

DRUGS AND POISONS LEGISLATION AMENDMENT (NEW PSYCHOACTIVE AND OTHER SUBSTANCES) BILL 2013

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Bill introduced on motion by Mr Anthony Roberts, read a first time and printed.**Second Reading****Mr ANTHONY ROBERTS** (Lane Cove—Minister for Fair Trading) [4.00 p.m.]: I move:
That this bill be now read a second time.

I am pleased to introduce the Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013. This bill will prohibit the supply, manufacture and advertising of synthetic drugs or psychoactive substances in New South Wales. It will also make it an offence to manufacture, supply or possess a substance listed on schedule 9 of the Commonwealth Poisons Standard list. The Liberals and Nationals Government laws represent a major shift in the approach to drug enforcement legislation in Australia. It will help to put our police on the front foot and stop them having to play catch-up with criminals over the legality of newly emerging drugs on our streets. In the past, specific drugs were banned as a reaction to their emergence, and only after they had been identified and tested. This bill will instead place a total ban on all psychoactive substances, subject to appropriate exemptions which I will explain in more detail shortly.

New South Wales will move to a multi-layered response to psychoactive substances and none should fall through the net. Firstly, the groundbreaking new laws will ban all psychoactive substances as well as those that are yet to be developed. Secondly, the bill will introduce an offence for the supply, manufacture and possession of schedule 9 prohibited substances on the Commonwealth Poisons Standard list. Finally, by retaining the existing laws which already prohibit specific drugs based on their chemical compound, it also allows the Government response to emerging drugs to be escalated once the specific psychoactive substances are identified and their associated harms and criminality assessed. These identified and assessed substances can then be added to schedule 1 of the Drug Misuse and Trafficking Act 1985 as a "prohibited drug" with significantly higher penalties attached to them based on the quantity of the drug involved.

This bill was developed by an interdepartmental committee formed after the tabling of a parliamentary committee inquiry report into synthetic drugs. The committee was chaired by NSW Fair Trading and included representatives from the Department of Premier and Cabinet, Ministry of Health, the NSW Forensic and Analytical Science Service, the NSW Police Force, the Ministry for Police and Emergency Services, and the Department of Attorney General and Justice. I was pleased to be tasked by the Premier with heading up this committee as we built the platform for this whole-of-government approach. I acknowledge the member for Castle Hill, the member for Campbelltown and the member for Cessnock. These outstanding members of this House worked very hard in putting this legislation together. In February 2012, the New South Wales Legislative Assembly Legal Affairs Committee commenced an inquiry into issues concerning synthetic drugs and psychoactive substances. On 30 May 2013 this year, following extensive consultation, the committee tabled its report, "Law Reform Issues Regarding Synthetic Drugs".

The report made 13 recommendations to the New South Wales Government, which

highlighted the need to reform the law to more effectively prohibit these new psychoactive substances. Just 10 days later, on 9 June, as the Minister for Fair Trading I imposed an interim 60-day product safety ban under the Australian Consumer Law section 109. The ban prohibited the sale, supply or possession in "trade and commerce" of 19 named synthetic drug products. The ban covered equivalent goods and anything represented as an equivalent and included measures to prevent suppliers changing product names. The Liberals and Nationals Government then requested the Federal Government impose a permanent national ban on these damaging drugs. Nine days later, on 18 June, the Federal Government instead announced a national interim product safety ban for 60 days, publicly stating that the ban could be extended for up to 120 days. The Federal ban applied to the same 19 named products and their equivalents as identified in New South Wales as well as the list of "prohibited substances" in schedule 9 of the Commonwealth Standard for the Uniform Scheduling of Medicines and Poisons.

On 11 June, in support of the interim ban, New South Wales Fair Trading commenced its largest ever compliance program. Fair Trading inspectors visited over 1,000 retailers identified as places where synthetic drugs might be sold and provided these retailers with information on the ban, and their responsibilities. Sixty-five retailers admitted to selling or having possession of drugs which were subject to the ban. Since the commencement of the ban, the retail sale of synthetic drugs has dried up. NSW Fair Trading has found only four retailers continuing to sell the banned products and is currently determining what action to take against them. Newcastle police reported between January and June this year an average of 26 incidents each month of severe behavioural disturbances attributed to synthetic drugs. But, following the interim ban, this has dropped to an average of just two incidents per month.

Preliminary Ministry of Health data shows emergency department presentations linked to synthetic drugs have dropped, with an average of 75 presentations per month between March and June this year compared to only 39 in July this year. It is clear from these initial statistics that these interim product safety bans have worked. Synthetic drugs are no longer easy to buy in New South Wales and there is now significantly more public awareness of their dangers. However interim bans cannot be used to permanently prohibit these dangerous drugs. Even the parliamentary committee recommended that they be used as an interim measure only until a drug could be identified and appropriately banned. In the absence of a permanent national product safety ban, the New South Wales Government has decided to act by introducing the most wide-reaching synthetic drug laws in Australia. I now turn to the detail of the Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013.

Schedule 1 [4] to the bill creates new offences of manufacturing, supplying, or possessing schedule 9 substances. Schedule 9 of the Commonwealth Poisons Standard contains a list of prohibited substances which may only be used for research purposes. Most of the substances listed in schedule 9 have already been prohibited in New South Wales as specific entries in schedule 1 of the Drug Misuse and Trafficking Act 1985. However, the new offences will ensure that where a substance is listed by the Commonwealth in schedule 9 but its risks and appropriate quantities have not sufficiently been evaluated to allow prescription under schedule 1 of the Drug Misuse and Trafficking Act 1985 it can still be controlled in New South Wales. The supply or manufacture of a schedule 9 substance will carry penalties of 20 penalty units, two years imprisonment, or both. Possession will carry the same monetary penalty and the possibility of up to 12 months imprisonment.

Schedule 1 [5] to the bill creates a new part 2C dealing with psychoactive substances. "Psychoactive substance" is defined as any substance which, when consumed by a person, has a psychoactive effect. Both "consumption" and "psychoactive effect" are defined in the Act and the definitions are very broad to ensure that there are no gaps or ways around this ban. "Consumption" includes ingestion, injection, inhalation, smoking, and any other means of introducing a psychoactive substance into any part of the human body. "Psychoactive effect" means the stimulation or depression of the central nervous system of the person, resulting in hallucinations or a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood, or causing a state of dependence, including physical or psychological addiction. As I said, this definition is intentionally broad and is intended to capture products that affect the central nervous system. It requires that psychoactive effect, however, to have some significance. This means it does not capture a product that may make a person feel good when they eat it but that does not have a significant effect on their central nervous system.

The bill creates a new offence under the proposed section 36ZF of manufacturing or supplying a psychoactive substance, knowing or being reckless as to whether it is being supplied or acquired for human consumption. The offences carry maximum penalties of 20 penalty units, two years imprisonment, or both. The element of "knowledge or recklessness as to whether the substance will be consumed by a person" is important, as there are substances which have lawful uses but can have psychoactive effects when misused. These instances will turn on their facts. In determining whether a person knew or was reckless as to whether a substance was being acquired or supplied for human consumption, the bill provides in the proposed subsection 36ZF (4) that a court may have regard to any advertising matter published or displayed by the person. It also provides for a court to have regard to any usage instruction concerning the substance by the person which indicates that the substance has a psychoactive effect or is similar in some way to a prohibited drug.

This provision will have a wide application as "publish" is defined in the bill to include distribute, disseminate, circulate, exhibit and cause or permit to be published. It includes publication over the internet. The provision also extends to any advertising displayed by the person and representations made by the person prior to the commencement of the new offence. This ensures that people cannot circumvent these laws by ceasing advertising activities and feigning ignorance as to the purpose for which the substance was being bought. The bill also creates a new offence under proposed section 36ZG of publishing, or displaying in any way, an advertisement, knowing or being reckless as to whether the advertisement promotes the consumption, sale, or supply of a substance for its psychoactive effects, and providing information on where the substance may be acquired. This offence also carries a maximum penalty of 20 penalty units, two years imprisonment, or both. This offence does not require evidence that the advertised good has a psychoactive effect; it simply requires evidence that it was put forward as having that effect.

Schedule 1 [6] to the bill also provides that where a substance which is not psychoactive is represented as being a psychoactive substance it will be taken to be a psychoactive substance for the purposes of the Act and regulations. This is consistent with existing provisions in the Drug Misuse and Trafficking Act 1985, under which a person who sells a substance representing it as a prohibited drug can be prosecuted as if the substance were that prohibited drug, regardless of the actual identity of the substance. The above offences represent a significant shift in drug enforcement. They seek to prohibit the sale of all psychoactive substances, both those existing and those yet to be developed, rather than prohibiting specific

substances by prescription. Combined with the broad definitions, this means that exemptions from the offences are required to ensure that legitimate psychoactive substances are not inadvertently prohibited. It also exempts substances that, whilst illegitimate, are more appropriately dealt with elsewhere.

First, the bill exempts drugs which are already prohibited. It exempts drugs listed under schedule 1 of the Drug Misuse and Trafficking Act 1985, as well as precursor chemicals prescribed in the regulation to that Act. This is to ensure there is no confusion as to which provision offenders ought to be prosecuted under. Similarly, the bill exempts poisons, restricted substances and drugs of addiction regulated under the Poisons and Therapeutic Goods Act 1966, and controlled drugs, precursors, and plants under Commonwealth legislation. As a large range of pharmaceuticals have psychoactive effects, the bill exempts therapeutic goods which are required to be listed on the Australian Register of Therapeutic Goods, or therapeutic goods which are specifically exempt from being listed on that register under the Commonwealth Therapeutic Goods Act 1989. The bill also exempts substances provided by health practitioners in the course of providing a health service. This will not mean that health practitioners will have a blank cheque to give out psychoactive substances, because if they were to provide such a substance for a non-therapeutic purpose they could no longer be said to be providing a health service under the Act.

The bill also creates exemptions for "food" within the meaning of the Food Act 2003. Substances such as caffeine are psychoactive, and even sugar can sometimes lead to a physical or psychological state of dependence. Food is, as we all know, something that people consume as nourishment, and the Food Act has an inclusive definition to make sure that Act has wide coverage and regulates most things people eat and drink. This exemption will mean that things such as food additives will not be inadvertently captured. It is not the intention of the legislation to capture low-risk substances that do not have significant psychoactive effects. As I have already noted, this is reflected in the definition of "psychoactive effect", which requires a significant change to a person's perception, mood and thoughts.

The bill also exempts psychoactive substances which have a long-established status as legal products, whether for all consumers or just adults such as alcohol, tobacco, and herbal products. While the adverse health impacts of alcohol and tobacco are widely documented, the legislation acknowledges that their use is widely accepted by society and they are specifically excluded from the operation of the new offences. In relation to herbal products, a market has existed for some years for 100 per cent natural herbal products, which are not prohibited under existing legislation and might be marketed as relaxing teas or sleeping aids. While some herbal products may or may not have mild psychoactive effects, it is not intended to prohibit such products, particularly as the very same herbs are often sold as herbal remedies in health food stores and supermarkets. If any concerns arise over the potential harms of such products, they can be listed in schedule 1 of the Drug Misuse and Trafficking Act 1985 as a prohibited drug.

These exemptions come with a proviso. It states that the exemptions will not apply if prohibited psychoactive substances have been added to a substance which would otherwise be exempt. This will ensure that sellers cannot circumvent the prohibitions, for example, by adding a synthetic cannabinoid to a natural herbal product, regardless of the quantities involved. Any addition will mean the exempt product will become a prohibited product. The breadth of the prohibition on psychoactive substances may give rise to concerns that, despite

the numerous targeted exemptions, benign products could be captured. For example, a cosmetic product which claims to improve one's mood could be construed as a representation that the product has a psychoactive effect. As I have already said, however, the definition of "psychoactive effect" requires a significant change to a person's mood or perception, and it is not intended to capture such marketing claims.

Ultimately, the NSW Police Force will have discretion on how the new offences will be enforced. Should any substances be inadvertently captured, the bill also includes a regulation-making power which allows additional substances to be exempted. Schedule 1 [8] to the bill amends the analogue provision contained in schedule 1 of the Drug Misuse and Trafficking Act 1985. Under the analogue provision, where a substance that is not a prohibited drug has psychotropic properties and is structurally similar to a prohibited drug in specified ways, it is treated as a prohibited drug for the purpose of the Act. The report by this Parliament's Legal Affairs Committee, "Law reform issues regarding synthetic drugs", recommended the removal of the requirement that the substance has psychotropic properties to simplify the requirements, due to the difficulties faced by law enforcement officers and the technical and subjective nature of the provisions. The bill adopts the committee's recommendation to reduce any difficulties in the prosecution of offences under the analogue provisions. Schedule 2 to the bill will amend the Poisons and Therapeutic Goods Act 1966.

Schedule 2 [3] adopts schedule 9 of the Poisons Standard into the New South Wales Act, which is then picked up in the new offence in the Drug Misuse and Trafficking Act 1985 that I have already outlined. Schedule 2 [5] to the bill provides that the Director General of the Department of Health may authorise a person or class of persons to manufacture, possess, use or supply a schedule 9 substance for medical or scientific research, analysis, teaching or training purposes, or for industrial or commercial purposes. It will be a defence to the possession, manufacture and supply offences for schedule 9 substances under the Drug Misuse and Trafficking Act 1985 that there was such an authorisation in place. This bill is a vital tool to ensure that synthetic drugs, or psychoactive substances, are illegal, cannot be sold in New South Wales and cannot be advertised in any way. The New South Wales Government has so far successfully removed those products from retail shelves using product safety bans but wants to make sure that these dangerous substances, which are marketed as legal highs, cannot return to our shelves and are outlawed across our community. I commend the bill to the House.

Mr Bryan Doyle: Great work, Minister.

Mr ANTHONY ROBERTS: I thank the member for Campbelltown.

Debate adjourned on motion by Ms Tania Mihailuk and set down as an order of the day for a future day.