



# Breaking Bad

A submission to the Senate Legal and  
Constitutional Affairs Committee on the Crimes  
Legislation Amendment (Psychoactive  
Substances and Other Measures) Bill 2014

## **Preamble**

Politicians and public servants who create black markets in illicit drugs by ignoring available evidence, may soon be held accountable for their culpability in the courts and other forums.

This association and a number of other NGOs, are currently preparing dossiers on persons involved in formulating drug policy; the level of drug usage and general availability of drugs at the time of new policy initiatives; and retrospective updates at yearly intervals of usage and availability. These figures can be relatively easy to compile using official data from police and customs seizures, media reports, drug expert's evaluations at street level and of course, industry sources.

Over the last 100 years, politicians and public servants have tried to regulate illicit drug use in Australia by using only one mechanism. Prohibition.

All the evidence suggests that it has been a monumental failure and that, in fact, prohibition has actually increased illicit drug use through a variety of ways. The least understood of these is that prohibition directly causes an underground pyramid sales system to develop, similar to the one that Amway uses and that Tupperware and a host of extremely successful pyramid sales companies still use. These pyramid selling structures are as extensive and sophisticated as any police or other enforcement agency but operate without a paper trail, through codes of silence and under cover. The more enforcement that is brought to bear on these pyramid selling structures, the better and more lucrative they become.

Police seizure figures over the past decade consistently prove that this is true. The number of people taking illicit drugs is increasing and the amount of drugs circulating in the community is also increasing. These are facts that are well documented and well known by policy makers and regulators and do not need to be documented here.

## **Banning the importation of substances which mimic the effects of illicit drugs**

*Breaking Bad* is widely regarded as one of the greatest television series of all time. In 2014, *Breaking Bad* entered the [Guinness Book of Records](#) as the highest rated show of all time. On one level it is a 'morality play' about a high school chemistry teacher, Walter White, who is diagnosed with inoperable lung cancer. He turns to a life of crime producing methamphetamine from a mobile laboratory in the form of a caravan, in order to ensure his family is looked after when he is gone. On another level, the program offers policy makers a compelling and fascinating account of how the prohibition of illicit drugs makes organized crime rich and casts misery on average families. We would strongly advise policy makers to watch the first series before escalating any prohibition on illicit drugs.

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. The fact that this logical sequence of events seems to have escaped the view of politicians and policy-makers, is a terrible indictment on the lack of creativity and intelligence that Australia brings to bear on drug policy.

Banning imports will create thousands of Walter Whites in mobile labs and secret production houses around the country. It will turbo-charge the amount of illegal drugs in the country.

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.

If we think the country is already awash with illegal drugs, this proposal to ban imports will see Australia looking like Mexico within a few short years. It is the most regressive drug policy ever considered in Australia since the decision to criminalise cannabis in the 1920s. (Between 30-50% of Australians now use cannabis.)

## **Overview of the Eros Association**

The Eros Association is Australia's adults only retail industry association and has been active in putting industry issues to government since 1992. Our members sell many of the products that may be captured by the proposed import ban - mostly through age-restricted premises and including adult stores, tobacconists and herbal retailers. A number of our members also manufacture and/or import these substances.

Eros believes that regulation, testing and control is the best option to achieve the objectives which are to reduce the impact of NPS on public health and make existing criminal laws more effective in responding to this emerging issue.

It is naïve at best to consider that further bans on NPS will achieve these outcomes. They have not in the past and they will not in the future. If the government is serious about the objective of reducing health impacts then other options must be considered.

The reasons for this position are:

1. Prohibition and the wide variety of analogue laws that have been introduced, have not reduced demand or supply of NPS in Australia or internationally.
2. The negative impacts and dangers of NPS have been overstated with little or no evidence produced.
3. There has been little research done on the actual health impact of NPS. On this note we are concerned that the Alcohol and Drug sector have not been consulted and are not aware of the RIS.
4. The market is large and growing in Australia and internationally. A ban on these products will not stop its growth.
5. Regulation will be far more effective in controlling NPS.
6. The industry has established a self-regulatory model that has been more effective than any government bans and with government support would be most effective.
7. Criminalising this market will simply create new market opportunities and new criminal activity.
8. The proposed regulatory regime invests unworkable powers with the ACBPS to determine if a substance has a legitimate use.
9. It is unfair to allow the agency that seized the NPS in the first place to then consider whether or not that decision was correct.
10. The issue of what is or is not a 'legitimate use' is value-laden and therefore should not be the subject of regulatory power but rather should

be included in an Act of Parliament.

11. The New Zealand Psychoactive Substances Act was very effective in reducing the availability and range of NPS.
12. An import ban will create a large and unregulated local manufacturing industry.

### **The Market for NPS**

The size of the Australian market for synthetic cannabinoid-type products alone is estimated at more than \$600 million. If you include other NPS and individual purchases made via the internet, then that figure could be as much as a billion dollars.

Considering the size of the market for synthetic cannabinoid-type products, we can assume that the vast majority of consumers do not suffer any significant negative health effects.

The Eros Association conducted a survey into the consumption and effects of social tonics, many of which contain synthetic cannabinoid-type substances. Our findings show that the vast majority of consumers enjoy these products for positive effects. Of all the respondents to the survey, very few significant negative side effects were reported.<sup>1</sup>

Respondents to the survey also noted that their two biggest concerns with the products are the unknown contents contained and the lack of regulation / pursuit of prohibition by governments.

In addition:

- 32% of survey respondents purchased a social tonic for relaxation or social reasons, with 20% reporting purchase because of legality, 16% for pain relief and 15% purchased a social tonic as an alternative to another drug such as alcohol.
- Anecdotes collected as part of the survey show that people use social tonics in a wide variety of ways, including to, "Quit harder drugs", "To quit binge drinking. To have a good time without becoming violent and out of control. They feel safer than the other drugs out there", "Pain relief for bad back", "Relaxation, pleasure, intimacy."
- Survey respondents were most concerned about the effects of prohibitory legislation on the market and the unregulated nature of the market, noting, "That due to constant bans and raids they are getting too strong but there is no alternative" and that it is, "Hard to know what they contain and product's strength as there is very little information on packaging."

### **Current Regulation**

NPS refers to many and varied substances that have immeasurable differences in their effect profiles and toxicology. It is impossible to ban such an incoherent set of substances as similarities between them may also represent similarities between benign substances, foodstuffs, industrial chemicals or other naturally occurring chemicals.

**This Association has seen no evidence that recent NPS legislation in the Australian states, has reduced supply or demand.**

There have been very few successful prosecutions and most significant cases are still in the courts and are proving to be a 'battle of the chemists'.<sup>2</sup>

Many media outlets reported that the interim ban implemented by the NSW Government in 2013 was due to the death of a young Sydney boy. Typical was this report from the ABC. "The New South Wales Government is banning the sale

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1 Eros Association Social Tonics Survey

2 <http://www.ukdpc.org.uk/wp-content/uploads/Analogue-control-19.06.12.pdf>

of 18 synthetic drugs for 90 days following the death of a Sydney teenager. Synthetic drugs have come under scrutiny after 17-year-old student Henry Kwan jumped off a balcony while allegedly under the influence of a drug that mimics LSD.”<sup>3</sup> The ban was implemented by the Australian Competition and Consumer Commission. It focused on brand names rather than substances and none of the banned products were related in any way to the substance that Henry Kwan took before his death.

The list of products banned mostly contained synthetic cannabinoid-type products along with several synthetic cathinone-type products. The substance Henry Kwan took was obtained through black market channels, out of the reach of the ACCC. He took the synthetic phenethylamine 25I-NBOMe, a vastly different substance to any of those listed by the ACCC.

Both Queensland and New South Wales' broad-reaching legislation has been criticised by academics and legal professionals. Registered psychologist and addiction expert, Stephen Bright points out some of the absurd unintended consequences of over-reaching legislation, “Queensland has gone as far as banning any drug or analogue that is structurally similar or has similar pharmacological effects. If you apply this definition, it means that some cheeses and avocado are illegal, which doesn't make sense.”<sup>4</sup>

Laws around the country have been unsuccessful in banning NPS. Trying to define whether or not a substance mimics the effects of illicit drugs begs the question of whether or not a certain substance is 'substantially similar' to an illicit substance. Experience has shown that trying to determine this often ends up as a 'battle of experts'.<sup>5</sup>

The Law Society of New South Wales Young Lawyers Criminal Law Committee made very similar points in a submission to the Legislative Assembly Committee on Legal Affairs Inquiry into Law Reform Issues regarding Synthetic Drugs<sup>6</sup>,

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3 <http://www.abc.net.au/news/2013-06-09/nsw-introduces-interim-ban-on-some-synthetic-drugs/4742394>

4 “New Drugs: New Problems?” Of Substance, vol 11, no 3 2013, pp 18

6 Submission 05/04/12 – Legislative Assembly Committee on Legal Affairs

noting that, “Manufacturers are (and should be) entitled to produce products that are not illegal. The legislation should respond to new SCPs (Synthetic Cannabinoid Products) in a way that is based on evidence and proportionate to the potential harm posed.” With relation to the NSW analogue provisions listed above, the Committee also note that, “Without the benefit of expert evidence, the Committee is unable to determine whether the paragraph has the consequences that other SCPs are also prohibited.”

During the second reading of NSW's Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013, the Honorable John Kaye clearly articulated the problems of banning everything broadly, “When one states that everything is banned, except for that which is not banned, one must then create exemptions for sensible things and then one is back to where one started – categorising. In this situation, when one categorises, inevitably it fails because one creates loopholes that inevitably will create opportunities for drug manufacturers to walk straight through.”<sup>7</sup>

What we have seen as a result of legislation is the emergence of a criminal element in the market place. When these substances came onto the market they were only sold from legitimate businesses that regulated who they sold to, paid GST and other taxes. Now criminal organisations are involved and the current proposal promises to cause this criminal involvement to explode.

### **Industry Self Regulation**

The Eros Association is a member-based organisation and represents many retailers and wholesalers of products containing certain synthetic cannabinoid-type substances. We have implemented self-regulatory schemes in order to ensure that products which cause harm are removed from the market immediately. We also consult with law enforcement and health authorities where possible to ensure the regulatory scheme is understood and useful.

As part of our self-regulatory program, we have implemented a secure holographic sticker program where each sticker is individually numbered and details about the product listed in our database. This allows us to react to any health concerns that may arise. In late 2013, there were three hospitalisations that resulted from people consuming a product called 'Marley' that appears to have been poorly manufactured.

Chief Health Officer Dr. Michael Ackland was quoted in a Victorian health warning, “While all three appear to have purchased the product from the same sex shop, I am very concerned that this product is more widespread across Melbourne and the rest of Victoria, and that other hospitals or health professionals may have seen patients with severe drug overdose reactions without realising the link. I strongly urge anyone who has Marley or any synthetic drug in their possession to refrain from using it, as it poses a significant risk to their health and wellbeing. I also call on outlets stocking Marley and any synthetic cannabis products to immediately stop selling them, as these drugs are

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Inquiry into Law Reform Issues regarding Synthetic Drugs

7 Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013, Second Reading 18/09/13



dangerous to users.”<sup>8</sup>

Although the product was not part of our regulatory program, we were able to issue a warning about the product and get the message out to retailers to remove this product from sale. This process was quick and efficient and ensured that no other consumers were harmed by this product.

We have not had to recall any of the products that are in our program due to adverse health effects but would be able to quickly do so if a situation arose.

Before businesses can become an Eros member they must agree to a Code of Ethics which is included in the appendix to this submission. Retailers of social tonics must also agree to a Code of Practice, which includes a point noting that our members will not sell products deemed to have an unacceptable risk to health, which we determine from evidence-based authoritative bodies, such as academic research showing the harms of a substance or if there have been severe reactions causally linked to the substance. As a result of this our members do not sell products in a powder form.

As an industry body with limited funding, we have a limited capacity to regulate the market, especially when state and federal legislators continuously pursue prohibition. The government effectively hands the market over to criminal operators and gangs when they prohibit substances sold by our members.

### **Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014**

Former Australian Federal Police Commissioner, Mick Palmer commented that, “The reality is that, contrary to frequent assertions, drug law enforcement has had little impact on the Australian drug market. This is true in most countries in the world. In Australia the police are better resourced than ever, better trained than ever, more effective than ever and yet their impact on the drug trade, on any objective assessment, has been minimal.”<sup>9</sup>

Ireland implemented similar legislation to that proposed, yet they have not seen the results that the policy sets out to achieve. Although Ireland did manage to stop bricks and mortar retailers from operating, they have shifted the market online and to street-level dealers.<sup>10</sup>

In fact, data from Ireland has shown that despite the new legislation, consumption of NPS among the 15-24 demographic is the highest in the EU.<sup>11</sup>

The Beckley Foundation notes, “The primary factor in the emergence of a global

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8 <http://www.health.vic.gov.au/media/synthetic-drugs-november-2013.htm>

9 <http://www.smh.com.au/federal-politics/society-and-culture/after-33-years-i-can-no-longer-ignore-the-evidence-on-drugs-20120606-1zwpr.html>

10 <http://www.irishexaminer.com/ireland/eu-warning-over-relentless-supply-of-synthetic-drugs-232642.html>

11 *ibid*

market in NPS is the attempt to circumvent United Nations international drug control conventions and national laws through the supply of substances that are neither controlled nor regulated.”<sup>12</sup>

The London School of Economics has just completed perhaps the most thorough account of the war on drugs done to date. The conclusion, backed by five Nobel Prize-winning economists: it has done more harm than good.<sup>13</sup>

### **Australian Industry**

According to the 2014 Global Synthetic Drugs Assessment Australia is sitting in the production epicentre of NPS.<sup>14</sup> The precursor chemicals required to make NPS are readily available in the Asia Pacific region.

Australia has seen a steady increase in local meth labs and it can be expected that this option will create opportunities for a local industry in NPS to emerge.

### **Moral Panic**

The Eros Association is concerned that the Bill and its explanations focus on a very limited number of cases as evidence against NPS. These few cases have been distorted and exaggerated through popular media outlets.

The significant media attention that NPS have received has not been indicative of the substances' potential for danger nor their actual harms in the community. The attention is due to a social phenomena known as 'moral panic', which has acted to not only advertise NPS to a wider audience but also prime legislators to pursue prohibition - despite a lack of evidence on this being the best option.

An Australian article entitled, “Kronic Hysteria: Exploring the intersection between Australian synthetic cannabis legislation, the media, and drug-related harm” published in the International Journal on Drug Policy concluded, “Policies implemented within the context of 'moral panic', while well-intended, can result in increased awareness of the banned product and the use of new yet-to-be-scheduled drugs with unknown potential for harm. Consideration of regulatory models should be based on careful examination of the likely intended and unintended consequences. Such deliberation might be limited by the discursive landscape.”

To move forward, attitudes toward people's preferences for psychoactive substances need to be more consistently understood.

The Bill uses the evaluative terms, 'legitimate' and 'illegitimate' to try and create a point of demarcation between one group of psychoactive substances and

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12 “Pathway to Reform: The New Zealand Initiative As A Global Model”, An Executive Summary

13 <http://www.lse.ac.uk/IDEAS/Projects/IDPP/The-Expert-Group-on-the-Economics-of-Drug-Policy.aspx>

14 The 2014 Global Synthetic Drugs Assessment

[http://www.unodc.org/documents/southeastasiaandpacific//2014/05/gsda/2014\\_Global\\_Synthetic\\_Drugs\\_Assessment\\_embargoed\\_Tokyo\\_web.pdf](http://www.unodc.org/documents/southeastasiaandpacific//2014/05/gsda/2014_Global_Synthetic_Drugs_Assessment_embargoed_Tokyo_web.pdf)

another. The import ban proposed will have exclusions for food, tobacco, alcohol, therapeutic goods, industrial chemicals, agricultural chemicals and veterinary chemicals.

It is not clear why the recreational use of alcohol would be considered legitimate merely by exemption, while the use of an NPS is considered illegitimate.

The Eros Association are suggesting that the harms caused by substances ought to be treated equally through their risk assessed evidence-base, not by arbitrary personal opinions and hysteric media reports. We are also suggesting that people can and do make rational, informed decisions about their psychoactive preference and this ought to be accepted rather than fought by ideologues.

If the stated objective of reducing the impact of NPS on public health is to be achieved, then potentials for harm need to be more consistently understood and pragmatic objectives set. Prohibiting NPS is legally challenging and morally inconsistent. Prohibition more broadly does not reduce the harms of psychoactive substances. Instead it allows a criminal black market a new source of income while criminalising those most at risk of harm from the use of psychoactive substances.

### **Risk and Harms**

If the broad objective of the policy is to reduce the impact of NPS on public health then policy makers need to be very careful that they are approaching the issue rationally and without prejudice caused by the moral-panic.

The Bill makes some assumptions about NPS which are empirical propositions:

1. Taking the substance would create a risk of death or serious harm
2. Taking the substance would have a physical or mental effect substantially similar to that caused by taking a listed illicit drug
3. The substance has the capacity to cause physiological dependence
4. The substance is banned as an illicit drug in an Australian State or Territory, or in a foreign country, or
5. The substance poses a substantial risk to the health or safety of the public

We have no measure for what constitutes acceptable risk in society. If alcohol were to be the yard-stick, then according to the multi-criteria analysis published in *The Lancet*<sup>15</sup>, it doesn't make sense that most of Australia's popular illicit drugs are illegal. For the sake of this argument, we will assume that an acceptable level of risk ought to be less than the social and personal harms caused by alcohol.

With this in mind, point two engages in cyclical reasoning.

**A** = *The effect profile of currently illicit drugs presents an unacceptable risk to society.*

**B** = *The effect profile of a substance substantially similar to an illicit drug presents an unacceptable risk to society.*

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15 <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2810%2961462-6/abstract>

**A is true because B is true. B is true because A is true.**

This reasoning is accepted, despite the fact that, “a physical or mental effect substantially similar to a currently illicit drug,” does not necessarily indicate a level of harm that ought to be unacceptable in the community. Point four is another kind of cyclical reasoning that avoids evidence in favour of accepting as a precedent, the prohibitory legislation developed by other policy makers.

This leaves points one, three and five, which are all empirical claims relating to the potential for harm of these substances.

**Conclusion**

Achieving the broad objectives of the Bill would be better achieved through the regulation, rather than prohibition of psychoactive substances. The evidence for continued prohibitive measures does not show that harms would be reduced, instead it appears they will be shifted to the black market and to alternative substances, whether novel or traditional.

The lesson presented by the evidence is that demand for psychoactive substances will not disappear through legislation. And the potentials for harm will not be reduced through increased prohibitory measures.

The Eros Association supports the broad objective of reducing the impact of NPS on public health. We believe that the best way to do this is accept that the demand for psychoactive substances exists and regulate it. Experience shows that increasingly complex controls will only shift the market into shadier territories, further from regulation that could save lives and lead to a healthier, safer market overall. All consumers in our society should be able to access the best possible information they can about the products they may wish to consume. An informed consumer will make the most rational decision for themselves. Consumers of psychoactive substances deserve this right.

We urge legislators to be pragmatic on this issue. The problems have not been and never will be solved through increasingly complex legislative controls around psychoactive substances - despite the strong rhetoric every time a new Bill is introduced to address the issue. Pragmatism will mean a lengthier process but it will also stop the chemical arms race from continuing. Considering the global shifts in drug policy discussion, it will also prepare Australia for likely changes to the United Nations drug treaties<sup>16</sup> and make it easier to address other problems around prohibition and the lack of evidence to support its continuation.

**Attachments**

1. Eros Code of Practice
2. MEMORANDUM OF ADVICE\_ Greg Barns

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16 <http://idpc.net/policy-advocacy/the-un-general-assembly-special-session-on-drugs-ungass-2016>



## **Eros Code of Practice**

### ***For Retailers of Social Tonics***

Eros members are responsible traders who:

- a) Sell only to over 18s; demand proof of age where necessary; and display appropriate age warnings.
- b) Do not sell social tonics from service stations, convenience stores, supermarkets or from non-fixed premises such as caravans or street carts.
- c) Sell to and supply from signposted, age-restricted, premises only.
- d) Purchase wholesale wherever possible from Eros members and affix an Eros approved product hologram at retail level.
- f) Sell products that have had due diligence done to ensure that they are legal to sell.
- g) Are responsive to Eros directions generally and especially when Eros is advised by police.
- h) Educate their staff about the nature of the products. This includes making available an educational brochure for customers which identifies any adverse health issues; reinforcing a right of refusal to serve any customer that staff may suspect will be adversely affected by a product; and promotion of a help line phone number for customers.
- i) Require all products to contain warning labels similar to alcohol and tobacco warnings and including warnings against driving or operating machinery following use. Contact details of the manufacturer, date of manufacture and contact for the National Poisons Centre should all be attached.
- j) Do not advertise their products in unrestricted or family areas.
- k) Do not sell MDPV-based products ('bath salts') or other products deemed as having an unacceptable risk to health.

### **MEMORANDUM OF ADVICE**

**EROS ASSOCIATION and ATTORNEY GENERAL'S DEPARTMENT  
REGULATION IMPACT STATEMENT ON BANNING IMPORTATION OF NPS**

I am asked to provide comment and advice in relation to the Commonwealth Attorney-General's Department (May 2014) Regulation Impact Statement: Banning the importation of substances which mimic the effects of illicit drugs ('the Statement'). These substances are also known as NPS.

The Wrong Approach

1. At the outset it is important to note that the Statement states the "broad objective of the policy is to reduce the impact of NPS on public health and make existing criminal laws more effective in responding to this emerging issue."
2. This objective will not be met by a policy of prohibition which is contemplated by the Statement.
3. There is strong evidence to suggest that criminalising drugs creates new market opportunities and new criminal activity.
4. In relation to proposed criminalisation of NPS the US experience is singularly instructive.
5. David Michael Jaros, Assistant Professor of Law at the University of Baltimore Law School in a paper, DM Jaros Perfecting Criminal Markets (2012) 112 Columbia Law Review 1947, argues that demand is created for criminal markets when legislators prohibit or ban goods or activities such as drugs, or unauthorised border entry in countries.
6. Jaros writes, at 1955;

"Second-order crimes are the product of two unfortunate consequences of criminalizing first-order antisocial conduct. First, the criminalization of a first-order activity can create demand for new types of goods and services that impose their own costs on society. For example, by criminalizing unauthorized entry across U.S. borders, Congress created demand for human smuggling services. Second, criminalization can create the opportunity for second-order crimes by pushing the undesirable activity

underground, where the government is unable to use regulatory tools that might prevent the crime from occurring. The combination of these two effects serves to multiply the growth of the criminal law as the symptoms of criminalization lead to more criminalization—expanding criminal codes, contributing to the complexity of sentencing guide lines, and, perversely, adding to the enforcement costs associated with preventing the initial first-order crime.”

7. The Statement fails to deal with first –order and second –order crimes that would emerge from prohibition of NPS. There is no recognition and analysis of the cost of creating second-order crime that comes with prohibiting NPS.
8. Jaros observes, at 1975:

“An appreciation of the relationship between first- and second-order crimes is not only essential to the formation of sound criminal justice policy, but it may also help explain the rapid expansion of the criminal code and the growing complexity of federal and state sentencing guidelines. Moreover, the recognition that criminalization has the capacity to actually improve related criminal markets may promote a normative shift in the perception of regulatory alternatives to criminalization.”
9. While this statement is made in the US context it is directly applicable to Australia.
10. The proposal to criminalise NPS importation, sale and possession has attached to it many costs and the major one is improving criminal markets for trafficking and possession of illegal products. Such criminal activity brings with it the apparatus and tools of firearms, fraud, violence and money laundering.
11. The Statement fails to establish a cost-benefit framework despite the value in doing so. There is simply no serious consideration of alternatives to banning NPS such as harm reduction strategies.

12. Yet as Jaros observes, at 1989;

“Focusing on the ways in which the criminalization of one behaviour can facilitate other criminal activity need not undermine the expressive value of criminalizing conduct. The fact that an effort to reduce the harm caused by criminal conduct unintentionally boosts related criminal markets need not dilute the law's moral message. However, it does suggest that alternative policy efforts to reduce harm should similarly be interpreted as not condoning the unlawful activity. If society were to recognize the ways in which criminalization facilitates other criminal activity, creative harm-reduction strategies might come to entail fewer normative costs.”

### Specific Concerns

13. The Statement proposes a regulatory regime in which there is a judgment made as to ‘legitimate’ and ‘illegitimate’ uses of NPS. It proposes investing powers in Australian Customs and Border Protection Service Officers (ACBPS) to determine if a substance has a ‘legitimate’ use.

14. The ACBPS would also act as ‘judge and juror’ by determining appeals from an importer who believes the NPS should not have been seized.

15. In relation to legitimacy the Statement proposes a power to exclude legitimate uses by regulation.

16. Stephen Morse observes that “definitions that define a substance as a drug in terms of its intended use rather than in terms of its inherent properties obscure important questions of legitimate use” Morse, S. J. (2012). Legal Regulation of Addictive Substances and Addiction in A. Carter, W. Hall & J. Illes (Eds.), *Addiction Neuroethics: The Ethics of Addiction Neuroscience Research and Treatment* p263.

17. The issue of what is or is not a legitimate use is value-laden and therefore should not be the subject of regulation making power, but rather should be included in an Act of Parliament.

18. On the question of the power of the ACBPS it is unfair to allow the agency that seized the NPS in the first place to then consider whether or not that



decision was correct. In the same way that police investigating actions of police is inherently unfair and leads to outcomes that clearly favour police versus a citizen who makes a complaint, it is clearly unsatisfactory to allow ACBPS to have a similar power.

19. The impacts of an import ban are grossly understated in the Statement. As noted above there is no cost-benefit analysis examining the second-order criminal activity that will emerge quickly to take advantage of the policy of prohibition.
20. In relation to the criminal justice system and the impact of the proposed ban the Statement appears extraordinarily naïve.
21. Firstly, the impacts of criminal law enforcement should not, the Statement argues, 'be overstated.' The primary focus is not on criminal offences. The experience of criminal defence lawyers acting for individuals currently being prosecuted, or where prosecutions are contemplated, in relation to so called 'legal highs' is that the focus of law enforcement agencies is certainly on prosecution. It has been police lobbying in various jurisdictions in Australia that has led to the flurry of legislative activity to criminalise certain substances.
22. Finally the Statement opines that an import ban on NPS without a legitimate use is a small but important step in reducing the number of people harmed directly or indirectly. One is tempted to say of this opinion that it appears the Commonwealth AG's Department has taken no notice of the monumental failure of the 40 odd year War on Drugs to stem the flow of harm from illicit drugs.

**Greg Barns**

**Salamanca Chambers, Hobart 16 May 2014**