

EXPLANATORY STATEMENT

Assistant Minister for Customs, Community Safety and Multicultural Affairs, Parliamentary
Secretary to the Minister for Home Affairs

Customs Act 1901
Criminal Code Act 1995

*Criminal Code and Customs Legislation Amendment (Precursors and Drugs)
Regulations 2020*

The purpose of the *Criminal Code and Customs Legislation Amendment (Precursors and Drugs) Regulations 2020* (the Regulations) is to amend the:

- *Criminal Code Regulations 2019* (the Code Regulations) to list additional substances as controlled precursors and border controlled precursors,
- *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) to impose controls on the importation and exportation of drugs (in accordance with Australia's international obligations), and the importation of precursors, and
- *Customs Regulation 2015* (the Customs Regulation) to include additional precursors as tier 1 goods in Part 1 to Schedule 7.

The *Criminal Code Act 1995* (the Code) codifies the general principles of criminal responsibility under laws of the Commonwealth, and contains all the general principles of criminal responsibility that apply to any offence. Section 5 of the Code provides that the Governor-General may make regulations prescribing matters required or permitted by the Code to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Code.

The *Customs Act 1901* (the Customs Act) concerns customs-related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Customs Act, provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters, which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Act.

Section 50 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the importation of goods into Australia. Section 112 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia. Both powers may be exercised by prohibiting the importation or exportation of goods absolutely or by prohibiting the importation or exportation of goods unless specified conditions or restrictions are complied with.

Subsections 233BAA(1) of the Customs Act provides that the regulations may provide that specified goods constitute tier 1 goods, and subsection 233BAA(3) provides that the regulations may prescribe quantities at which those specified goods constitute tier 1 goods. Subsection 130(1) and clause 1 of Part 1 of Schedule 7 to the Customs Regulation set out a list of goods that are ‘tier 1 goods’ and their quantities where relevant. These goods, if exported or imported in contravention of subsections 233BAA(3) or (5) of the Customs Act, will result in an offence punishable by imprisonment of five years or 1000 penalty units, or both.

Amendments in relation to precursors

Section 301.3 of the Code provides that a controlled precursor is a substance listed by a regulation as a controlled substance and section 301.6 of the Code provides that a border controlled precursor is a substance listed by the regulations as a border controlled substance.

Section 13 and 16 of the Code Regulations list controlled precursors and border controlled precursors respectively for the purposes of Part 9.1 of the Code, which contains offences in relation to the pre-trafficking and possession of controlled precursors and the importation and exportation of border controlled precursors. The Regulations include ten additional precursors in section 13 and twelve additional precursors in section 16, as well as their commercial and marketable quantities. The precursors have been identified as having no known legitimate industrial or commercial use. These additions reflect new drug manufacturing methodologies that are constantly evolving to use new chemicals in the domestic manufacture of illicit drugs. The additions also ensure that Commonwealth controls are better aligned with state and territory controls and enable law enforcement to investigate, prosecute and disrupt the importation of new precursors used in the manufacture of illicit drugs.

The Regulations also add to Schedule 4 to the PI Regulations those border controlled precursors that are to be listed in the Code Regulations by the Regulations, but that are not already listed in Schedule 4, to ensure that these substances can be seized at the border without a warrant if they are imported without the required permission.

The Regulations also amend the commercial quantities and marketable quantities for phenyl-2-propanone which is currently listed as a controlled precursor and a border controlled precursor in the Code Regulations. These quantities are replaced with smaller quantities which reflect recognised and published methods for producing methamphetamine from phenyl-2-propanone.

In addition, the Regulations also add to clause 1 in Part 1 of Schedule 7 to the Customs Regulation those border controlled precursors that are included in section 16 of the Code Regulations by the Regulations, to the extent they are not already listed. This ensures that these substances are tier 1 goods for the purpose of section 233BAA of the Customs Act.

Amendments in relation to drugs

The Minister for Health requested amendments to the PE Regulations and the PI Regulations in relation to drugs due, in part, to recent scheduling decisions by the United Nations Commission on Narcotic Drugs for the *Single Convention on Narcotic Drugs of 1961*, as

amended by the 1972 Protocol, the *Convention on Psychotropic Substances of 1971* and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.

Australia as a signatory to these Conventions is obliged to impose import and export controls on substances scheduled in these Conventions. The amendments will ensure Australia's continuing compliance with these Conventions by adding the newly scheduled substances to Schedule 8 to the PE Regulations and Schedule 4 to the PI Regulations.

On the recommendation of the Department of Health, seven additional substances are added to Schedule 4 to the PI Regulations in order to better align with state and territory drug control regulations. These substances have been classified as Prohibited Substances in Schedule 9 to the *Standard for the Uniform Scheduling of Medicines and Poisons*.

Details of the Regulations are set out in [Attachment A](#).

The Department of Health, the Australian Federal Police and the Australian Criminal Intelligence Commission were consulted in the development of the Regulations.

The Office of Best Practice Regulation (the OBPR) was consulted and advised that no Regulation Impact Statement is required because the precursors listed have no known legitimate industrial and commercial use, and the drug changes are of minor impact. The OBPR consultation reference numbers are 25258 and 26449.

As the other proposed amendments give effect to international obligations or are minor or machinery in nature, further consultation was considered unnecessary. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which envisages consultations where appropriate and reasonably practicable.

Section 301.8 of the Code also requires that, before a regulation is made listing a substance as a controlled precursor or a border controlled precursor, the AFP Minister must be satisfied that there is a risk that the substance will be used to unlawfully manufacture a controlled drug (other than a determined controlled drug). The AFP Minister is the Minister administering the *Australian Federal Police Act 1979*.

The Assistant Minister for Customs, Community Safety and Multicultural Affairs is satisfied that the above criteria have been met in relation to the relevant substances that are listed by the Regulations.

Details of the Regulations are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at [Attachment B](#).

The Regulations are a legislative instrument for the purposes of the Legislation Act.

The whole of the Regulations commence on 12 August 2020.

Details of the *Customs Legislation Amendment (Precursors and Drugs) Regulations 2020*

Item 1 – Name

This section provides that the title of the Regulations is the *Criminal Code and Customs Legislation Amendment (Precursors and Drugs) Regulations 2020*.

Section 2 – Commencement

Table item 1 provides for the whole of this instrument to commence 12 August 2020.

Section 3 – Authority

This section sets out the authorities under which the *Criminal Code and Customs Legislation Amendment (Precursors and Drugs) Regulations 2020* (the Regulations) are to be made, which are the *Criminal Code Act 1995* (the Criminal Code) and the *Customs Act 1901* (the Customs Act).

Section 4 – Schedules

This section is the enabling provision for the Schedule to the Regulations, and provides that, each instrument that is specified in a Schedule to the Regulations, be amended or repealed as set out in the applicable items in the Schedule concerned and that any other item in a Schedules to this instrument has effect according to its terms.

The instruments being amended are the *Criminal Code Regulations 2019* (the Code Regulations), the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations), the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations), and the *Customs Regulations 2015* (the Customs Regulations).

Schedule 1 – Amendments

Criminal Code Regulations 2019

Items 1 - 6 Section 13

The table in section 13 of the Criminal Code Regulations lists substances that are a controlled precursor for the purposes of paragraph 301.3(1)(a) of the Criminal Code, along with the quantities that are the commercial quantity and the marketable quantity of each controlled precursor. Serious drug offences under Part 9.1 in Chapter 9 of the Criminal Code apply to substances that are controlled precursors for the purposes of paragraph 301.3(1)(a) of the Criminal Code.

Together, items 1 – 5 amend the table in section 13 of the Criminal Code Regulations by adding certain new substances to it, reflecting new drug manufacturing methodologies that are constantly evolving to use new chemicals in the domestic manufacture of illicit drugs. The additions also ensure that Commonwealth controls are better aligned with state and territory controls.

Item 6 reduces the commercial quantity and marketable quantity for phenyl-2-propanone, which is currently listed as a controlled precursor in the table in section 13 of the Criminal Code Regulations. These smaller quantities reflect recognised and published methods for producing methamphetamine from phenyl-2-propanone, and enable the offences in Part 9.1 of Chapter 9 of the Criminal Code to apply to these smaller quantities.

Items 7 – 12 Section 16

The table in section 16 of the Criminal Code Regulation lists substances that are a border controlled precursor for the purposes of paragraph 301.6(1) of the Criminal Code, along with the quantities (if any) that are the commercial quantity and the marketable quantity of each border controlled precursor. Serious drug offences under Part 9.1 in Chapter 9 of the Criminal Code apply to substances that are border controlled precursors for the purposes of paragraph 301.6(1)(a) of the Criminal Code.

Together, items 7 – 12 amend the table in section 16 of the Criminal Code Regulations by adding certain new substances to it, reflecting new drug manufacturing methodologies that are constantly evolving to use new chemicals in the domestic manufacture of illicit drugs. The additions also ensure that Commonwealth controls are more aligned with state and territory controls.

Item 12 reduces the commercial quantity and marketable quantity for phenyl-2-propanone, which is currently listed as a border controlled precursor in the table in section 16 of the Criminal Code Regulations. These smaller quantities reflect recognised and published methods for producing methamphetamine from phenyl-2-propanone, and enable the offences in Part 9.1 of Chapter 9 of the Criminal Code to apply to these smaller quantities.

Customs (Prohibited Exports) Regulations 1958

Item 13 and 14 Part 2 of Schedule 8

Regulation 10 of the PE Regulations provides that the exportation from Australia of a Schedule 8 drug is prohibited unless certain circumstances apply. Schedule 8 sets out the description of those drugs the exportation of which is prohibited if specified conditions, restrictions or requirements are not complied with.

Together, items 13-22 amend the relevant parts of Schedule 8 to the PE Regulations to implement the 2020 scheduling decisions of the United Nations Commission on Narcotic Drugs, which added new substances to the *Single Convention on Narcotic Drugs of 1961* as amended by the 1972 Protocol and the *Convention of Psychotropic Substances of 1971*.

Items 12 and 13 ensure Australia's continuing compliance with these international drug conventions by adding certain newly scheduled drugs to Part 1 of Schedule 8 to the PE Regulations

Item 15 – 19 Part 2 of Schedule 8

These items ensure Australia's continuing compliance with these international drug conventions by adding certain newly scheduled drugs to Part 2 of Schedule 8 to the PE Regulations.

Item 20 Part 3 of Schedule 8

This item ensure Australia's continuing compliance with these international drug conventions by adding the newly scheduled drugs to Part 3 of Schedule 8 to the PE Regulations.

Item 21 - 22 Part 4 of Schedule 8

This item ensures Australia's continuing compliance with these international drug conventions by adding the newly scheduled drugs to Part 4 of Schedule 8 to the PE Regulations.

Customs (Prohibited Imports) Regulations 1958

Regulation 5 of the PI Regulations provides the framework that controls the importation of drugs into Australia. The term *drug* is defined under subregulation 5(20) to include a chemical, compound, or other substance or thing that is included in Schedule 4 to the PI Regulations. Schedule 4 sets out the description of those drugs.

Items 23 - 25, 28, 29, 32 - 33, 35, 37 and 44 Schedule 4

Together these items implement the 2019 scheduling decisions of the United Nations Commission on Narcotic Drugs, which added new substances to the *Single Convention on Narcotic Drugs of 1961* as amended by the 1972 Protocol and the *Convention of Psychotropic Substances of 1971*.

These items ensure Australia's continuing compliance with these international drug conventions by adding the newly scheduled drugs to the PI Regulations

Items 27, 30 – 31, 34, 36, 40 and 43 Schedule 4

These items add seven substance that have been classified as prohibited drugs in Schedule 9 to the *Standard for the Uniform Scheduling of Medicines and Poisons* (the Poisons Standard) to Schedule 4 to the PI Regulations.

The Poisons Standard is a legislative instrument made under the *Therapeutic Goods Act 1989*. It consists of decisions regarding the classification of medicines and poisons into Schedules for inclusion in the relevant legislation of the States and Territories. It also includes model provisions about containers and labels, a list of products recommended to be exempt from these provisions, and recommendations about other controls on drugs and poisons.

The addition of substance classified in Schedule 9 to the Poisons Standard to Schedule 4 to the PI Regulations enables the control of the these substances to be better aligned with their control under state and territory regulations.

Items 26, 38 – 39 and 41 – 42 Schedule 4

These items together amend the table in Schedule 4 to the PI Regulations to add those border controlled precursors that are listed in the Code Regulations in accordance with items 7 to 12, described above, and which are not already be added as part of the implementation of the 2019 scheduling decisions of the United Nations Commission on Narcotic Drugs, described above. This ensures that these substances can be seized at the border without a warrant if they are imported without the required permission.

Items 34 Schedule 4

This item amends the table in Schedule 4 to the PI Regulations to add three new substances.

One substance, flualprazolam, is added as part of the implementation of the 2019 scheduling decisions of the United Nations Commission on Narcotic Drugs, which added new substances to the *Single Convention on Narcotic Drugs of 1961* as amended by the 1972 Protocol and the *Convention of Psychotropic Substances of 1971*, described above.

The other two substances, flubromazepam and flubromazolam, are added as they have both been classified as prohibited drugs in Schedule 9 to the Poisons Standard, as described above.

Customs Regulation 2015

Items 45 - 50 Subclause 1(1) of Schedule 7

This item amends the table in subclause 1(1) of Schedule 7 to the Customs Regulation to add twelve new substances.

Section 233BAA of the Customs Act concerns tier 1 goods. Subsections 233BAA(1) and (3) enable certain specified goods to be prescribed in the Customs Regulation as tier 1 goods, and at prescribed quantities.

Under subsection 233BAA(4), a person commits an offence against this subsection if:

- (a) the person intentionally imported goods; and
- (b) the goods were tier 1 goods and the person was reckless as to that fact; and
- (c) their importation:
 - (i) was prohibited under the Act absolutely; or
 - (ii) was prohibited under the Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.

A person convicted of an offence under subsection 233BAA(4) is punishable by a fine not exceeding 1000 penalty units or imprisonment for up to five years, or both. An identical offence relating to the exportation of tier 1 goods is set out in subsection 233BAA(5).

Subsection 130(1) of the Customs Regulation provides that for the purpose of section 233BAA of the Customs Act, tier 1 goods are those drugs, other goods and quantities of drugs prescribed in Part 1 of Schedule 7 to the Customs Regulation.

New items 42 - 47 insert the following precursors into the table under subclause 1(1) of Schedule 7:

Alpha Phenylacetoacetamide (APAA)
Alpha Phenylacetonitrile (APAAN)
4 Anilino N phenethylpiperidine (ANPP)
N Phenethyl 4 piperidone (NPP)
Chloroephedrine
Chloropseudoephedrine
Methyl alpha phenylacetoacetate (otherwise known as MAPA)
Methyl 3 (3', 4' methylenedioxyphenyl) 2 methyl glycidate (otherwise known as MMDMG)
3 (3', 4' Methylenedioxyphenyl) 2 methyl glycidic acid, sodium salt (otherwise known as NaMDMG)
Methyl 3 phenyl 2 methyl glycidate
3 Phenyl 2 methyl glycidic acid, sodium salt
Phenyl 2 propanone bisulphite

These substances are the same controlled precursors that are listed in the Code Regulations in accordance with items 7 to 11, described above, and which are not already listed in that table. This enables prosecution of a person under section 233BAA for unlawful exportation and importation of precursors. This is an alternative to the offence of importing or exporting prohibited goods that are not tier 1 goods, under section 233 of the Customs Act which is punishable by a penalty only. This provides greater deterrence to the unlawful exportation and importation of precursors.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

**Criminal Code and Customs Legislation Amendment (Precursors and Drugs)
Regulations 2020**

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Criminal Code and Customs Legislation Amendment (Precursors and Drugs) Regulations 2020* (the Regulations) amends the:

- *Criminal Code Regulations 2019* (the Code Regulations) to list additional substances as controlled precursors and border controlled precursors,
- *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) to impose controls on the importation and exportation of drugs (in accordance with Australia's international obligations), and the importation of precursors, and
- *Customs Regulation 2015* (the Customs Regulation) to include additional precursors as tier 1 goods in Part 1 to Schedule 7.

Amendments in relation to precursors

Section 301.3 of the *Criminal Code Act 1995* (the Code) provides that a controlled precursor is a substance listed by a regulation as a controlled substance and section 301.6 of the Code provides that a border controlled precursor is a substance listed by a regulation as a border controlled substance.

Section 13 and 16 of the Code Regulations list controlled precursors and border controlled precursors respectively for the purposes of Part 9.1 of the Code, which contains offences in relation to the pre-trafficking and possession of controlled precursors and the importation and exportation of border controlled precursors. The Regulations include ten additional precursors in section 13 and twelve additional precursors in section 16, as well as their commercial and marketable quantities. The precursors have been identified as having no known legitimate industrial or commercial use. These additions reflect new drug manufacturing methodologies that are constantly evolving to use new chemicals in the domestic manufacture of illicit drugs. The additions also ensure that Commonwealth controls are better aligned with state and territory controls and enable law enforcement to investigate, prosecute and disrupt the importation of new precursors used in the manufacture of illicit drugs.

The Regulations also add to Schedule 4 to the PI Regulations those border controlled precursors that are to be listed in the Code Regulations by the Regulations, but that are not already listed in Schedule 4, to ensure that these substances can be seized at the border without a warrant if they are imported without the required permission.

The Regulations also amend the commercial quantities and marketable quantities for phenyl-2-propanone which is currently listed as a controlled precursor and a border controlled precursor in the Code Regulations. These quantities are replaced with smaller quantities which reflect recognised and published methods for producing methamphetamine from phenyl-2-propanone.

In addition, the Regulations also add to clause 1 in Part 1 of Schedule 7 to the Customs Regulation those border controlled precursors that are included in section 16 of the Code Regulations by the Regulations, to the extent they are not already listed. This ensures that these substances are tier 1 goods for the purpose of section 233BAA of the Customs Act.

Amendments in relation to drugs

The Minister for Health requested amendments to the PE Regulations and the PI Regulations in relation to drugs due, in part, to recent scheduling decisions by the United Nations Commission on Narcotic Drugs for the *Single Convention on Narcotic Drugs of 1961*, as amended by the 1972 Protocol, the *Convention on Psychotropic Substances of 1971* and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988*.

Australia as a party to these Conventions is obliged to impose import and export controls on substances scheduled in these Conventions. The amendments will ensure Australia's continuing compliance with these Conventions by adding the newly scheduled substances to Schedule 8 to the PE Regulations and Schedule 4 to the PI Regulations.

On the recommendation of the Department of Health, seven additional substances are added to Schedule 4 to the PI Regulations in order to better align with state and territory drug control regulations. These substances have been classified as Prohibited Substances in Schedule 9 to the *Standard for the Uniform Scheduling of Medicines and Poisons*.

Human rights implications

The Regulations promotes the right to the enjoyment of the highest attainable standard of physical and mental health in Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Amendments to precursors

Whilst the additional substances have been identified as having no known legitimate industrial or commercial use, persons in Australia may require them for legitimate medical purposes. The restriction of access to these substances, however, is necessary, reasonable and proportionate to achieving the legitimate objective of protecting the Australian community

from the risks to health that misuse of these substances may cause if manufactured into illicit drugs.

Consistent with section 301.8 of the Code, the AFP Minister is satisfied that there is a risk that the precursors will be used to unlawfully manufacture a controlled drug (other than a determined controlled drug).

Amendments in relation to drugs

The addition of import and export controls over these substances also reflects Australia's implementation of international legal obligations under the *Convention on Psychotropic Substances of 1971* and the *United Nations Convention against Illicit Traffic in Narcotic Drugs Substances 1988*.

This follows the listing of other substances in the Code Regulations that are included in the following United Nations Conventions to which Australia is a party:

- the *Single Convention on Narcotic Drugs 1961*, as amended by the 1972 Protocol,
- the *Convention on Psychotropic Substances 1971*, and
- the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988*.

The restriction of access to these substances promotes the right to health in Article 12(1) of the ICESCR by preventing a danger to general health and welfare of the Australian community.

Where a legitimate need for the substances arises (such as for medical purposes), the PI Regulations allow a person to obtain a licence or a permission to import those substances. The outcome of these amendments is that the importation of listed goods would be permissible with approval from the relevant authority (in this case the Department of Health), but the illicit movement of goods would be an offence.

To the extent that these substances are required for medical purposes, this amendment may engage Article 12(1) of the ICESCR but that the exceptions mentioned above will make sufficient allowance such that this right is not limited..

Conclusion

The Legislative Instrument is compatible with human rights because it promotes Article 12 of the ICESCR by protecting the general health and welfare of the Australian community from misuse of substances if manufactured into illicit drugs, whilst facilitating the import of those substances where there is a legitimate need.

The Hon Jason Wood
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliamentary Secretary to the Minister for Home Affairs