The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 [Provisions]

September 2014

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2.42 The committee recommends that the bill be amended to exempt plants and their extracts from the application of Schedule 1.

Recommendation 2

2.45 The committee recommends that the Government amend the Explanatory Memorandum to make clear that it is intended that: sentencing discretion should be left unaffected in respect of the non-parole period; in appropriate cases there may be significant differences between the non-parole period and the head sentence; and that the mandatory minimum is not intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').

Recommendation 3

2.46 Subject to the preceding recommendations, the committee recommends that the bill be passed.

Chapter 1

Introduction and background

Referral of the bill's provisions

1.1 On 17 July 2014, the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the bill) was introduced in the House of Representatives by the Minister for Justice, the Hon Michael Keenan MP.[1] On the same day, the Senate adopted a report of the Selection of Bills Committee which recommended that, upon its introduction in the House of Representatives, the provisions of the bill be referred immediately to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 2 September 2014.[2]

Purpose of the bill

1.2 The bill consists of six schedules, which incorporate a range of measures intended to 'improve Commonwealth criminal justice arrangements'.[3] More specifically, the bill would:

- ban the importation of all substances that have a psychoactive effect that are not otherwise regulated or banned;
- provide Australian Customs and Border Protection (ACBPS) officers with powers to stop these substances at the border;
- address an error in the definition of a minimum marketable quantity in respect of a drug analogue of one or more listed border controlled drugs;
- introduce new international firearms trafficking offences, amend existing cross-border firearms offences and introduce mandatory minimum sentences of five years' imprisonment for these offences;
- amend the international transfer of prisoners regime within Australia and clarify the processes involved;
- amend certain slavery offences to clarify they have universal jurisdiction; and
- retrospectively validate access by the Australian Federal Police (AFP) to certain investigatory powers in designated state airports.[4]

Background and key provisions

1.3 The short title for the bill indicates a focus on new psychoactive substances (NPS) and the Regulation Impact Statement ('*Banning the Importation of Substances which Mimic the Effects of Illicit Drugs*'), attached to the Explanatory Memorandum,

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1 *House of Representatives Votes and Proceedings*, No. 58, 17 July 2014, pp 725-726 [proof].

2 Selection of Bills Committee, *Report no. 9 of 2014*, 17 July 2014; *Journals of the Senate*, No. 45, 17 July 2014, pp 1236-1237 [proof].

3 Explanatory Memorandum, p. 2.

4 Explanatory Memorandum, p. 2.

supports this view.[5] However, the bill also addresses a number of other important criminal justice issues. The following sections discuss the background and key provisions of the bill. Contentious provisions are set out in greater detail.

New psychoactive substances

1.4 According to the bill's Explanatory Memorandum, NPS are substances 'designed to mimic the psychoactive effects of illicit drugs, but their chemical compositions are not captured by existing controls on those drugs'.[6] Of concern is the fact that '[t]hese substances are typically untested, of varying composition, concentration and toxicity and carry unknown or unpredictable side effects'.[7] While it has been difficult to collect and analyse data on NPS, there has been significant media attention on the issue and a number of reported deaths and hospitalisations resulting from the suspected use of NPS.[8] Australian border agencies are also 'detecting increasing numbers of new psychoactive substances in recent years'.[9] Domestic and international data, albeit limited, supports the proposition that the use of NPS is growing.[10] Also of concern is the fact that NPS have been marketed as 'legal highs', creating the impression that they have been tested and authorised for sale.[11]

1.5 The importation of illicit drugs is currently controlled under Part 9.1 of the *Criminal Code Act 1995* (Criminal Code) and the *Customs (Prohibited Imports) Regulations 1956*, which bans substances based on chemical composition, including structurally similar substances.[12] However, manufacturers can alter the chemical composition of these substances in order to stay ahead of bans introduced by governments, which take time because of the need to gather evidence about their use and harm.[13] Officers of the ACBPS currently have powers to detain unregulated NPS at the border if they are suspected to be illicit drugs. However, '[i]f detained

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5 The Office of Best Practice Regulation advised that a Regulation Impact Statement was not necessary for the other measures in the bill, 'as the proposed changes have a minor impact on business, community organisations or individuals'. Explanatory Memorandum, p. 5.

6 Explanatory Memorandum, p. 2.

7 Explanatory Memorandum, p. 28.

8 Explanatory Memorandum, Regulation Impact Statement, p. 85.

9 Explanatory Memorandum, pp 28, 87.

10 Explanatory Memorandum, Regulation Impact Statement, pp 86-87.

11 Explanatory Memorandum, Regulation Impact Statement, p. 85.

12 Under the Criminal Code, new and harmful drugs, plants and precursors may be criminalised indefinitely by regulation (sections 301.7 and 301.8) or for up to 18 months under an emergency determination (sections 301.13 and 301.14), to allow time to determine whether a substance should be criminalised indefinitely. NPS may also be added to the Prohibited Imports Regulations on the basis of advice from the Therapeutic Goods Administration and Office of Chemical Safety (within the Department of Heath) about their potential risks and harms. See Explanatory Memorandum, p. 28.

13 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 5 [proof].

substances are not illicit drugs, officers cannot formally seize them and must allow their importation, even if ACBPS suspects the substance is being imported solely for consumption as an alternative to a listed illicit drug'.[14] The Explanatory Memorandum notes that 'there are no known domestic manufacturers of the active ingredients for new psychoactive substances' and therefore banning the importation of these substances is 'an important part of reducing their supply in Australia'.[15]

Policy response and design

1.6 In October 2013, the Intergovernmental Committee on Drugs (IGCD) published a *Framework for a National Response to New Psychoactive Substances*. The IGCD agreed that '[t]o deal with the rapid rate of emergence of NPS, jurisdictions should consider implementing broad precautionary schemes to ban potentially harmful substances without a legitimate use or which are designed to mimic illicit drugs'.[16] Following this, the Attorney-General's Department (AGD) developed measures to ban the importation of substances which mimic the effects of illicit drugs. AGD prepared a Regulation Impact Statement (RIS), which it released on 6 May 2014 for public comment until 16 May 2014.[17] The statement canvassed four key options for tackling the public health and criminal law issues that NPS purportedly pose:

(i) Implement a ban on the importation of substances which mimic the effects of illicit drugs and that are otherwise unregulated.

(ii) Explore a pre-market assessment scheme for psychoactive substances, whereby psychoactive substances that have been assessed as 'low-risk' may be legally sold.

(iii) Education campaigns.

(iv) Continue to progressively ban dangerous substances based on their chemical structure.

1.7 AGD received six submissions, three of which were broadly in support of the proposed ban,[18] with the remaining three broadly in support of a pre-market assessment scheme.[19] Submissions favouring a pre-market assessment scheme argued that a ban would 'drive NPS use underground', that there was insufficient data on the scale of the NPS problem, and that the scheme may affect the importation of

14 Explanatory Memorandum, Regulation Impact Statement, p. 88.

15 Explanatory Memorandum, p. 28.

16 Intergovernmental Committee on Drugs (IGCD), *Framework for a National Response to New Psychoactive Substances*, October 2013, p. 3.

17 Attorney-General's Department, *Regulation Impact Statement: Banning the importation of substances which mimic the effects of illicit drugs*, May 2014.

18 Those from the Plastics and Chemical Industries Association, the Pharmacy Guild of Australia, and the Happy Herb Company.

19 Those from the Australian Drug Law Reform Foundation, the Eros Association, and Name Withheld.

substances with a legitimate use.[20] While acknowledging these claims, AGD nevertheless determined that '[a]n import ban on psychoactive substances without a legitimate use is likely to be a small but important step in reducing the number of people who are harmed, directly or indirectly, from using unsafe, untested and dangerous substances which masquerade as legal or legitimate alternatives to listed illicit drugs'.[21]

1.8 In accordance with the proposal set out in the RIS, the bill would create offences in the Criminal Code to ban the importation of substances which (1) have a psychoactive effect and/or (2) are represented, impliedly or expressly, to be an alternative to a controlled drug. The ACBPS and the AFP would be given powers to search for, detain, seize and destroy these substances, unless importers could prove the suspected NPS had a legitimate use or did not have a psychoactive effect. Importantly, the measures would 'work in parallel with, and not replace, any of the existing schemes which regulate the importation of both illicit drugs and substances with a legitimate use into Australia'.[22] It was also intended that these measures would operate alongside and not replace existing health, law enforcement and education initiatives and also complement state and territory regimes under the national framework for new psychoactive substances that the Law, Crime and Community Safety Council announced on 4 July 2014.[23]

Proposed amendments

1.9 New section 320.1 sets out a number of important definitions for the proposed offences. The term *psychoactive substance* is defined as 'any substance that, when a person consumes it, has the capacity to induce a *psychoactive effect*'. The Explanatory Memorandum notes that '[t]his is a broad definition, intended to capture all substances that mimic, or have similar effects to, serious drugs listed in the Criminal Code Regulations'.[24] A *psychoactive effect*, in relation to a person, is defined as one that either causes (1) 'a state of dependence, including physical or psychological addiction' or (2) 'stimulation or depression of the person's central nervous system, resulting in hallucinations or in a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood'. A *serious drug*

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20 Explanatory Memorandum, Regulation Impact Statement, pp 104-105.

21 Explanatory Memorandum, Regulation Impact Statement, p. 106.

22 Explanatory Memorandum, p. 2.

23 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 5 [proof]. At the meeting of the Law, Crime and Community Safety Council on 4 July 2014, Ministers endorsed the *Framework for a National Response to New Psychoactive Substances*. This framework was developed by the former Intergovernmental Committee on Drugs, with input from health, law enforcement and non-government experts and provides a guide for a balanced national response to new psychoactive substances. See Intergovernmental Committee on Drugs, *Framework for a National Response to New Psychoactive Substances* (October, 2013), available at http://www.lccsc.gov.au/sclj/lccsc_publications/2014_publications.html

24 Explanatory Memorandum, p. 30.

alternative is one that 'has a psychoactive effect that is the same as, or is substantially similar to, the psychoactive effect of a serious drug' or 'a lawful alternative to a serious drug'. Serious drugs are those drugs and plants (and their analogues) that are 'controlled' and 'border controlled' under Part 9.1 of the Criminal Code.

1.10 New subsection 320.2(1) would create an offence for importing a psychoactive substance. The prosecution would need to establish that the defendant imported a substance (fault element: intention) and that the substance was a psychoactive substance (fault element: recklessness).[25] The offence would carry a maximum penalty of imprisonment for 5 years, or 300 penalty units, or both. However, new subsection 320.2(2) would set out a number of exclusions, such that substances with which are controlled by some other regime are not captured by the offence. These exclusions would include certain types of food,[26] tobacco products,[27] registered or listed therapeutic goods and exempt therapeutic goods,[28] agricultural and veterinary chemicals,[29] industrial chemicals,[30] substances already dealt with under the serious drug offences in Part 9.1 of the Criminal Code,[31] prohibited imports,[32] and those substances prescribed by regulation.[33] The Explanatory Memorandum states that '[t]he exclusion of these categories of substances essentially replicates existing practice at the border' whereby suspicious substances are referred to the relevant regulator.[34] These exclusions would not apply if the substance had another – not excluded – psychoactive substance added to it.[35]

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25 Note that it would not be necessary to prove that the defendant was reckless as to the particular identity of the substance or whether the substance had a particular psychoactive effect: new ss. 320.2(4). The prosecution need only prove that the defendant knew, or was reckless as to whether, the substance he or she imported was a psychoactive substance. Explanatory Memorandum, p. 38.

26 Within the meaning of the *Food Standards Australia New Zealand Act 1991*: new ss. 320.2(2)(a).

27 Within the meaning of the section 8 of the *Tobacco Advertising Prohibition Act 1992*: new ss. 320.2(2)(b).

28 Within the meaning of the *Therapeutic Goods Act 1989*: new ss. 320.2(2)(c) & (e). Goods that are represented in any way to be for therapeutic use or for use as an ingredient or component in the manufacture of therapeutic goods are also excluded: new ss. 320.2(2)(d).

29 Within the meaning of the *Agricultural and Veterinary Chemicals Code Act 1994*: new ss. 320.2(2)(f)-(h).

30 Within the meaning of the *Industrial Chemicals (Notification and Assessment) Act 1989*: new ss. 320.2(2)(i).

31 New ss. 320.2(2)(j).

32 New ss. 320.2(2)(k).

33 New ss. 320.2(2)(l).

34 Explanatory Memorandum, p. 32.

35 New ss. 320.2(3).

1.11 However, defendants would bear the evidential onus of proof in relation to proving that a substance falls within one of the exclusions.[36] This means that a defendant would need to adduce or point to 'evidence that suggests a reasonable possibility that the matter exists or does not exist'.[37] The Explanatory Memorandum suggests that the intended use of a substance is a matter 'peculiarly within the knowledge of the owner or importer of the goods' and it would be 'significantly more difficult and costly' for the prosecution to raise evidence that the substance did not fall into any of the excluded categories.[38]

1.12 New subsection 320.3(1) would create an offence where a person imports a substance and that substance is presented in such a way, including through its labelling or packaging, that it expressly or implicitly represents the substance to either have the same, or substantially similar effects to, a serious drug, or to be a lawful alternative to such a drug. The offence would carry a maximum penalty of imprisonment for 2 years, 120 penalty units, or both. It would not be necessary for the prosecution to prove that the substance actually had a psychoactive effect, as the offence would only depend on the physical presentation of the substance. New subsection 320.3(4) would clarify that the prosecution need only prove that the defendant knew, or was reckless as to, the fact that the representation was about any serious drug. New subsection 320.3(3) would exclude a number of substances that have a legitimate use and whose presentation is regulated under another regulatory regime, similar to the exclusions outlined above. Similarly, the defendant would have the evidential burden of proving an exclusion category applied.[39]

1.13 The bill proposes a number of amendments to Part XII of the *Customs Act 1901* which would provide ACBPS and AFP officers with the powers to search for and seize psychoactive substances that are imported unlawfully, and provide for their forfeiture. The Explanatory Memorandum notes:

> While the amendments will largely extend the existing powers and mechanisms to psychoactive substances and goods presented as serious drug alternatives, they will also create a new procedure for dealing with claims for the return of seized psychoactive substances. This procedure will require a person whose goods have been seized on suspicion or belief that they are a prohibited psychoactive substance to commence court action to recover their goods.[40]

1.14 Importantly, where a person cannot prove that a seized substance either does not have a psychoactive effect or falls within one of the exclusion categories, then it

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36 New ss. 320.2 (referring to ss. 13.3(3)).

37 Criminal Code, ss. 13.3.

38 Explanatory Memorandum, p. 37.

39 New ss. 320.3 (referring to ss. 13.3(3)).

40 Explanatory Memorandum, p. 42.

would be condemned as forfeited. However, there would be compensation measures for importers whose goods are mistakenly seized and disposed of or destroyed.[41]

1.15 Existing procedures would be used for resolving claims involving substances presented as serious drug alternatives. This is purportedly because an officer would be 'more readily able to determine whether or not a substance is a serious drug alternative' and '[a]n importer should be able to establish compliance with the requirements of the relevant regulatory regime with relative ease'.[42]

Firearms trafficking

1.16 In the bill's Second Reading Speech, the Minister for Justice (the Minister) explained that '[i]n the lead up to the 2013 election, the coalition undertook to implement tougher penalties for gun-related crime'.[43] Consistent with this commitment, the bill would create new offences in the Criminal Code to criminalise the trafficking of firearms and firearm parts into and out of Australia.[44] It would also extend existing offences of cross-border disposal or acquisition of a firearm and taking or sending a firearm across borders within Australia in Division 360 of the Code to include firearm parts as well as firearms. Existing firearms trafficking offences in the Criminal Code are limited to trafficking between the states and territories and do not criminalise the trafficking of firearms parts.

1.17 The bill would also introduce mandatory minimum sentences of five years' imprisonment for offenders charged with a firearms trafficking offence under the Criminal Code, with maximum penalties of 10 years imprisonment or a fine of 2,500 penalty units, or both. However, this sentence would not carry with it a specified non-parole period and would not apply to minors.[45] The Minister argued that this would 'clearly signal the seriousness of the offence, while providing courts with discretion to set custodial periods consistent with the particular circumstances of the offender and the offence'.[46]

International Transfer of Prisoner Scheme

1.18 The *International Transfer of Prisoners Act 1997* (ITP Act) governs Australia's international transfer of prisoners scheme, designed to promote 'the successful rehabilitation and reintegration into society of a prisoner, whilst preserving the sentence imposed by the sentencing country in the prisoner's home country'.[47] In

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41 Explanatory Memorandum, p. 44.

42 Explanatory Memorandum, p. 43.

43 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 5 [proof].

44 New Division 361 – International firearms trafficking.

45 Explanatory Memorandum, pp 57-58.

46 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

47 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

the bill's Second Reading Speech, the Minister noted the effectiveness of the scheme to date but argued it needed to be amended to 'alleviate existing time and resource burdens whilst appropriately maintaining prisoner's rights'.[48] The proposed changes would:

- enable prisoners serving suspended sentences to fall within the ambit of the scheme;
- introduce the concept of a 'close family member' into the ITP Act to assist prisoners to establish community ties with a particular state, territory or transfer country and also to extend the range of people who can consent to the transfer of a prisoner who is a child or person incapable of valid consent;
- remove the requirement for a decision to be made in so-called 'unviable cases' (for example, where the relevant consents have not been obtained);
- clarify that the definition of 'joint prisoner' includes a prisoner who was convicted in more than one Australian state or territory;
- allow for application forms to be approved by the Attorney-General;
- bar reapplications to the Attorney-General within one year from the date of refusal or withdrawal of a previous application;
- clarify that prisoners may apply to either the sentencing country or directly to Australia;
- clarify the date on which an assessment of dual criminality will be undertaken; and
- simplify the process of notifying and seeking the consent of the state and/or territory and transfer country.[49]

Jurisdiction applicable to slavery offences

1.19 The prohibition of slavery is considered a *jus cogens* (peremptory) norm of customary international law. As such, the prohibition is non-derogable and applies at all times and in all circumstances. Serious crimes of a similar nature such as piracy, genocide, crimes against humanity, war crimes and torture are categorised under Australian law as offences with 'universal jurisdiction'.[50]

1.20 The bill would insert a new section 270.3A into the Criminal Code to provide that the slavery offences in section 270.3 have universal jurisdiction. Wherever a slavery offence takes place wholly outside of Australia's territory, the Attorney-

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48 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

49 Explanatory Memorandum, p. 60.

50 Explanatory Memorandum, p. 79. 'Universal jurisdiction' is the term used to describe 'extended jurisdiction—category D' under section 15.4 of the Criminal Code. If this section applies to an offence, then the offence falls within Australian jurisdiction 'whether or not the conduct constituting the alleged offence occurs in Australia' and 'whether or not a result of the conduct constituting the alleged offence occurs in Australia'.

General's permission to prosecute would be required.[51] The Minister stated that this would 'ensure that Australian law enforcement agencies have the appropriate tools to target this crime wherever it occurs'.[52]

Anti-money laundering

1.21 According to the Minister, the bill would make amendments to the *Financial Transactions Reports Act 1988* to 'simplify the obligations of cash dealers under Australia's anti-money laundering regime, removing duplication and red tape'.[53]

1.22 The bill would give permanent effect to an exemption granted by the Australian Transaction Reports and Analysis Centre (AUSTRAC) Chief Executive Officer (CEO) which removed obligations of cash dealers to block accounts in certain circumstances as well as the associated obligations of the AUSTRAC CEO to give notice to the account signatories, unblock accounts if satisfied of certain circumstances and forfeit all rights and interests in relation to the account in certain circumstances.[54] The Explanatory Memorandum states that the AUSTRAC CEO previously granted the relevant exemption because the obligations imposed on cash dealers were largely duplicative of safeguards contained in the subsequent *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.[55]

Validating airport investigations

1.23 The bill would 'validate investigatory action, if any, of the AFP and special members, in relation to state offences having occurred in certain Commonwealth airports during the period between the repeal and passage of regulations'.[56] This period was from 19 March 2014, when the *Commonwealth Places (Application of Laws) Regulations 1998* were repealed, to 17 May 2014, when the *Commonwealth Places (Application of Laws) Regulation 2014* came into effect.[57]

Other minor amendments

1.24 Finally, the bill makes a number of minor amendments to correct inaccurate references and grammatical errors in the Criminal Code and the *Customs Act 1901*, particularly in relation to controlled drug offences.

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51 New ss. 270.3B.

52 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

53 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

54 Explanatory Memorandum, p. 84.

55 Explanatory Memorandum, p. 84.

56 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 17 July 2014, p. 6 [proof].

57 Explanatory Memorandum, p. 80.

Proposed government amendments to the bill

1.25 On 20 August 2014, the Inquiry Secretary received correspondence from AGD submitting proposed amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (AML/CTF Act) which the Government intended to move as Government amendments to the bill.[58] These proposed amendments would, it was submitted, 'make minor and technical amendments' to the AML/CTF Act in order to:

- clarify that the Australian Taxation Office (ATO) may share AUSTRAC information relating to threshold transactions and international funds transfer instructions, particularly with the taxpayer about whom the information relates; and
- enable the Victorian Independent Broad-based Anti-corruption Commission (IBAC) to access AUSTRAC information, purportedly to bring IBAC's investigative abilities into line with similar agencies in other jurisdictions.

1.26 The correspondence received from AGD stated that:

> The amendments were originally intended to be included in the Bill but unfortunately this was not possible. An unintended consequence of not including the amendments was precluding consideration of those measures by the Senate Legal and Constitutional [Affairs Legislation] Committee's inquiry. This was not the intention, and therefore the Government has agreed that we provide an advanced copy of the proposed amendments to the Committee.

1.27 Further, the Department indicated that:

> The first amendment in particular is time critical as it supports an ATO data matching project which is anticipated to raise significant revenue in the 2014-15 financial year and enhance protection of Australia's revenue base.

1.28 The committee received these amendments after the close of submissions and one day prior to the only public hearing into the bill. As such, it was unfortunately unable to solicit comment from relevant stakeholders.

Reports of other committees

1.29 On Wednesday, 27 August 2014, the Parliamentary Joint Committee on Human Rights tabled its *Tenth Report of the 44th Parliament* in the House of Representatives, which examined the bill in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Report examined a number of measures in the bill, raised a number of concerns, and sought further advice from the Minister for Justice in respect of the following issues:

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58 See Additional information received from the Attorney-General's Department on 20 August 2014, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill

- whether the reverse evidentiary burden applicable to the exemptions in proposed sections 320.2 and 320.3 is compatible with the right to be presumed innocent;
- whether the definition of a 'psychoactive substance', for the purposes of proposed section 320.2, as currently drafted, meets the standards of the quality of law test for human rights purposes and whether article 15 of the International Covenant on Civil and Political Rights (ICCPR) is engaged;
- whether mandatory sentencing is compatible with the right to freedom from arbitrary detention and the right to a fair trial;
- whether the strict liability and absolute liability elements of the proposed firearm offences are compatible with the right to be presumed innocent;
- whether the removal of the requirement for the Attorney-General to make a decision in 'unviable' applications is compatible with the right to a fair hearing;
- whether the proposed limitation of administrative reviews and limits on reapplications in respect of the International Transfer of Prisoners Scheme is compatible with the right to a fair hearing; and
- whether the retrospective validation of conduct by AFP and special members is compatible with: the right to security of the person and freedom from arbitrary detention; the prohibition against retrospective criminal laws; the right to life; the prohibition on torture, cruel, inhuman and degrading treatment or punishment; the right to an effective remedy; and article 14 of the ICCPR.[59]

1.30 On Wednesday, 27 August 2014, the Senate Standing Committee for the Scrutiny of Bills tabled *Alerts Digest No. 10 of 2014* in the Senate. This provided commentary on the bill and examined a number of proposed measures. It raised some concerns but left the question of whether the measures were appropriate to the Senate as a whole. However, it did seek further justification from the Minister for the proposed retrospective validation measures set out in Schedule 5, item 2 of the bill, noting 'the importance of the principle that prospective legal authorisation should be provided for the exercise of coercive powers'.[60]

1.31 The committee has noted these reports and their commentary. It highlights that ministerial responses, which will be incorporated in future reports of these committees, will not be available prior to the tabling date for the present inquiry. As such, the primary focus of this report is on key issues raised in submissions received and during the public hearing. However, the committee will appraise itself of future

59 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44th Parliament*, 27 August 2014, pp 9-31.

60 Senate Standing Committee for the Scrutiny of Bills, *Alerts Digest No. 10 of 2014*, 27 August 2014, pp 15-16.

determinations made by the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights.

Conduct of the inquiry

1.32 The committee advertised the inquiry on its website and invited a number of stakeholders to make submissions by 4 August 2014. The committee received 15 submissions, all of which are available on the committee's website.[61]

1.33 On 22 August 2014, the committee held a public hearing in Melbourne. Mr Torsten Wiedemann and representatives from AGD, ACBPS, the Eros Association, Happy Herb Company, and the Law Society of Australia attended as witnesses.

Structure of this report

1.34 The report is structured in two chapters—this introductory chapter, which has provided an overview and background of the bill and its key provisions; and chapter 2, which addresses any issues raised by submitters and witnesses.

Acknowledgements

1.35 The committee thanks those organisations and individuals who made submissions and appeared as witnesses, particularly in view of the limited timeframe in which submissions could be made.

Note on references

1.36 References to the committee Hansard are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

61 See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

Chapter 2

Key issues

Issues raised

2.1 The committee received 15 submissions, primarily focused on issues pertaining to the proposed ban on the importation of new psychoactive substances (NPS) and the introduction of mandatory minimum sentences for firearms trafficking offences. These two issues are discussed in the following sections.

New psychoactive substances

Policy approach and consultation

2.2 The committee received a number of submissions in support of the proposed ban on the importation of NPS, as well as some against the ban, or in favour of specific amendments.

2.3 Submissions from law enforcement agencies and state prosecutors were generally supportive of the proposal to ban the importation of NPS.[1] For example, the Australian Crime Commission (ACC) submitted that:

> At this time, the health implications of new psychoactive substances [are] unclear. For this reason, the ACC recommends that the Government maintain a zero-tolerance approach towards new psychoactive substances, and believes that it is appropriate to place the onus on importers of psychoactive substances to establish that the substance has a legitimate use. The Bill, which focuses on the psychoactive nature of the substances in this market rather than on individual chemical structures, provides an effective and sustainable legislative response to this complex and ever-evolving market. The Bill will prevent individuals and crime groups from importing new psychoactive substances until such time as the Government is satisfied that the substance does not pose a significant risk to the Australian community, taking into account health and sociological risks. The response has been developed following wide-ranging consultation with Commonwealth, state and territory agencies and is considered appropriate. For this reason, the ACC strongly supports the implementation of the Bill.[2]

2.4 Four submissions focused specifically on the impact of the proposed ban on the importation of plant material and urged that an exemption be created.[3] The details of these submissions are discussed separately below.

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1 See Office of the Director of Public Prosecutions (Tasmania), *Submission 11*, p. 1; Australian Customs and Border Protection Service, *Submission 14*; Northern Territory Police Force, *Submission 15*, p. 2.

2 Australian Crime Commission, *Submission 7*, pp 2-3.

3 See Torsten Wiedemann, *Submission 1*; Dr Alistair Hay, *Submission 2*; Happy Herb Company, *Submission 4*; One Health Organisation, *Submission 8*; Confidential, *Submission 9*.

2.5 Finally, a number of submissions challenged the Government's proposed policy more generally, on the basis that it would capture a very broad range of conduct or that alternative models would be more effective.

2.6 The Bar Association of Queensland argued:

> The proposed definition of 'psychoactive substances' is very wide capturing any substance which when consumed might induce a wide range of effects, including, as alternatives, dependence or addiction and or significant change of thinking, behaviour, perception, awareness or mood. As a result, potentially a large number of substances have been rendered illegal imports.
>
> …The Association is of the opinion that it would be preferable to legislate specifically for those substances which have been found to be causing harm, for example, through hospital emergency admissions (in this country or elsewhere). If a particular substance is being chemically imitated, then it may be appropriate, again based on the basis of the incidence of harm, to legislate, generally, against chemical imitators of that illicit substance.
>
> This would avoid the uncertainty associated with a general prohibition of all psychoactive substances and would focus the criminal prohibition on the prevention of identified harm.[4]

2.7 The Bar Association of Queensland further noted that the offence created by proposed section 320.3 would 'extend to importing harmless substances that are dressed up to represent that they are a serious drug alternative' and it was 'not clear why the law should be concerned with conduct of that kind'.[5] It made that point that a person that mislabelled poisons ran the risk of being prosecuted for other offences, such as manslaughter or murder.[6]

2.8 The Tasmanian Office of the Director of Public Prosecutions noted, but did not comment on, the model adopted in New Zealand to address NPS. Under this model, responsibility is placed on:

> …NPS producers to develop products that are no more than a low risk of harm. Manufacturers must now clinically test products before they can be legally sold. A unit within the Ministry of Health oversees the importation, manufacture and sale of these products under tight regulations that requires approval by a Psychoactive Substances Expert Advisory Committee. The committee must have relevant expertise in pharmacology, toxicology, neuroscience, medicine and any other areas the Authority considers relevant.[7]

2.9 The Eros Association – an adults only retail association – suggested that this model had been 'very effective in reducing the availability and range of NPS'.[8] The

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4 Bar Association of Queensland, *Submission 12*, p. 2.

5 Bar Association of Queensland, *Submission 12*, p. 1.

6 Bar Association of Queensland, *Submission 12*, pp 1-2.

7 Office of the Director of Public Prosecutions (Tasmania), *Submission 11*, p. 7.

8 Eros Association, *Submission 13*, p. 4.

Eros Association submitted that 'regulation, testing and control is the best option' to 'reduce the impact of NPS on public health and make existing criminal laws more effective in responding to this emerging issue'.[9] Ms Patten, Chief Executive Officer (CEO) of the Eros Association, explained that the industry selling NPS was already self-regulated but that it would be 'happy to adopt' a regulatory model similar to that in New Zealand.[10]

2.10 Happy Herb Company – a business operating in Australia and the United States that sells 'herbs, herbal extracts and other nature products' – advocated that:

> …an evidence-based regulatory approach to the issue of drugs in society, recommending that this be treated as a public health matter rather than a criminal one. Prohibition simply enlarges the black market, as the public demand for psychoactive substances does not diminish in accordance with supply.[11]

2.11 The Attorney-General's Department (AGD) explained that the proposed policy was part of a 'consensus approach' and had been adopted after a process of consultations with stakeholders, state and territory governments and counterparts in New Zealand.[12] It provided the following explanation as to why a pre-market assessment scheme, similar to that implemented in New Zealand, was rejected in favour of the proposed approach:

> Exploration of the issues underlying such a scheme, including the constitutional considerations, obtaining national agreement (including possibly seeking a referral of powers), and setting up and implementing a new regulatory regime for psychoactive substances, would be an extremely lengthy process. During this time, the status quo would continue. Importers would continue to import substances designed to get around border controls based on chemical structure. Untested and unsafe products would continue to be presented as legal alternatives to illicit drugs and they would continue to cause harm to individuals and the community.
>
> A pre-market assessment scheme would also be contrary to the Government's approach to NPS, which is to list substances as border controlled drugs in the *Criminal Code* as evidence about their use and harms has become available. It would similarly be contrary to recent moves in a number of jurisdictions, such as New South Wales, Queensland and South Australia, to comprehensively ban substances that seek to mimic the effects of illicit drugs.

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9 Eros Association, *Submission 13*, p. 4.

10 Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, pp 20-21.

11 Happy Herb Company, *Submission 4*, p. 4.

12 See Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 22 August 2014, pp 29-30, 34; Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014), Attachment A.

> The Department notes that the New Zealand *Psychoactive Substances Act 2013* allows psychoactive substances assessed as 'low risk' to be manufactured and sold in New Zealand. Initially, the New Zealand Government provided interim approval for the manufacture and sale of a small number of psychoactive products. However, on 8 May 2014, it withdrew all those approvals following continued reports of severe adverse reactions. In these circumstances, and where no psychoactive substances have yet been approved for manufacture and sale in New Zealand, the Department considers that a pre-market assessment scheme should be approached with caution.[13]

The importation of plant material

2.12 A number of submissions raised concerns that the proposed measures aimed at banning NPS would capture the importation of plants, seeds, herbs, fungus, and botanical extracts, which are used for legitimate purposes but technically have, often mild or undesirable, psychoactive effects.[14] Dr Alistair Hay suggested that this is particularly the case for importers of plants who are not interested in their psychoactive effects and where the identification of such material would require the services of highly skilled persons.[15]

2.13 Moreover, it was argued that the proposed exemptions would not adequately address this issue because many of these materials had not yet been listed under the *Therapeutic Goods Act 1989* or *Food Standards Australia New Zealand Act 1991*. For example, Mr Torsten Wiedemann submitted that many commonly imported medicinal and culinary herbs would not fall within the 'food' exemption because they do not have 'a long history of traditional consumption in Australia or New Zealand'.[16] While the *Therapeutic Goods Act 1989* creates a mechanism by which some of these goods can be registered and thus lawfully imported, it was argued that the process and cost of doing so would be prohibitive.[17]

2.14 The point was made by some submitters that because the chemical structure of plants cannot be altered, the justification relied on to ban NPS in the manner proposed by the bill did not apply.[18] As the Happy Herb Company argued:

> Dangerous plants can be, and already are, easily prohibited through existing legislation without importers being able to circumvent that legislation through making minor modifications to the molecular structure of the substance; this is the crucial difference between a naturally occurring plant

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13 Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014), p. 3.

14 See Torsten Wiedemann, *Submission 1*; Dr Alistair Hay, *Submission 2*; Happy Herb Company, *Submission 4*; One Health Organisation, *Submission 8*; Confidential, *Submission 9*.

15 Dr Alistair Hay, *Submission 2*, p. 1.

16 Torsten Wiedemann, *Submission 1*, p. 1.

17 Torsten Wiedemann, *Submission 1*, p. 1; Happy Herb Company, *Submission 4*, p. 2.

18 Torsten Wiedemann, *Submission 1*, p. 1; Happy Herb Company, *Submission* 4, p. 2.

> and a compound created in a laboratory…Though the goal of this law should be to support better health and well-being outcomes for all Australians, if plants and botanical extracts are not excluded from the jurisdiction of this bill then Australian citizens and businesses will be deprived of their legitimate right to import, study and use numerous harmless and benign herbs.[19]

2.15 The Happy Herb Company outlined the impact the proposed ban would have on its business:

> We would have to immediately conduct a massive audit of every single herb that is sold throughout our retail outlets…There are potentially an awful lot of herbs that could fall under the remit of the legislation. So we would have to immediately figure out which herbs were going to be affected and revamp a lot of our catalogues and our online shop and negotiate with our suppliers and manufacturers to create different products. You might have a herbal product which contains five or 10 separate herbs, and if any of those contains a single one of these herbs, like a very mild caffeine-type substance, we would have to reformulate that product. We would have to find alternative supplier arrangements. It will definitely be a large body of work, and I expect it would impact on our bottom line significantly, eventually.[20]

2.16 It was suggested by a number of submitters that the proposed ban should be amended to include an exemption for the importation of plant material and associated extracts for non-drug related purposes.[21] As a model, these submissions pointed to an exemption in New South Wales (NSW) legislation that otherwise criminalises the supply, manufacture or advertising of psychoactive substances: section 36ZE(1)(h) of the *Drug Misuse and Trafficking Act 1985* (NSW) provides that these offences do not apply to 'any plant or fungus, or extract from a plant or fungus, that is not, or does not contain, a substance specified in Schedule 1'.

2.17 In response to these concerns and questions posed by the committee at the public hearing, AGD stated the following:

> The ban is not intended to affect the importation of plants, herbs and fungi for horticultural, agriculture or botanical purposes. Plants, herbs and fungi are unlikely to be affected by the ban, in particular because the Australian Customs and Border Protection Service (ACBPS) is unlikely to detain and seize them under these provisions. However, the Department is aware that New South Wales has exempted plants and fungi and their extracts from its regime in the *Misuse of Drugs Act 1986*.
>
> The Department is currently examining the possibility of exempting plants from the offence of importing a prohibited psychoactive substance under

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19 Happy Herb Company, *Submission 4*, p. 2.

20 Mr Niall Edward Fahy, Operations Manager, Happy Herb Company, *Committee Hansard*, 22 August 2014, pp 15-16.

21 Torsten Wiedemann, *Submission 1*, p. 1; Alistair Hay, *Submission 2*, p. 1; Happy Herb Company, *Submission 4*, p. 2.

> proposed section 320.2 of the Bill. However, any changes to the Bill or exemptions to the offence in proposed section 320.2 are a matter for Government.[22]

Proving a 'psychoactive effect'

2.18 Some submissions and evidence from witnesses revealed concerns that the definition of a 'psychoactive effect' was too broad, inherently subjective, and difficult to prove in practice given the lack of published research on NPS.[23]

2.19 While the Law Council of Australia did not make a formal submission on this issue, the committee was directed to its *Policy Statement: Rule of Law Principles*, which relevantly states that:

> The intended scope and operation of offence provisions should be unambiguous and key terms should be defined. Offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct and are thus overly dependent on police and prosecutorial discretion to determine, in practice, what type of conduct should or should not be subject to sanction.[24]

2.20 The Tasmanian Office of the Director of Public Prosecutions submitted that:

> Experts employed with the Forensic Sciences Services of Tasmania (FFST) have been consulted in relation to these submissions and have highlighted some potential difficulties with proving NPS offences. Although FFST can provide a certificate of analysis identifying what the substance is, whether it falls through the gaps and allows for the proposed offences in the Bill to be laid, there is a potential issue with proving that the substance has a psychoactive effect. Whilst an expert such as a toxicologist or pharmacologist can usually provide evidence about the effects of drugs, based on clinical trials, research and published articles, FSST has advised the Tasmanian DPP that the problem with the experimental drugs we are seeing on the market now, is that there is no or little in the way of experimental clinical trials and therefore very little in the way of published research. Unless an offender makes admissions about the psychoactive effects of a substance, the Crown will be required to prove the substance and that it has a psychoactive effect. This evidence would need to be led from an expert, who is qualified to give such evidence.
>
> If this Bill is passed, the concern of FSST and this office is, if expert evidence is required to prove the offence, whether the available literature will be sufficient to prove the offence. FSST has advised that the current approach is to deal with the matter on a case by case basis. In the absence of clinical trials, evidence about a NPS is obtained from what literature is

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22 Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014), p. 2.

23 See, e.g., Bar Association of Queensland, *Submission 12*, p. 2; Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, p. 18.

24 Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 1(b), p. 2.

> available – e.g. case reports in relation to people who have taken the drug and/or other available reviews. The amount of available literature on a NPS currently depends on how long the drug has been on the market and who has been using it.
>
> If the Bill is to be passed in its current form, the Tasmanian DPP recommends that a body of scientific research needs to be undertaken to assist law enforcement agencies and prosecution services with proving these offences.[25]

2.21 The Northern Territory Police Force, while supporting the proposal to increase Customs' powers at the border, noted that the *Misuse of Drugs Act* (NT) was amended on 11 February 2014 to remove all references to 'psychoactive and psychotropic effects, on the basis that it was difficult for an expert to give such evidence given the differing effects of substances on individuals'. It suggested that '[t]he terminology is subjective, and the interpretation would be broad and open to legal challenge'.[26]

2.22 In relation proving the proposed offences, AGD conceded that there would be 'challenges' to doing so but suggested the offences would only be 'used when appropriate'. AGD suggested that the offences were 'secondary to the main aim of the bill, which is to enable Customs to act in response to a substance of concern that does not fall within one of the listed illicit drugs'.[27] As to how one would prove a substance gave rise to a 'psychoactive effect', AGD suggested the following:

> In broad strokes in relation to psychoactivity, there are probably two things: (1) the chemical composition of what it is that you are analysing, the substance of concern and (2) existing evidence based on what effect those substances will have if ingested and just the physiological effect of those substances when they are ingested.[28]

2.23 ACBPS also explained its approach to implementing the proposed ban at an operational level:

> If Customs and Border Protection finds a good that has come across the border and seizes it, in some cases there is going to be a very clear indication to us that that particular substance is a new psychoactive drug because it is marketed that way—it is commercially available as 'kronic' or whatever the product may be. There will be some subnarrative under the title saying, 'This will give you a legal high,' or those sorts of things. That is a fairly good indicator to us in Customs that it is potentially a new psychoactive substance and that we ought to put the onus back on the

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25 Office of the Director of Public Prosecutions (Tasmania), *Submission 11*, pp 6-7.

26 Northern Territory Police Force, *Submission 15*, pp 1-2.

27 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 22 August 2014, p. 33.

28 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 22 August 2014, p. 30.

> importer to demonstrate to us whether there is a risk to health or whatever that might be.
>
> Here is where we get to the point of agreement. The capability to determine that risk is immature. We can only make those judgements, at this point in time, on the labelling of those substances. If a delegate within Customs has to make a decision on whether an importer ought to have those goods released to him or her I would, at this point in time, set a high threshold for my officers. I would require scientific, clinical evidence. Otherwise, the risk transfers to the Customs and Border Protection officer making that decision to release a substance into the community which potentially has a risk which is unknown. So your comment is right: it is an immature capability in terms of that determination.[29]
>
> …But if [the substance] is unlabelled, or it is concealed, that is a very difficult thing to do. We would then have to go through a process of seeking guidance and advice from the Commonwealth Medical Officer, health officials, the [Therapeutic Goods Administration] and various clinical evidence and we would have to determine all that.[30]

Reversal of the evidentiary onus of proof

2.24 The Human Rights Committee of the Law Society of NSW raised concerns about the proposed reversal of the evidentiary onus of proof in relation to the exemptions listed in proposed sections 320.2(2) and 320.3(3), which are not essential elements of the offence:

> In the Committee's view, proposed ss 320.2 and 320.3 represent a direct violation of Art 14(2) of the *International Covenant on Civil and Political Rights* ("ICCPR"). The Compatibility Statement argues that the reversal is reasonable because it is a regulatory offence and the defendant would have more knowledge about the information forming the basis of the offence.
>
> However, while the UN Human Rights Committee has determined that the onus can be reversed for civil regulatory offences (see *Morael v France* (207/86), the plain words of Article 14(2) make it clear that it is specifically prohibited in relation to criminal charges. The Committee submits that seeking to provide for more expeditious prosecutions is neither a sufficient nor legitimate reason for circumventing the presumption of innocence and the requirement that the prosecution prove every element of the offence, which are fundamental principles of human rights and criminal justice.[31]

2.25 While the Law Council of Australia did not make a formal submission on this issue, the committee was directed to its *Policy Statement: Rule of Law Principles*, which relevantly states:

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29 Mr Roman Quaedvlieg, Deputy Chief Executive Officer, Border Enforcement, Australian Customs and Border Protection Service, *Committee Hansard*, 22 August 2014, p. 32.

30 Mr Roman Quaedvlieg, Deputy Chief Executive Officer, Border Enforcement, Australian Customs and Border Protection Service, *Committee Hansard*, 22 August 2014, p. 33.

31 The Law Society of NSW, *Submission 10*, pp 1-2.

> The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence. Only where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, should the defendant bear the onus of establishing that matter. Even then the defendant should ordinarily bear an evidential, as opposed to legal burden.[32]

2.26 The Law Council of Australia also directed the committee to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, produced by AGD, which states that:

> If an element of the offence is difficult for the prosecution to prove, imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. This would generally be unjust. However, where a matter is peculiarly within the defendant's knowledge and not available to the prosecution, it may be legitimate to cast the matter as a defence.[33]

2.27 Mr Odgers SC, representing the Law Council of Australia, responded to questioning on this issue with the following:

> I am hesitant, because I have not discussed this with my colleagues or indeed with the Law Council itself, and therefore what I say immediately needs to be taken with that in mind…But let me say this: there is a distinction between the onus of proof and an evidential burden. Certainly the Law Council has always strongly opposed or at least been concerned about circumstances in which there is a reversal of the onus of proof—that is, that instead of the prosecution having to prove some element of an offence the defence has to prove the absence of that element. However, there is less concern with evidential burdens. Evidential burdens are burdens placed on a party to raise an issue, to adduce at least some evidence that raises the question about a particular aspect of an offence, such as to then, once the issue is raised, put the burden on the prosecution to prove that matter. If the evidential burden is not met then the prosecution can simply proceed on the assumption that the issue does not arise and there is no need to prove it.[34]

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32 Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 3(e), p. 3.

33 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

34 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, p. 10.

Mandatory minimum sentences for firearms trafficking offences

2.28 A number of submissions, particularly from peak law organisations and state prosecution departments,[35] were strongly opposed to the introduction of mandatory minimum sentences for the proposed firearms trafficking offences.[36] For example, the NSW Director of Public Prosecutions submitted the following:

> It was the experience in NSW when there were a number of people smuggling cases before the NSW Courts that the accused did not enter pleas of guilty because of the mandatory minimum sentence and all the trials ran the full course. This had a significant impact on the District Court to dispose of other work and on the resources of the [Commonwealth Director of Public Prosecutions]…Additionally trials with a mixture of Commonwealth and State offences by reason alone of the combined effect of State and Commonwealth provisions are more complex cases to prosecute. The inclusion of a mandatory minimum sentence in this mix will add to the overall complexity.[37]

2.29 The Human Rights Committee of the Law Society of NSW submitted that, '[a]s a rule of law matter', it opposed mandatory minimum sentencing:

> Mandatory sentences are more likely to result in unreasonable, capricious and disproportionate outcomes as they remove the ability of courts to hear and examine all of the relevant circumstances of a particular case. As a result, mandatory sentencing can produce disproportionately harsh sentences and result in inconsistent and disproportionate outcomes. Further, there is no evidence that the harsher penalties provided by mandatory sentencing have any deterrent value. The Committee notes the suggestion in the Compatibility Statement that judicial discretion is preserved because there is no minimum non-parole period proposed. However, with respect, the Committee's view is that a mandatory minimum sentence by definition fetters judicial discretion.
>
> As such, the Committee's view is that mandatory minimum sentences violate Article 9 of the ICCPR as they amount to arbitrary deprivations of liberty. The Committee notes for example the UN Human Rights Committee's decision in *C v Australia* (900/1999) on lack of individual justification for deprivations of liberty.
>
> Further, the Committee submits that mandatory minimum sentences are likely to be a breach of Article 14(5) of the ICCPR because that Article

35 In accordance with a protocol between the Commonwealth Director of Public Prosecutions and state/territory prosecutors, the states and territories will often prosecute cases involving a mix of Commonwealth and state offences.

36 See Director of Public Prosecutions (NSW), *Submission 3*, pp 1-2; Law Council of Australia, *Submission 5*, pp 1-2; The Law Society of New South Wales, *Submission 10*, p. 2; Bar Association of Queensland, *Submission 12*, pp 2-3; Office of the Director of Public Prosecutions (Tasmania), *Submission 11*, pp 10-12.

37 Director of Public Prosecutions (NSW), *Submission 3*, pp 1-2.

> requires a sentence (not only a conviction) to be reviewable on appeal. That could not happen if the sentence is the mandatory minimum.[38]

2.30 The Law Council of Australia recommended that the mandatory sentencing measures be removed from the bill, but, in the event this did not occur, requested a revision of the Explanatory Memorandum to make clear that the Government intended that:

> • the sentencing discretion be left unaffected in respect of the non-parole period;
>
> • in appropriate cases there may be significant differences between the non-parole period and the head sentence; and
>
> • the mandatory minimum is *not* intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').[39]

2.31 The Law Council of Australia suggested this approach on the basis of concerns that:

> …the mandatory minimum sentence will be seen as a 'sentencing guidepost' which specifies the appropriate penalty for the least serious case. This would mean that courts would feel constrained to impose a non-parole period that is the usual proportion (about 2/3 of the head sentence) and, even then, only in the least serious case.
>
> The Law Council considers that, in principle, the non-parole period should be completely open-ended, so that in appropriate cases extremely low non-parole periods could be imposed. In the Law Council's view any adoption of a form of mandatory sentencing should only be to indicate that general deterrence must be given special weight in sentencing in this context. In this way, some of the Law Council's concerns regarding the mandatory sentences in the Bill may be mitigated.[40]

2.32 Similarly, the Tasmanian Office of the Director of Public Prosecutions suggested that, if the mandatory sentence provisions remain in the bill, amendments be incorporated to allow a judge to depart from the mandatory minimum sentence in the following circumstances:

- The offender was under 18 or over 18 but under 21 at the time the offence was committed or at the time of sentencing; and / or
- The offender suffered with a cognitive impairment; and / or
- The imposition of the mandatory minimum sentence would not be in the public interest; and / or

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38 The Law Society of New South Wales, *Submission 10*, p. 2 [citations omitted].

39 Law Council of Australia, *Submission 5*, p. 2.

40 Law Council of Australia, *Submission 5*, p. 2.

- Exceptional circumstances exist that would justify a sentencing judge departing from the mandatory minimum sentence.[41]

2.33 In response to these concerns at the public hearing, AGD stated the following:

> The penalty will ensure that high probability offenders receive sentences proportionate to the seriousness of their offending. However, the mandatory minimum will not carry with it a specified nonparole period; nor will it apply to minors. This will supply Courts with the discretion to set custodial periods appropriate to the circumstances of the offender and the offence while also sending a clear signal about the seriousness of the offence.[42]

2.34 In response to questions on notice, AGD stated that it was 'not aware of specific instances where sentences for the trafficking of firearms or firearms parts have been insufficient' but that the introduction of mandatory minimum sentences for firearms trafficking offences implemented the Government's election commitment. Further, it indicated that the non-binding *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* did not prohibit their use, though recommended they be avoided.[43]

Committee view

2.35 The committee considers that the bill contains measures to improve Commonwealth criminal justice arrangements in Australia. The committee's specific comments on the proposed amendments are as follows.

2.36 The committee also notes that in the present case, some likely amendments to the bill were provided to the committee at a late stage, and have therefore not been exposed to the full inquiry process and to the considered scrutiny of interested stakeholders.

New psychoactive substances

2.37 The committee appreciates the complexity of designing a policy that effectively addresses the emergence of new and untested psychoactive substances in Australia. There is currently not enough evidence to suggest that pre-market assessment schemes, such as that trialled in New Zealand, are effective.

2.38 The committee notes concerns that the definition of a 'psychoactive effect' in the bill is broad and captures many legitimate substances. However, it highlights the point made by Mr Odgers SC that it is 'not uncommon' for criminal legislation to be drafted in a way that catches criminal activity of a 'very, very low seriousness or culpability' and that in these situations it is important that prosecutorial discretion is

41 Office of the Director of Public Prosecutions (Tasmania), *Submission 11*, p. 12.

42 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 22 August 2014, p. 28.

43 Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014), pp 1-2.

maintained.[44] Evidence from AGD and ACBPS suggests that they are acutely aware of the broad reach of this proposed ban and will apply discretion to the use of their powers or the offences.

2.39 The committee also notes concerns about the proposed reversal of the evidentiary burden of proof in respect of the offences that would be created by proposed sections 320.2 and 320.3. However, this applies only in relation to the *exemptions* listed and not the elements of the offence. It is satisfied that, given the emerging nature of untested and potentially harmful NPS, it is appropriate for importers to prove the intended use of a substance and that it falls within an exemption, a matter peculiarly within the knowledge of the importer. The committee also notes that an evidentiary burden only requires a defendant point to some evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3 Criminal Code), for the prosecution to then disprove the matter beyond reasonable doubt (section 13.1 Criminal Code).[45]

2.40 The committee is concerned that, in the event an individual is prosecuted for importing a psychoactive substance, there will be significant challenges in successfully prosecuting a case because of the difficulty in proving that a substance, when consumed, has the capacity to induce a 'psychoactive effect', as defined in the proposed amendments. Of particular concern is the inherent subjectivity in this definition, along with the real possibility that there would be no published research on the effects of many new psychoactive substances.

2.41 Evidence provided in submissions and from witnesses at the public hearing was that the proposed ban on the importation of psychoactive substances would unfairly extend to plant material and extracts. AGD was unable to convince the committee why this was so, and why an exemption, similar to that provided for in NSW legislation, had not been considered or adopted. However, it was made clear that it was unlikely that legitimate importers of plant material would be captured by the legislation in practice. AGD has indicated it would consider exempting plants from the offence of importing a prohibited psychoactive substance under section 320.2 of the bill.[46] On the evidence before it, the committee is of the view that such an exemption would be prudent and reduce the potential for unintended consequences to arise from the proposed amendments.

Recommendation 1

2.42 The committee recommends that the bill be amended to exempt plants and their extracts from the application of Schedule 1.

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44 Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, p. 11.

45 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

46 Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014), p. 2.

Mandatory sentencing for firearms trafficking offences

2.43 The committee acknowledges the concerns of the various peak law organisations and state prosecutors regarding the implementation of mandatory minimum sentences for firearms trafficking offences. However, the Government must respond to community concern about serious crime and the need to ensure that offenders receive sentences that reflect the seriousness of their offence. The committee draws attention to the fact that the proposed mandatory minimum sentences would not apply to children and do not impose a minimum non-parole period on offenders. To a certain degree, this will preserve a court's discretion in sentencing and ensure sentences imposed by courts are proportionate and take into account the circumstances of the offence and the offender.

2.44 Nevertheless, the committee sees merit in the recommendation of the Law Council of Australia that the Explanatory Memorandum be edited to ensure judges retain a greater level of discretion in sentencing. This proposal strikes a finer balance between community views on the need for tougher sentencing for serious crime and the views of the legal profession and others that judges' sentencing discretion must not be unduly restrained.

Recommendation 2

2.45 The committee recommends that the Government amend the Explanatory Memorandum to make clear that it is intended that: sentencing discretion should be left unaffected in respect of the non-parole period; in appropriate cases there may be significant differences between the non-parole period and the head sentence; and that the mandatory minimum is not intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').

Recommendation 3

2.46 Subject to the preceding recommendations, the committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair

Additional comments by Labor Senators

1.1 Labor senators agree with the majority of the report, except for the recommendation made in respect of the proposed mandatory minimum sentences for firearms trafficking offences. We wish to draw attention to the strong opposition of the peak law organisations and state prosecutors who submitted evidence to the inquiry in this respect.

1.2 Labor senators highlight that the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, produced by the Attorney-General's Department, states that minimum penalties should be avoided. This is because they, *inter alia*:

- interfere with judicial discretion to impose a penalty appropriate in the circumstances of a particular case;
- may create an incentive for a defendant to fight charges, even where there is little merit in doing so;
- preclude the use of alternative sanctions such as community service orders that would otherwise be available in Part IB of the *Crimes Act 1914*; and
- may encourage the judiciary to look for technical grounds to avoid a restriction on sentencing discretion, leading to anomalous decisions.[1]

1.3 In this particular instance, Labor senators are of the view that the imposition of mandatory minimum sentences for firearms trafficking offences should be avoided. The better approach would be to implement a regime of penalties for firearms trafficking offences reflecting that proposed by Labor when it was in Government.

1.4 In November 2012 the then Labor Government introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 into the House of Representatives. This bill, which lapsed in the Senate at the end of the 43rd Parliament, expanded existing cross-border firearms trafficking offences in the *Criminal Code Act 1995*, introduced new international firearms trafficking offences, and introduced new aggravated offences for dealing in 50 or more firearms and firearms parts. It was intended that the new 'basic offences' would attract a penalty of 10 years imprisonment, consistent with existing firearms trafficking offences. However, it was proposed that the 'aggravated offences' would attract a higher penalty of life imprisonment, the same maximum penalty applied to drug trafficking. In the words of the then Minister for Justice, this would 'send a strong message that trafficking in firearms and the violence it creates will not be tolerated'.[2]

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1 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 38.

2 The Hon Jason Clare MP, Minister for Justice, *House of Representatives Hansard*, 5 February 2013, p. 71.

1.5 Labor senators urge the Government to adopt a similar sentencing regime in relation to the proposed firearms trafficking offences. This would still send a strong message to serious criminals but avoid the issues associated with mandatory minimum sentences and better preserve judicial discretion.

Recommendation 1

1.6 The imposition of mandatory minimum sentences for firearms trafficking offences should be replaced with increased penalty provisions, as set out in the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012.

Senator the Hon Jacinta Collins

Deputy Chair

Dissenting report by the Australian Greens

1.1 The Legal and Constitutional Affairs (Legislation) Committee majority report on this Bill ("the Report") has serious flaws in relation to the definitions of 'psychoactive substances' and 'significant effect'.

1.2 The Bill does not provide safeguards from criminal prosecution for people innocently importing or possessing plants, seeds or substances that are harmless, low risk or not intended to be used in relation to illicit drug use.

1.3 The rationale for reversing the 'onus of proof' has not been adequately argued by the relevant Government agencies and there are identifiable 'grey areas' which could leave innocent people in legal limbo.

1.4 The New Zealand model for addressing new synthetic drugs has not been properly considered in the drafting of this Bill and there is evidence that a New Zealand-type model provides a safer and more effective means to control psychoactive and new synthetic drug importation and use than does a blanket ban.

1.5 Evidence presented by submitters involved in the importation and sale of legal synthetic substances highlight the size of the market and the need for regulation to ensure low-risk and relatively safe substances are available while unregulated, dangerous substances remain banned.

1.6 The Greens support the Chair's recommendation that the Bill be amended to exempt plants and their extracts from the application of Schedule 1.

Definitions too broad will encompass harmless herbs and plants

1.7 The definition in the Bill outlining what constitutes 'psychoactive substances' is too broad and all-encompassing and will possibly place innocent people importing or possessing relatively harmless substances for therapeutical reasons at risk of criminal prosecution.

1.8 The Bar Association of Queensland submitted:

> The proposed definition of 'psychoactive substances' is very wide capturing any substance which when consumed might induce a wide range of effects, including, as alternatives, dependence or addiction and or significant change of thinking, behaviour, perception, awareness or mood. As a result, potentially a large number of substances have been rendered illegal imports.
>
> The offence created using this definition is one which would extend to importing harmless substances that are dressed up to represent that they are a serious drug alternative. It is not clear why the law should be concerned with conduct of that kind.[1]

1.9 Mr Torsten Wiedemann, a specialist in ethnobotany (the use of plants by different cultures), also stated that the definition in the Bill is too broad. Mr Wiedemann outlined his concerns that the Bill overreaches in its broad definitions and

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1 Bar Association of Queensland, *Submission 12*, p. 2.

the effect would mean some substances with the same constituents would be banned, while others would be legal. This inconsistency was highlighted in his evidence to the inquiry:

> …the import of seeds for horticultural, agricultural and botanical purposes is unfairly affected. That is because many seeds contain psychoactive substances. They are generally not used or abusable because they are mostly toxic. There are a lot of seeds that are plain toxic, so you would not want to eat them, but they are still psychoactive under the definitions of the bill, which are very broad. That is my third point in the submission: the definition of 'psychoactive' and particularly the definition of 'significant effect' are too vague.
>
> … there are a whole lot of herbs which the public servants who wrote this bill probably assumed would be exempted under the food laws or under the therapeutic goods laws, but they are not. One species from, say, Chinese medicine might be permitted and another species from Indian medicine or from South American medicine which is closely related and has exactly the same constituents would be prohibited because it is not listed on any of the TGA lists or food lists as a permitted item.[2]

1.10 Mr Niall Fahy, Operations Manager of Happy Herb Company which imports and sells a range of herb and herbal extracts in over 50 locations in Australia, also submitted that the definition outlined in the Bill is arbitrary and would include harmless products taken for health purposes or therapeutic reasons:

> …the bill is currently written goes far beyond the stated aim of banning synthetic or designer drugs, by including all natural substances which might fall within the definition—a very arbitrary definition—of what a psychoactive substance is. This will in effect outlaw many therapeutic agents that are not manufactured by a pharmaceutical company. If a psychoactive agent is defined in terms capturing many substances that are taken for health purposes but cannot be bought in a chemist, then there are a number of natural therapeutic goods and herbal supplements that will instantly be banned for practically no reason at all.[3]

1.11 The Eros Association, an established adults only retail industry association, concurred that the definition of 'significant effect' in the Bill is too vague and products outside of the Therapeutic Goods Administration (TGA) list that are harmless or low risk substances would be captured by the Bill, including tea and coffee:

> The explanatory memorandum sets the bar for 'significant effect' at or below caffeine … Hence it appears to include even very mild CNS activity … an energy drink would be regarded as illegal if it wasn't for the fact it is exempt by the food exemption. That means the same would apply to tea or coffee as it contains the same active ingredient, and again these are exempt by the food regulations. But there are many other caffeine (or similarly

2 Mr Torsten Wiedemann, *Committee Hansard*, 22 August 2014, p. 1.

3 Mr Niall Edward Fahy, *Committee Hansard*, 22 August 2014, p. 14.

> stimulating purine alkaloid) containing herbs that are not listed in the food or TGA regulations and hence are not exempt.[4]

1.12 The Committee heard evidence that it would very difficult to distinguish between legal and illegal products and very challenging to verify what causes a 'significant effect' on individuals. The Eros Association explained how legal and illegal new synthetic substances can currently be obtained in Australia:

> **CHAIR:** Could I go to downtown Melbourne and walk into a shop and ask for synthetic marijuana?
>
> **Ms Patten:** Yes.
>
> **CHAIR:** And would that be legal, or illegal? Would I be committing an offence if I did that—me buying it or them selling it?
>
> **Ms Patten:** It would depend on what they sold you. If they sold you a product that was not restricted or was not prohibited, then yes, it would be a legal transaction.
>
> **Senator DI NATALE:** Perhaps I could just clarify that. The original chemical that was colloquially referred to as 'synthetic marijuana' was banned and is not legally available, obviously, because it has been banned. The molecule was altered. It produced not a dissimilar effect from the original substance that was banned and is now legally available, because it has not been banned. That would also be referred to by some people as synthetic marijuana.
>
> **CHAIR:** And would that be banned under this legislation?
>
> **Senator DI NATALE:** Under this legislation, because it is psychoactive the intention would be to ban it.
>
> **Ms Patten:** Yes. We still do not know what 'significant' psychoactive effect is—we do not know what that means. Is it two glasses of wine? Is it five cups of coffee? What is 'significant'? Because of the reverse onus, we would have to then prove that this substance was not significant. I am not even sure how you could do that—I have no idea. Yes, the substances have changed a lot. I think we are seeing 1½ new substances every week being developed and coming out in the world.
>
> **CHAIR:** A chemist or someone with a chemist's knowledge sitting down and devising a concoction or cocktail of drugs that give an effect?
>
> **Ms Patten:** That is right.[5]

1.13 The Eros Association CEO, Ms Fiona Patten, further noted that previous attempts to define a psychotic substance have failed because there is insufficient and research in this area:

> We have seen a number of states try to introduce very broad definitions of a psychoactive substance, very broad definitions. They still have not worked.

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4 Torsten Wiedemann, *Submission 1*, p. 4.

5 *Committee Hansard*, 22 August 2014, p. 23.

> In fact, there was a case that had been going for three years in New South Wales that was finalised this week. The case was dismissed after one hour because the prosecution's expert witnesses could not provide suitable evidence that the product had psychotropic properties.[6]

1.14 The Bill's fundamental flaw in regards to having a workable definition of 'psychoactive' and 'significant effect' was highlighted by Mr Wiedemann, who explained how the Bill would operate if implemented. Mr Wiedemann submitted that 'psychoactive' and 'effect' are so broad and vague that products never intended for any other purpose than cultural use could be considered dangerous psychoactive substances:

> **Mr Wiedemann:** Yes. For example, there is a South American tea that all South Americans drink. It is the 'national tea' in five or six different South American countries. It is called Yerba Mate. This is on the TGA lists, or possibly in the food list. In Ecuador they use a related species which has exactly the same ingredients, but it would actually be illegal because it contains caffeine and other alkaloids related to caffeine. It has exactly the same effect and exactly the same benefits, but it would be illegal. If you are an Ecuadorian who wants to keep drinking their 'national tea', you will be breaking the law in the future if this goes through.
>
> **Senator DI NATALE:** Is it a definitional problem, do you think, in the way we define a psychoactive substance?
>
> **Mr Wiedemann:** Yes. Part of the problem is that it says, in the definitions of psychoactive, that it has to be 'of substantial effect'. Usually 'substantial effect' you would put somewhere above caffeine. It would have to be considerably stronger than caffeine to get close to having the effects of ecstasy or speed or those sorts of things. But because they gave that Rebecca example in the memorandum [Explanatory Memorandum], that brings the bar so much lower and so we do not know how far below caffeine it is.
>
> **Senator DI NATALE:** But isn't psychoactive a very—there are people who would drink two or three cups of coffee and get very, very anxious—incredibly anxious—
>
> **Mr Wiedemann**: Yes, absolutely.
>
> **Senator DI NATALE:** and so isn't using a definition like 'psychoactive' very subjective?
>
> **Mr Wiedemann:** Absolutely, and it is also the amount of dosage. Some people will drink one cup of tea and feel virtually nothing, other people will drink five coffees in an hour and freak out. It is definitely a big difference in dosage and effect.
>
> **Senator DI NATALE:** And you are suggesting that one way, which does not deal with this definitional problem of psychoactive, is to have a blanket exemption for plants?

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6 Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, p. 18.

> **Mr Wiedemann:** Yes, and all plant products. As I said, there is no threat there. It does not make any sense to regulate something or restrict something if there is no actual threat.[7]

1.15 The Attorney-General's Department (AGD) was unable to provide a clear and precise definition of which products would be captured by the definition of 'psychoactive' and the process for determining if a seized product contained psychoactive substances. Despite repeated requests for a definition, the Attorney-General's Department could only agree that the definition was 'enormously broad' and they needed to consider whether certain harmless products, like herbs and teas, would be included in the Bill.

> **Senator DI NATALE:** 'Psychoactive' is enormously broad.
>
> **Mr Coles:** It is enormously broad, but those exclusions are also very broad. For the most part, psychoactive products are going to be captured by one of those exclusions, in which case this scheme does not apply.
>
> **Senator DI NATALE:** We heard about a South American tea that is consumed by a large number of people that is not captured by the exemption.
>
> **Mr Coles:** And, as I have said, we will take that on notice and consider that question.[8]

1.16 The Deputy Chief Executive Officer, Border Enforcement, Australian Customs and Border Protection Service, Mr Roman Quaedvlieg, was asked to clarify how a psychoactive effect would be proved under the Bill, given the previous evidence that many harmless herbs, plants, and even tea could be considered a psychoactive or new synthetic substance and therefore be banned. Significantly, Mr Quaeddvlieg agreed that the process for determining a psychoactive substance was 'immature' and that Australian Customs and Border Protection Service would require guidance on how to implement this aspect of the Bill:

> **Senator DI NATALE:** How does someone prove to you that something is not psychoactive if there is no evidence?
>
> **Mr Quaedvlieg:** This is where I think we agree. That is a very difficult thing to prove, because the capability for us to make that determination is quite immature. As I said, if it is clearly labelled, 'This is a psychoactive substance and it will give you a legal high that mimics ecstasy, cocaine, LSD,' then I am not going to let my officers let that into the community.
>
> **Senator DI NATALE:** Sure.
>
> **Mr Quaedvlieg:** But if it is unlabelled, or it is concealed, that is a very difficult thing to do. We would then have to go through a process of seeking guidance and advice from the Commonwealth Medical Officer, health officials, the TGA and various clinical evidence and we would have to determine all that.

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7 *Committee Hansard*, 22 August 2014, p. 4.

8 *Committee Hansard*, 22 August 2014, p. 33.

> **Senator DI NATALE:** It just raises alarm bells for me that we are going down a path and we have no way of resolving the answer as to whether something is psychoactive or not, and that is the substance of the legislation.
>
> **Mr Quaedvlieg:** I understand your concern. I think I should refer you back to the Attorney-General's Department for that particularly component. I was giving you a practical perspective.[9]

Reversal of the onus of proof

1.17 Mr Torsten Wiedemann noted that as many plants and seeds contain some psychoactive substances, the Bill could potentially criminalise importers who specialise in botanical collecting:

> Many seeds used in horticulture, agriculture and in botanical collections have some level of psychoactive effect (as defined in the proposed legislation). Despite these effects usually also being toxic, undesirable and un-abusable [sic], this proposed legislation would criminalise importers of such seeds.[10]

1.18 The Happy Herb Company expanded on the problems created by reversing the onus of proof. They explained that as the Therapeutic Goods Administration (TGA) only lists and regulates a small number of substances, those substances that fall outside of the TGA could be banned. Mr Fahy submitted that these herbs are used for a variety of common and harmless purposes:

> The TGA can only regulate a small proportion of the plants that exist in the world. There is a huge amount of plants and herbs that are used for some [other] purposes all around the world, and the TGA only lists a small proportion of those, to my knowledge.[11]

1.19 The Happy Herb Company further submitted that the provisions in the Bill that reverse the onus of proof would create many problems for importers and sellers of herbs and therapeutic substances, who could not easily determine the constitution of a particular product:

> We would not be seeking out herbs that have a psychoactive effect but the legislation would cause us to have to determine which herbs could be considered under the laws to have a psychoactive effect because the law will be applied to whatever extent it can be, even if it does not intend to capture a very mild caffeine type substance. The onus would then be on us, as the people who are supplying these herbs to the public and getting in touch with suppliers who need to import these herbs, to ensure that they could not be considered psychoactive under the law. I do not see any clear way in which we could actually do that. Pretty much all herbs affect the nervous system to some degree. As far as I can tell—and I am not a legal

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9 *Committee Hansard*, 22 August 2014, p. 33.

10 Mr Torsten Wiedemann, *Submission 1*, p. 1.

11 Mr Niall Edward Fahy, *Committee Hansard*, 22 August 2014, p. 15.

> expert—this definition of 'psychoactive' would make it quite difficult to determine which herbs are psychoactive.[12]

1.20 Mr Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, was asked specifically to clarify how the reversal of onus of proof would operate. Mr Coles agreed that while the onus is on an importer to prove a product did not have a psychoactive agent, the measures needed to prove this were 'emerging' and poses 'challenges'. The evidence from the AGD indicated that the proposed changes to the Criminal Code outlined in the Bill have not been properly thought through and too many significant issues remain vague, unsubstantiated and open to interpretation and possibly legal challenge.

1.21 The Attorney-General's Department also admitted that they may not know what the effects of certain imported substances would be, even though they want them banned:

> I will come back to the substance of your concern. In terms of the offences, in a sense they will be used when appropriate. But they are really secondary to the main aim of the bill, which is to enable Customs to act in response to a substance of concern that does not fall within one of the listed illicit drugs. Then that triggers a process where, as Mr Quaedvlieg has said, in the proceedings that follow, the onus would be on the importer to establish that the goods are not a psychoactive substance. I think this is where your concern rests. What we are saying is: we accept that this is an emerging area. We do not resile from the fact that there will be challenges here. But equally concerning is: if an importer is bring something into the country and there is no apparent legitimate use for it—which there is not, because it does not fall within one of the established schemes for food or medicines or chemicals—and it is not an illicit drug, and the importer has no idea, really, what it does or the effect it will have, and there is no apparent legitimate end use, then that is a concerning situation: that those substances could be introduced into the community and no-one really understands the effect they are going to have.[13]

The case for regulation, not prohibition

1.22 The Committee heard evidence of the so-called New Zealand model which seeks to regulate emerging synthetic substances that are deemed low-risk. This model creates a pre-market assessment scheme to deal with the challenges posed by importing a variety of substances, some of which may be low risk or there is no evidence of harm. The AGD was questioned as to whether they had looked at the New Zealand model and considered adopting a similar scheme in Australia:

> **Mr Coles:** I can certainly take it on notice but, as I said, I suspect we will largely be restating what I have already said here today. I think what you are putting to me is some kind of scheme similar to the New Zealand

12 Mr Niall Edward Fahy, *Committee Hansard*, 22 August 2014, p. 16.

13 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 22 August 2014, p. 33.

> scheme where there is an assessment auspiced by some kind of government body, perhaps with the costs borne by the importer, with a judgement at the end of the process about the harm or otherwise of the substance of concern. We are certainly aware of that model and, as I said, we took it into account.
>
> **CHAIR:** It raises the issue, which I do not necessarily agree with, of the alcohol prohibition years in America. Again there is debate, and I do not necessarily have the same view as the Eros Foundation on this, but it does raise the issue that providing something that is legally regulated and allegedly not really harmful is better than driving it all underground, without any regulation, where you could have very, very dangerous substances or backyard operators throwing in anything.[14]

1.23 In a subsequent letter to the Committee, the AGD provided further answers regarding their position on a pre-testing regime. The AGD stated that they did not consider a pre-market assessment scheme as a viable way to deal with new synthetic substances as unsafe and untested products would continue to present as legal alternatives and would continue to cause harm to individuals and the community.[15]

1.24 The Attorney-General's Department response has still not adequately explained how unsafe substances are determined and in rejecting the New Zealand model, they appear to have conceded that the pre-testing of products by importers presents a legal, viable and supported way for low-risk products, plants and seeds to be imported.

1.25 The Happy Herb Company submitted that a ban as outlined in the Bill would likely lead to an *increase* in 'underground' drugs and an expanding black market:

> Prohibition simply enlarges the black market, as the public demand for psychoactive substances does not diminish in accordance with supply.[16]
>
> Of the estimated 4 million species of plants on Earth, there exist countless non-addictive herbs that are considered beneficial to human health. Of these, vast numbers exhibit mild psychoactivity along with negligible or non-existent adverse health effects. However a great deal of these substances have not yet been listed by the TGA or the FSANZ Act.
>
> Dangerous plants can be, and already are, easily prohibited through existing legislation without importers being able to circumvent that legislation through making minor modifications to the molecular structure of a substance; this is the crucial difference between a naturally occurring plant and a compound created in a laboratory.
>
> Existing import laws effectively deal with illicit herbal drugs which by their nature cannot be chemically altered to take advantage of loopholes.

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14 *Committee Hansard*, 22 August 2014, p. 35.

15 Attorney-General's Department, *Answers to questions on notice*, 22 August 2014 (received 28 August 2014).

16 Happy Herb Company, *Submission 4*, p. 4.

> Essentially plants should never have been targeted by the proposed legislation, and their inclusion would be significantly problematic.[17]

Drug production in Australia

1.26 The Eros Association also stated that an escalating black market would be the likely consequence from banning new synthetic substances. Eros also raised concerns about the development of domestic manufacture of new synthetic substances. The Eros Association spent considerable time outlining the potential black market and manufacture of new substances created by prohibition and provided evidence of the extent of legal and illegal substance use in Australia:

> Banning the importation of substances which mimic the effects of illicit drugs, will simply kick-start the large-scale production of these drugs in Australia.
>
> Bans on imports do nothing to address the desire and the market for drugs at home. If they can no longer be bought in from overseas, there are tens of thousands of chemistry graduates who have the know-how to produce synthetic cannabinoids and a host of other drugs in their backyards.[18]

1.27 Ms Patten presented statistical evidence showing that there are 230,000 users of synthetic substances in Australia, according to the Australian household drug survey and that 12,821.925 units of 'social tonics' were sold in Australia in the last financial year with a sales value of $692,383,950, with almost $70 million is GST collected. Ms Patten explained the situation in Ireland, where new synthetic substances were banned:

> I think it is worth mentioning Ireland, which introduced a blanket ban on these products. They now have the highest use amongst the under-30s of these products. So the ban did not work; it just took the products out of a regulated market there. The figures in New Zealand of what happened under a regulated market showed that overall crime decreased. They were able to regulate the market. It went from around 3,000 outlets to 150. The substances, as I am sure you are well aware, were registered with the government. If there were any adverse conditions or effects found with those substances, they were then removed from sale immediately. The EU has also recommended a similar program where anything that is identified as having a risk of fatalities or health consequences will be immediately pulled but it will recognise that there are some low-risk, new psychoactive substances that should not be banned.[19]

1.28 Further to the Attorney-General's Department being unable to satisfactorily explain how a 'psychoactive effect' would be determined, they also conceded in evidence that there needs to be a model or process in place; and acknowledged that one similar to New Zealand's would address the issue of determining the effects of a

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17 Happy Herb Company, *Submission 4*, p. 2.

18 Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, p. 15.

19 Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, p. 19.

substance. This response tacitly recognised that a New Zealand-style system may be an effective response to new psychoactive substances.

> **Senator DI NATALE:** You make a determination that this is a psychoactive drug, and you have defined 'psychoactive'. At some point someone has got to demonstrate that in fact it does have a psychoactive property. How do you do that?
>
> **CHAIR:** Do you call a chemist? Do you call a psychiatrist?
>
> **Senator DI NATALE:** What do you do?
>
> **Mr Coles:** I think you would do all of those things. As we have said, this is about responding to new and emerging drugs. That is very clearly a challenge and we do not resile from that. But whichever model you adopt, whether you adopt the model that is being proposed here or a model similar to the model that New Zealand has implemented, at some point you have to get down to the question: what does the substance do; what effect does it have? I am not suggesting it is not difficult. I am just saying—
>
> **Senator DI NATALE:** The New Zealand model has got a very clear mechanism for doing that. That is the whole point of the New Zealand model. They set up an independent group, the manufacturer of the product has to demonstrate through clinical trials or at least provide some very hard data about the effect and safety of a drug and there is a process for doing that. This proposal is content free—there is no mechanism through which to determine the psychoactive of the drug. So your contrast is a good one: the New Zealand approach has got a very clear way of dealing with it; this does not.[20]

1.29 Ms Patten presented a strong case for regulation, which is similar to the New Zealand model:

> I seem to be the only industry person calling for greater government regulation of our industry. Yes, I think a regulatory model is needed. A prohibition model has not worked. As I said, 40 pieces of legislation going from banning anything that looks like one of these products have not stopped the sale, and in the last 12 months we have still seen over 12 million units of this product sold in Australia.[21]

Recommendation 1

1.30 The Australian Greens recommend that the Senate does not pass the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014.

1.31 The Australian Greens acknowledge the gravity of firearms trafficking offences and the need for sentencing guidelines which reflect the seriousness of the offending. However, the Australian Greens do not support mandatory minimum sentences in relation to any offences.

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20 *Committee Hansard*, 22 August 2014, p. 35.

21 Ms Fiona Patten, CEO, Eros Association, *Committee Hansard*, 22 August 2014, p. 20.

1.32 While there is no evidence that mandatory sentencing laws have a deterrent effect, there is clear evidence that they can result in injustice because they remove the discretion of a judge to take into account particular circumstances that may result in unintended consequences. In addition, mandatory sentencing removes any incentive for defendants to plead guilty, leading to longer, more contested and more costly trials.

Recommendation 2

1.33 The Australian Greens recommend clauses relating to mandatory minimum sentencing be removed from Schedule 2.

Senator Richard Di Natale

Appendix 1

Public Submissions

1 Mr Torsten Wiedemann
2 Dr Alistair Hay
3 Office of the Director of Public Prosecutions (NSW)
4 Happy Herb Company
5 Law Council of Australia
6 Anti-Slavery Australia
7 Australian Crime Commission
8 One Health Organisation
9 Confidential
10 The Law Society of New South Wales
11 Office of the Director of Public Prosecutions (Tasmania)
12 Bar Association of Queensland
13 Eros
14 Australian Customs and Border Protection Service
15 Northern Territory Police

Appendix 2

Public hearings and witnesses

Friday 22 August 2014 – Melbourne

WIEDEMANN, Mr Torsten (Bodo), Private capacity

ODGERS, Mr Stephen, SC, Member, National Criminal Law Committee, Law Council of Australia

FAHY, Mr Niall Edward, Operations Manager, Happy Herb Company

PATTEN, Ms Fiona, CEO, Eros Association

COLES, Mr Anthony, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

CROFTS, Mr Robert, Acting Senior Legal Officer, Criminal Law and Law Enforcement Branch, Attorney-General's Department

KILEY, Mr Andrew, Acting Principal Legal Officer, International Crime Cooperation Division, Attorney-General's Department

QUAEDVLIEG, Mr Roman, Deputy Chief Executive Officer, Border Enforcement, Australian Customs and Border Protection Service

Appendix 3

Tabled documents, answers to questions on notice and additional information

Friday 22 August 2014 - Melbourne

Answers to questions on notice

1 Response to questions on notice, provided by Attorney-General's Department on 27 August 2014.

Additional information

1 Additional information received from the Attorney-General's Department on 20 August 2014.

2 Additional information received from Eros on 22 August 2014: The Star Trust, What Happened Under a Regulated Market? The Interim Period of the Psychoactive Substances Act July 2013 - May 2014.

3 Additional information received from Eros on 22 August 2014: Eros, Social Tonics in Australia (August 2014).

4 Additional information received from the Law Council of Australia on 28 August 2014.