

Dissenting report by the Australian Greens

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

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

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

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

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

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

Definitions too broad will encompass harmless herbs and plants

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

1.8 The Bar Association of Queensland submitted:

The proposed definition of ‘psychoactive substances’ is very wide capturing any substance which when consumed might induce a wide range of effects, including, as alternatives, dependence or addiction and or significant change of thinking, behaviour, perception, awareness or mood. As a result, potentially a large number of substances have been rendered illegal imports.

The offence created using this definition is one which would extend to importing harmless substances that are dressed up to represent that they are a serious drug alternative. It is not clear why the law should be concerned with conduct of that kind.¹

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

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

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

...the import of seeds for horticultural, agricultural and botanical purposes is unfairly affected. That is because many seeds contain psychoactive substances. They are generally not used or abusable because they are mostly toxic. There are a lot of seeds that are plain toxic, so you would not want to eat them, but they are still psychoactive under the definitions of the bill, which are very broad. That is my third point in the submission: the definition of 'psychoactive' and particularly the definition of 'significant effect' are too vague.

... there are a whole lot of herbs which the public servants who wrote this bill probably assumed would be exempted under the food laws or under the therapeutic goods laws, but they are not. One species from, say, Chinese medicine might be permitted and another species from Indian medicine or from South American medicine which is closely related and has exactly the same constituents would be prohibited because it is not listed on any of the TGA lists or food lists as a permitted item.²

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

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

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

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

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

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

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

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

CHAIR: Could I go to downtown Melbourne and walk into a shop and ask for synthetic marijuana?

Ms Patten: Yes.

CHAIR: And would that be legal, or illegal? Would I be committing an offence if I did that—me buying it or them selling it?

Ms Patten: It would depend on what they sold you. If they sold you a product that was not restricted or was not prohibited, then yes, it would be a legal transaction.

Senator DI NATALE: Perhaps I could just clarify that. The original chemical that was colloquially referred to as 'synthetic marijuana' was banned and is not legally available, obviously, because it has been banned. The molecule was altered. It produced not a dissimilar effect from the original substance that was banned and is now legally available, because it has not been banned. That would also be referred to by some people as synthetic marijuana.

CHAIR: And would that be banned under this legislation?

Senator DI NATALE: Under this legislation, because it is psychoactive the intention would be to ban it.

Ms Patten: Yes. We still do not know what 'significant' psychoactive effect is—we do not know what that means. Is it two glasses of wine? Is it five cups of coffee? What is 'significant'? Because of the reverse onus, we would have to then prove that this substance was not significant. I am not even sure how you could do that—I have no idea. Yes, the substances have changed a lot. I think we are seeing 1½ new substances every week being developed and coming out in the world.

CHAIR: A chemist or someone with a chemist's knowledge sitting down and devising a concoction or cocktail of drugs that give an effect?

Ms Patten: That is right.⁵

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

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

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

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

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

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

Mr Wiedemann: Yes. For example, there is a South American tea that all South Americans drink. It is the 'national tea' in five or six different South American countries. It is called Yerba Mate. This is on the TGA lists, or possibly in the food list. In Ecuador they use a related species which has exactly the same ingredients, but it would actually be illegal because it contains caffeine and other alkaloids related to caffeine. It has exactly the same effect and exactly the same benefits, but it would be illegal. If you are an Ecuadorian who wants to keep drinking their 'national tea', you will be breaking the law in the future if this goes through.

Senator DI NATALE: Is it a definitional problem, do you think, in the way we define a psychoactive substance?

Mr Wiedemann: Yes. Part of the problem is that it says, in the definitions of psychoactive, that it has to be 'of substantial effect'. Usually 'substantial effect' you would put somewhere above caffeine. It would have to be considerably stronger than caffeine to get close to having the effects of ecstasy or speed or those sorts of things. But because they gave that Rebecca example in the memorandum [Explanatory Memorandum], that brings the bar so much lower and so we do not know how far below caffeine it is.

Senator DI NATALE: But isn't psychoactive a very—there are people who would drink two or three cups of coffee and get very, very anxious—incredibly anxious—

Mr Wiedemann: Yes, absolutely.

Senator DI NATALE: and so isn't using a definition like 'psychoactive' very subjective?

Mr Wiedemann: Absolutely, and it is also the amount of dosage. Some people will drink one cup of tea and feel virtually nothing, other people will drink five coffees in an hour and freak out. It is definitely a big difference in dosage and effect.

Senator DI NATALE: And you are suggesting that one way, which does not deal with this definitional problem of psychoactive, is to have a blanket exemption for plants?

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

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

Senator DI NATALE: 'Psychoactive' is enormously broad.

Mr Coles: It is enormously broad, but those exclusions are also very broad. For the most part, psychoactive products are going to be captured by one of those exclusions, in which case this scheme does not apply.

Senator DI NATALE: We heard about a South American tea that is consumed by a large number of people that is not captured by the exemption.

Mr Coles: And, as I have said, we will take that on notice and consider that question.⁸

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

Senator DI NATALE: How does someone prove to you that something is not psychoactive if there is no evidence?

Mr Quaedvlieg: This is where I think we agree. That is a very difficult thing to prove, because the capability for us to make that determination is quite immature. As I said, if it is clearly labelled, 'This is a psychoactive substance and it will give you a legal high that mimics ecstasy, cocaine, LSD,' then I am not going to let my officers let that into the community.

Senator DI NATALE: Sure.

Mr Quaedvlieg: But if it is unlabelled, or it is concealed, that is a very difficult thing to do. We would then have to go through a process of seeking guidance and advice from the Commonwealth Medical Officer, health officials, the TGA and various clinical evidence and we would have to determine all that.

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

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

Senator DI NATALE: It just raises alarm bells for me that we are going down a path and we have no way of resolving the answer as to whether something is psychoactive or not, and that is the substance of the legislation.

Mr Quaedvlieg: I understand your concern. I think I should refer you back to the Attorney-General's Department for that particularly component. I was giving you a practical perspective.⁹

Reversal of the onus of proof

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

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

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

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

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

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

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

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

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

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

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

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

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

The case for regulation, not prohibition

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

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

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

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

scheme where there is an assessment auspiced by some kind of government body, perhaps with the costs borne by the importer, with a judgement at the end of the process about the harm or otherwise of the substance of concern. We are certainly aware of that model and, as I said, we took it into account.

CHAIR: It raises the issue, which I do not necessarily agree with, of the alcohol prohibition years in America. Again there is debate, and I do not necessarily have the same view as the Eros Foundation on this, but it does raise the issue that providing something that is legally regulated and allegedly not really harmful is better than driving it all underground, without any regulation, where you could have very, very dangerous substances or backyard operators throwing in anything.¹⁴

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

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

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

Prohibition simply enlarges the black market, as the public demand for psychoactive substances does not diminish in accordance with supply.¹⁶

Of the estimated 4 million species of plants on Earth, there exist countless non-addictive herbs that are considered beneficial to human health. Of these, vast numbers exhibit mild psychoactivity along with negligible or non-existent adverse health effects. However a great deal of these substances have not yet been listed by the TGA or the FSANZ Act.

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

Existing import laws effectively deal with illicit herbal drugs which by their nature cannot be chemically altered to take advantage of loopholes.

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

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

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

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

Drug production in Australia

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

Banning the importation of substances which mimic the effects of illicit drugs, will simply kick-start the large-scale production of these drugs in Australia.

Bans on imports do nothing to address the desire and the market for drugs at home. If they can no longer be bought in from overseas, there are tens of thousands of chemistry graduates who have the know-how to produce synthetic cannabinoids and a host of other drugs in their backyards.¹⁸

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

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

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

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

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

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

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

Senator DI NATALE: You make a determination that this is a psychoactive drug, and you have defined 'psychoactive'. At some point someone has got to demonstrate that in fact it does have a psychoactive property. How do you do that?

CHAIR: Do you call a chemist? Do you call a psychiatrist?

Senator DI NATALE: What do you do?

Mr Coles: I think you would do all of those things. As we have said, this is about responding to new and emerging drugs. That is very clearly a challenge and we do not resile from that. But whichever model you adopt, whether you adopt the model that is being proposed here or a model similar to the model that New Zealand has implemented, at some point you have to get down to the question: what does the substance do; what effect does it have? I am not suggesting it is not difficult. I am just saying—

Senator DI NATALE: The New Zealand model has got a very clear mechanism for doing that. That is the whole point of the New Zealand model. They set up an independent group, the manufacturer of the product has to demonstrate through clinical trials or at least provide some very hard data about the effect and safety of a drug and there is a process for doing that. This proposal is content free—there is no mechanism through which to determine the psychoactive of the drug. So your contrast is a good one: the New Zealand approach has got a very clear way of dealing with it; this does not.²⁰

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

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

Recommendation 1

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

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

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

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

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

Recommendation 2

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

Senator Richard Di Natale

