

# 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.<sup>1</sup> 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.<sup>2</sup>

### 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'.<sup>3</sup> 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.<sup>4</sup>

### 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.<sup>5</sup> 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'.<sup>6</sup> 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'.<sup>7</sup> 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.<sup>8</sup> Australian border agencies are also 'detecting increasing numbers of new psychoactive substances in recent years'.<sup>9</sup> Domestic and international data, albeit limited, supports the proposition that the use of NPS is growing.<sup>10</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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 Health) 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'.<sup>14</sup> 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'.<sup>15</sup>

### *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'.<sup>16</sup> 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.<sup>17</sup> 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,<sup>18</sup> with the remaining three broadly in support of a pre-market assessment scheme.<sup>19</sup> 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

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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.<sup>20</sup> 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'.<sup>21</sup>

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'.<sup>22</sup> 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.<sup>23</sup>

#### *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'.<sup>24</sup> 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](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).<sup>25</sup> 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,<sup>26</sup> tobacco products,<sup>27</sup> registered or listed therapeutic goods and exempt therapeutic goods,<sup>28</sup> agricultural and veterinary chemicals,<sup>29</sup> industrial chemicals,<sup>30</sup> substances already dealt with under the serious drug offences in Part 9.1 of the Criminal Code,<sup>31</sup> prohibited imports,<sup>32</sup> and those substances prescribed by regulation.<sup>33</sup> 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.<sup>34</sup> These exclusions would not apply if the substance had another – not excluded – psychoactive substance added to it.<sup>35</sup>

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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.<sup>36</sup> 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'.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

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'.<sup>42</sup>

### ***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'.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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'.<sup>46</sup>

### ***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'.<sup>47</sup> 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'.<sup>48</sup> 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.<sup>49</sup>

### ***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'.<sup>50</sup>

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.<sup>51</sup> The Minister stated that this would 'ensure that Australian law enforcement agencies have the appropriate tools to target this crime wherever it occurs'.<sup>52</sup>

### ***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'.<sup>53</sup>

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.<sup>54</sup> 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*.<sup>55</sup>

### ***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'.<sup>56</sup> 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.<sup>57</sup>

### ***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.<sup>58</sup> 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 44<sup>th</sup> 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](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Psychoactive_Substances_Bill)

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- 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.<sup>59</sup>

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'.<sup>60</sup>

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

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59 Parliamentary Joint Committee on Human Rights, *Tenth Report of the 44<sup>th</sup> 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.<sup>61</sup>

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.

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61 See [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)