably onerous in the circumstances, or
  - (b) the subject of the order is not likely to engage in the manufacture or supply of a prohibited drug, or



- (c) the risk of the subject of the order engaging in the manufacture or supply of a prohibited drug could be mitigated in another way.
- (6) The following are not to be provided to the Local Court—
  - (a) a document that formed part of the application for the drug supply prohibition order,
  - (b) the reasons recorded by the authorised magistrate for making the order.
- (7) Subsection (6) does not prevent the Commissioner of Police from providing information to the Local Court if the Commissioner considers it to be relevant to the application.
- (8) An application for the revocation of a drug supply prohibition order must not be made by the subject of the order within 6 months after—
  - (a) a copy of the order has been served personally on the subject of the order, or
  - (b) an application for the revocation of the order is refused by the Local Court.
- (9) An application for the revocation of a drug supply prohibition order may be made by the Commissioner of Police or the oversight commissioner at any time.
- (10) The Local Court may revoke a drug supply prohibition order on application by the Commissioner of Police or the oversight commissioner.

#### **14 Reports to authorised magistrate and oversight commissioner**

- (1) The Commissioner of Police is to ensure that a report is provided to the authorised magistrate who issued a drug supply prohibition order and the oversight commissioner that sets out the following—
  - (a) the number of searches carried out under the order,
  - (b) details of each search, including the following—
    - (i) the date on which the search took place,
    - (ii) the location of the search,
    - (iii) the person, vehicle or premises searched,
    - (iv) the type and duration of the search,
    - (v) the number of persons (excluding police officers) who were present at the search or were adversely affected by the search,
  - (c) details of evidence uncovered by the searches and the use made or to be made of the evidence,
  - (d) details of anything seized,
  - (e) whether an application was made to revoke the order and the results of the application.
- (2) The report must be provided as soon as practicable after the order ceases to be in force because it has expired or been revoked.

#### **15 Oversight commissioner**

- (1) The Secretary, in consultation with the Attorney General, must appoint an oversight commissioner.
- (2) The oversight commissioner is to be employed in the Public Service on a full-time or part-time basis.
- (3) A person cannot be employed as the oversight commissioner unless the person is—
  - (a) an Australian legal practitioner with at least 7 years' legal practice experience, and

- (b) either—
  - (i) a Judge or other judicial officer, or a former Judge or other judicial officer, of a superior court of record of the State or of another State or Territory or of Australia, or
  - (ii) qualified to be appointed as a Judge or other judicial officer of a court referred to in subparagraph (i).
- (4) The oversight commissioner has the functions conferred or imposed on the commissioner by or under this Act or any other Act.
- (5) The Secretary may appoint additional oversight commissioners under this section on a temporary basis to cover an absence of the oversight commissioner or in other circumstances as the Secretary sees fit.

## 16 Authorised magistrate

- (1) In this Act—

*authorised magistrate* means a magistrate in relation to whom a consent under subsection (2) and a declaration under subsection (3) are in force.
- (2) A magistrate may, by instrument in writing, consent to be declared by the Attorney General under this section.
- (3) The Attorney General may, by instrument in writing, declare magistrates in relation to whom consents are in force under this section to be authorised magistrates for the purposes of this Act.
- (4) An authorised magistrate has, in relation to the exercise of a function conferred on an authorised magistrate by this Act, the same protection and immunity as a magistrate has in relation to proceedings in the Local Court.
- (5) A magistrate who has given consent under this section may, by instrument in writing, revoke the consent.
- (6) A declaration of an authorised magistrate under this section may not be revoked by the Attorney General.
- (7) However, the declaration of a magistrate as an authorised magistrate is revoked if—
  - (a) the authorised magistrate ceases to be a magistrate, or
  - (b) the magistrate revokes the magistrate's consent to be an authorised magistrate, or
  - (c) the Chief Magistrate notifies the Attorney General that the magistrate should not continue to be an authorised magistrate.
- (8) To avoid doubt—
  - (a) the selection of an authorised magistrate to exercise a particular function conferred on authorised magistrates is not to be made by the Attorney General or another Minister, and
  - (b) the exercise of that particular function is not subject to the control and direction of the Attorney General or another Minister.

## 17 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, about matters—
  - (a) this Act requires or permits to be prescribed, or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Without limiting subsection (1), the regulations may prescribe the following—

- (a) requirements for applications made under this Act,
- (b) forms for the purposes of this Act.

**18 Repeal of Act**

This Act is repealed on the day that is 3 years after the day on which section 9 commences.

## Schedule 1 Savings, transitional and other provisions

### Part 1 Regulations

#### 1 Savings or transitional regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the commencement of—
  - (a) a provision of this Act, or
  - (b) a provision amending this Act.
- (2) A savings or transitional provision consequent on the commencement of a provision must not be made more than 2 years after the commencement.
- (3) A savings or transitional provision made consequent on the commencement of a provision is repealed 2 years after the commencement.
- (4) A savings or transitional provision made consequent on the commencement of a provision may take effect before the commencement but not before—
  - (a) for a provision of this Act, the date of assent to this Act, or
  - (b) for a provision amending this Act, the date of assent to the amending Act.
- (5) A savings or transitional provision taking effect before its publication on the NSW legislation website does not, before its publication—
  - (a) affect the rights of a person in a way prejudicial to the person, or
  - (b) impose liabilities on a person for anything done or omitted to be done.
- (6) In this clause—

**person** does not include the State or an authority of the State.

## **Schedule 2      Amendment of Surveillance Devices Act 2007 No 64**

### **Section 8 Installation, use and maintenance of optical surveillance devices without consent**

Insert after section 8(2)(d1)(i)—

- (ia) the *Drug Supply Prohibition Order Pilot Scheme Act 2020*,

[Second reading speech made in—  
Legislative Council on 22 October 2020  
Legislative Assembly on 18 November 2020]