



New South Wales

Criminal Legislation Amendment Bill 2007

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.



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New South Wales

Criminal Legislation Amendment Bill 2007

No. , 2007

A Bill for

An Act to make miscellaneous amendments to legislation relating to crimes, criminal procedure, and other matters.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Criminal Legislation Amendment Act 2007</i> .	3
2 Commencement	4
(1) Sections 1–3, 5, Schedule 1 [1], [11], [12] and [15] and Schedule 3 [1] and [3]–[6] commence on the date of assent to this Act.	5 6
(2) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (1).	7 8
3 Amendment of Acts	9
The Acts specified in Schedules 1–4 are amended as set out in those Schedules.	10 11
4 Repeal of Drug Misuse and Trafficking Amendment Act 2006 No 39	12
The <i>Drug Misuse and Trafficking Amendment Act 2006</i> is repealed.	13
5 Repeal of Act	14
(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.	15 16
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	17 18

Schedule 1	Amendment of Criminal Procedure Act 1986 No 209	1 2
	(Section 3)	3
[1] Section 6 Certain offences to be dealt with summarily		4
	Omit section 6 (1) (c). Insert instead:	5
	(c) an offence for which the maximum penalty that may be imposed is not, and does not include, imprisonment for more than 2 years, excluding the following offences:	6 7 8
	(i) an offence that under any other Act is required or permitted to be dealt with on indictment,	9 10
	(ii) an offence listed in Table 1 or 2 to Schedule 1.	11
[2] Section 136 Court may order pre-trial disclosure in particular case		12
	Insert “one or more of the following matters” after “having regard to” in section 136 (2).	13 14
[3] Section 136 (2) (a) and (b)		15
	Omit “and” wherever occurring.	16
[4] Section 143 Requirements as to notices		17
	Insert after section 143 (4):	18
	(5) A party required to give a notice under this Division must file a copy of the notice with the court as soon as practicable after giving it, or as otherwise required by the court.	19 20 21
[5] Section 147		22
	Omit the section. Insert instead:	23
147 Exemption for matters previously disclosed		24
	(1) The prosecutor is not required to include in a notice under this Division anything that has already been included in a brief of evidence in relation to the matter served on the accused person in accordance with this or any other Act.	25 26 27 28
	(2) However, the prosecutor must include in the notice a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.	29 30 31

[6] Section 150 Notice of alibi	1
Insert “to the Director of Public Prosecutions and files a copy of the notice with the court” after “particulars of the alibi” in section 150 (2).	2 3
[7] Section 150 (8), definition of “prescribed period”	4
Omit “21 days”. Insert instead “42 days”.	5
[8] Section 151 Notice of intention to adduce evidence of substantial mental impairment	6 7
Insert “to the Director of Public Prosecutions and files a copy of the notice with the court” after “raise that contention” in section 151 (1).	8 9
[9] Section 205 Order dismissing matter to be made	10
Insert after section 205 (2):	11
(3) This section does not apply to a matter that is taken to be dismissed because of section 208.	12 13
[10] Section 208 Dismissal of matter if matter withdrawn	14
Insert at the end of the section:	15
(2) The dismissal of a matter because of its withdrawal by the prosecutor does not prevent any later proceedings in any court for the same matter against the same person.	16 17 18
[11] Section 259	19
Omit the section. Insert instead:	20
259 Offences to which this Chapter applies	21
(1) This Chapter applies to the offences listed in Tables 1 and 2 to Schedule 1.	22 23
(2) All the offences listed in Tables 1 and 2 to Schedule 1 are indictable offences, subject to the provisions of this Chapter.	24 25
[12] Section 344A Further review by Ombudsman—Aboriginal and Torres Strait Islander communities	26 27
Omit “30 November 2008” from section 344A (3).	28
Insert instead “31 May 2009”.	29

[13] Schedule 1 Indictable offences triable summarily	1
Insert after clause 30A in Table 1:	2
30B Offences involving possession of prohibited drug precursors	3
An offence referred to in section 24B of the <i>Drug Misuse and Trafficking Act 1985</i> .	4 5
[14] Schedule 1	6
Insert “or (2)” after “section 93FA (1)” in clause 6 of Table 2.	7
[15] Schedule 2 Savings, transitional and other provisions	8
Insert at the end of clause 1 (1):	9
<i>Criminal Legislation Amendment Act 2007</i>	10
[16] Schedule 2	11
Insert at the end of the Schedule (with appropriate Part and clause numbers):	12
Part Provisions consequent on enactment of Criminal Legislation Amendment Act 2007	13 14
Changes to pre-trial disclosure requirements	15
(1) The amendments made to Division 3 of Part 3 of Chapter 3 by the <i>Criminal Legislation Amendment Act 2007</i> do not apply in respect of any pre-trial disclosure that is carried out pursuant to an order made by the court under section 136 before the commencement of the amendments.	16 17 18 19 20
(2) The amendments made to sections 150 and 151 by the <i>Criminal Legislation Amendment Act 2007</i> do not apply in respect of a trial that was listed for hearing before the commencement of the amendments.	21 22 23 24
Withdrawal of matter by prosecutor	25
The amendments made to sections 205 and 208 by the <i>Criminal Legislation Amendment Act 2007</i> apply only to the dismissal of a matter on or after the commencement of the amendments.	26 27 28

Schedule 2	Amendment of Criminal Appeal Act 1912	1
	No 16	2
	(Section 3)	3
[1] Section 14A Crown appeals—absence of respondent		4
Omit “An appeal under section 5C, 5D, 5DA or 5DB”.		5
Insert instead “A Crown appeal”.		6
[2] Section 14A (2)–(6)		7
Insert at the end of section 14A:		8
(2) If on a Crown appeal the court decides to impose on a respondent, in the absence of the respondent, a sentence of imprisonment by way of full-time detention, and the respondent is not in custody at the time of that decision, the court may decline to specify a commencement date for the sentence until the respondent appears before the court for sentencing.		9 10 11 12 13 14
(3) If the court declines to specify a commencement date for a sentence under this section:		15 16
(a) sections 47 and 48 of the <i>Crimes (Sentencing Procedure) Act 1999</i> do not apply until the respondent appears before the court for sentencing, and		17 18 19
(b) when the respondent appears before the court for sentencing, sections 47 and 48 of the <i>Crimes (Sentencing Procedure) Act 1999</i> apply in respect of the sentence as if the sentence were imposed by the court on the day the respondent so appears.		20 21 22 23 24
(4) The court may, for the purpose of disposing of proceedings on a Crown appeal, or imposing a sentence in such proceedings (including specifying the commencement date for a sentence), issue a warrant to arrest a respondent if the respondent fails to appear before it and the court is satisfied:		25 26 27 28 29
(a) that the respondent has been given notice of the date on which the proceedings were to be disposed of, or the sentence imposed, or		30 31 32
(b) that attempts to give such notice have failed because the respondent’s whereabouts are unknown.		33 34
(5) Part 4 of Chapter 4 of the <i>Criminal Procedure Act 1986</i> applies, with any necessary modifications, to warrants issued by the court under this section in the same way as it applies to warrants issued in proceedings to which that Part applies.		35 36 37 38

(6) In this section:	1
<i>Crown appeal</i> means an appeal under section 5C, 5D, 5DA, 5DB or 5DC.	2 3
[3] Schedule 1 Savings and transitional provisions	4
Insert after clause 11:	5
12 Criminal Legislation Amendment Act 2007	6
The amendments made to section 14A by the <i>Criminal Legislation Amendment Act 2007</i> extend to proceedings on a Crown appeal (within the meaning of that section) that were commenced, but not finally disposed of, before the amendments commenced.	7 8 9 10 11

Schedule 3	Amendment of Crimes Act 1900 No 40	1
	(Section 3)	2
[1] Section 4A		3
Insert after section 4:		4
4A Recklessness		5
For the purposes of this Act, if an element of an offence is recklessness, that element may also be established by proof of intention or knowledge.		6 7 8
[2] Section 93FA Possession, supply or making of explosives		9
Omit section 93FA (2). Insert instead:		10
(2) A person who possesses, supplies or makes an explosive, under circumstances that give rise to a reasonable suspicion that the person did not possess, supply or make the explosive for a lawful purpose, is guilty of an offence. Maximum penalty: Imprisonment for 3 years or 50 penalty units, or both.		11 12 13 14 15 16
[3] Section 331 Contradictory statements on oath		17
Omit “jury” wherever occurring. Insert instead “trier of fact”.		18
[4] Section 345 Principals in the second degree—how tried and punished		19
Omit “same punishment as the principal”.		20
Insert instead “same punishment to which the person would have been liable had the person been the principal”.		21 22
[5] Section 346 Accessories before the fact—how tried and punished		23
Omit “same punishment as the principal offender”.		24
Insert instead “same punishment to which the person would have been liable had the person been the principal offender”.		25 26
[6] Section 351B Aiders and abettors punishable as principals		27
Omit “the principal offender is liable” from section 351B (2).		28
Insert instead “the person would have been liable had the person been the principal offender”.		29 30

**Schedule 4 Amendment of Drug Misuse and
 Trafficking Act 1985 No 226**

		1
		2
	(Section 3)	3
[1]	Section 11C	4
	Insert after section 11B:	5
11C	Possession of instructions for manufacture or production of prohibited drugs	6 7
(1)	A person who has in his or her possession a document that contains instructions for the manufacture or production of a prohibited drug is guilty of an offence.	8 9 10
(2)	It is a defence to a prosecution for an offence under subsection (1) if the defendant establishes:	11 12
(a)	that the defendant is licensed or authorised under the <i>Poisons and Therapeutic Goods Act 1966</i> to manufacture or produce the prohibited drug to which the instructions relate, or	13 14 15 16
(b)	that the defendant is acting in accordance with an authority granted by the Director-General of the Department of Health where the Director-General is satisfied that the manufacture or production of the prohibited drug to which the instructions relate is for the purpose of scientific research, instruction, analysis or study, or	17 18 19 20 21 22
(c)	that the defendant is in possession of the document for the purposes of an activity that is not unlawful, or	23 24
(d)	that the defendant otherwise has a reasonable excuse for possessing the document.	25 26
[2]	Section 24A Possession of precursors and certain apparatus for manufacture or production of prohibited drugs	27 28
	Omit section 24A (1). Insert instead:	29
(1)	A person who has possession of:	30
(a)	a precursor, or	31
(b)	a drug manufacture apparatus,	32
	intended by the person for use in the manufacture or production, by that person or another person, of a prohibited drug is guilty of an offence.	33 34 35

[3] Section 24A (3)	1
Omit the subsection. Insert instead:	2
(3) In this section:	3
<i>drug manufacture apparatus</i> means an apparatus specified or described in the regulations as a drug manufacture apparatus for the purposes of this section.	4 5 6
<i>precursor</i> means a substance specified or described in the regulations as a precursor for the purposes of this section.	7 8
[4] Section 24B	9
Insert after section 24A:	10
24B Possession of prohibited drug precursors	11
(1) A person who has in his or her possession a precursor of a quantity not less than the quantity prescribed by the regulations in relation to that precursor is guilty of an offence.	12 13 14
(2) It is a defence to a prosecution for an offence under subsection (1) if the defendant establishes:	15 16
(a) that the defendant is in possession of the precursor for the purposes of an activity that is not unlawful, or	17 18
(b) that the defendant otherwise has a reasonable excuse for possessing the precursor.	19 20
(3) In this section, <i>precursor</i> means a substance:	21
(a) that is capable of being used to manufacture or produce a prohibited drug, and	22 23
(b) that is specified or described in the regulations as a precursor for the purposes of this section.	24 25
[5] Section 31 Indictable offences—summary disposal of unless prosecution or accused elects otherwise	26 27
Insert “or 24B” after “section 24A” in section 31 (1A).	28
[6] Section 33AB Penalties for offences involving possession of prohibited drug precursors	29 30
Insert at the end of the section:	31
(2) The penalty for an offence under section 24B is a fine of 1,000 penalty units or imprisonment for a term of 5 years, or both, except as provided by section 31.	32 33 34

[7] Section 35A	1
Insert after section 35:	2
35A Defence to certain offences involving substances used in industry	3
Despite any other provision of this Act, it is not an offence against this Act for:	4
(a) a person to manufacture, produce, possess or supply a substance listed in Schedule 2 if the substance is contained in a product from which the substance cannot be readily extracted or readily synthesized, or	5
(b) a person to manufacture, produce, possess or supply a substance listed in Schedule 2 if the substance is contained in a product that is not for human consumption and the person manufactures, produces, possesses or supplies the product in connection with an activity that is not unlawful, or	6
(c) a person to possess or supply a substance listed in Schedule 2 if the person possesses or supplies the substance for the purpose of its disposal as waste or its destruction.	7
[8] Section 40A Proof of certain matters	8
Omit “or 25 (4)” from section 40A (2). Insert instead “, 25 (4) or 35A”.	9
[9] Section 44A	10
Insert after section 44:	11
44A Amendment of Schedule 2	12
The Governor may, from time to time, by regulation amend Schedule 2:	13
(a) by adding the name or description of or relating to a substance, or	14
(b) by amending a name or description of or relating to a substance for the purpose of more accurately describing the substance.	15

