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.
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> …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.
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> 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.
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> 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*.
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> 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.
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> 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.
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> 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.
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> 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]
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> …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.
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> 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.
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> 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.
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> 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;
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> • in appropriate cases there may be significant differences between the non-parole period and the head sentence; and
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> • 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.
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> 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