



**Australian Government**  
**Attorney-General's Department**  
**Criminal Justice Division**

27 August 2014

Mr Tim Watling  
Secretary  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Secretary

**Inquiry into the Crimes Legislative Amendment (Psychoactive Substances and Other Measures) Bill 2014**

Thank you for providing the Attorney-General's Department with an opportunity to appear before the Senate Legal and Constitutional Affairs Committee's inquiry into the Crimes Legislative Amendment (Psychoactive Substances and Other Measures) Bill 2014.

At the Committee's hearing on 22 August 2014, I took a number of questions on notice. The Department's response to these questions is set out below.

- 1. Could the Explanatory Memorandum to the Bill be amended to clarify that courts should not consider the mandatory minimum sentence for firearms trafficking offences in determining an offender's non-parole period (Chair)?**

The Explanatory Memorandum states that the lack of a non-parole period will preserve a court's discretion in sentencing and help ensure that sentences imposed by courts are proportionate and take into account the particular circumstances of the offence and the offender. Any amendment to the Explanatory Memorandum is a matter for Government.

- 2. Is there any case law where the sentence imposed on a person convicted of firearms trafficking offences has been insufficient (Senator the Hon Jacinta Collins)?**

The Department is not aware of specific instances where sentences for the trafficking of firearms or firearm parts have been insufficient. In its *Policy to Tackle Crime*, the Government committed to introducing mandatory minimum sentences of five years imprisonment for firearms trafficking offences. Schedule 2 of the Bill implements this election commitment.

- 3. What is the rationale for including mandatory minimum sentences for firearms trafficking offences when this is inconsistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Senator the Hon Jacinta Collins)?**

The Guide does not prohibit the use of mandatory minimum sentences and notes that there are

Commonwealth offences with minimum penalties, though it recommends that they should be avoided. The Guide is not binding and departures from it are a matter for the Government. As noted above, in this instance, Schedule 2 of the Bill implements the Government's election commitment, set out in its *Policy to Tackle Crime*, to introduce mandatory minimum sentences of five years imprisonment for firearms trafficking offences.

**4. Please provide a list of the organisations that attended the Intergovernmental Committee on Drugs' stakeholder forum about new psychoactive substances (Senator the Hon Jacinta Collins).**

On 18 July 2013, the Illicit Drugs Subcommittee of the Intergovernmental Committee on Drugs held a workshop in Hobart to discuss measures to respond to new psychoactive substances. The Department does not have a list of persons who attended the forum. However, a list of the organisations that indicated they would attend is at **Attachment A**.

**5. Please consult with submitters on the issue of excluding plants from the measure to ban the importation of psychoactive substances and report back to the Committee (Chair and Senator Richard Di Natale).**

The Department has consulted with Mr Wiedemann and the Happy Herb Company about their concerns that the importation of plants will be unintentionally captured by the legislation.

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

The Department is currently examining the possibility of exempting plants from the offence of importing a prohibited psychoactive substance under 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.

**6. Please provide references to the places in the Bill and Explanatory Memorandum which explain why plants would be unlikely to be seized by ACBPS officers under this measure (Senator the Hon Jacinta Collins).**

Under the regime set up by this Bill, ACBPS officers will only use their powers to seize goods on suspicion that they are prohibited psychoactive substances where they have detained a substance on suspicion that it is an illicit drug, but subsequent testing has demonstrated that it is not listed under the *Criminal Code* or the *Customs (Prohibited Imports) Regulations 1956*, and it is not otherwise controlled by an existing regulatory regime.

Currently, the officer must release the substance, even if he or she suspects that it is imported for use as an alternative to an illicit drug. The powers in this Bill will allow ACBPS officers to seize those substances. The procedure the ACBPS will adopt is set out on page 98 of the Explanatory Memorandum, in the Regulation Impact Statement.

A person importing a plant or plant material for horticultural, botanical or agricultural purposes should not be caught by this process as their goods will not be stopped on suspicion of being illicit drugs. However, as noted in response to question 5 above, the Department is

currently examining the possibility of exempting plants from the offence of importing a prohibited psychoactive substance under proposed section 320.2 of the Bill.

**7. Please outline the reasons why a pre-market assessment scheme, like that operating in New Zealand, was not adopted (Chair).**

The Department does not consider that a pre-market assessment scheme is a viable way of dealing with the challenges posed by new psychoactive substances.

Exploration of the issues underlying such a scheme, including the constitutional considerations, obtaining national agreement (including possibly seeking a referral of powers), and setting up and implementing a new regulatory regime for psychoactive substances, would be an extremely lengthy process. During this time, the status quo would continue. Importers would continue to import substances designed to get around border controls based on chemical structure. Untested and unsafe products would continue to be presented as legal alternatives to illicit drugs and they would continue to cause harm to individuals and the community.

A pre-market assessment scheme would also be contrary to the Government's approach to NPS, which is to list substances as border controlled drugs in the *Criminal Code* as evidence about their use and harms has become available. It would similarly be contrary to recent moves in a number of jurisdictions, such as New South Wales, Queensland and South Australia, to comprehensively ban substances that seek to mimic the effects of illicit drugs.

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.

I trust this information will assist the Committee in its inquiry. If you have any further questions, please contact Robert Crofts, A/g Senior Legal Officer, on (02) 6141 3008.

Yours sincerely

Anthony Coles  
Assistant Secretary  
Criminal Law and Law Enforcement Branch

Encl:  
Attachment A – Organisations which attended the Intergovernmental Committee on Drugs Stakeholder Forum

## ATTACHMENT A

### **Organisations which attended the Hobart meeting of the Illicit Drugs Subcommittee (sitting under the Intergovernmental Committee on Drugs)**

#### *Commonwealth Agencies*

Attorney-General's Department  
Australian Competition & Consumer Commission  
Australian Crime Commission  
Australian Customs and Border Protection Service  
Australian Federal Police  
Department of Health and Ageing

#### *Attorney-General's/Justice Departments*

Department of Attorney General and Justice- NSW  
Department of Justice - Victoria  
Department of Justice and Attorney-General - Queensland  
Attorney-General's Department - South Australia  
Department of Justice - Tasmania

#### *Health Departments*

Ministry of Health - NSW  
Department of Health - Victoria  
Queensland Health  
Department of Health - Western Australia  
SA Health  
Department of Health and Human Services - Tasmania  
ACT Health - ACT  
Department of Health - Northern Territory  
Ministry of Health - New Zealand

#### *Police Agencies*

Ministry for Police and Emergency Services - NSW  
New South Wales Police  
Victoria Police  
Queensland Police  
Western Australia Police  
South Australia Police  
Tasmania Police

#### *Other*

Australian National Council on Drugs  
National Centre for Education and Training on Addiction  
National Drug and Alcohol Research Centre  
National Drug Research Institute  
South Australia Drug and Alcohol Services  
Turning Point Alcohol and Drug Centre - Victoria  
University of South Australia