

## **INQUIRY INTO LAW REFORM ISSUES REGARDING SYNTHETIC DRUGS**

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OUR REFERENCE

## DIRECTOR'S CHAMBERS



YOUR REFERENCE

DATE

5 April 2012

Dominic Perrottet MP  
Chair, Legal Affairs Committee  
Legislative Assembly  
NSW Parliament  
Macquarie St  
Sydney 2000

Dear Mr Perrottet

### **Law reform issues regarding synthetic drugs**

Thank you for your invitation to comment on law reform issues regarding synthetic drugs.

The Office of the Director of Public Prosecutions (ODPP) function is to prosecute serious crime in the District and Supreme Courts, which includes offences in relation to the manufacture and supply of prohibited drugs pursuant to the *Drug Misuse and Trafficking Act 1985* (DMT Act). The ODPP also prosecutes appeals from the Local Court to the District Court.

To assist in the preparation of these comments a request was made to all ODPP lawyers to identify any cases they had conducted involving synthetic substances. No cases were referred in response to this request. ODPP lawyers at the NSW Drug Court have however reported about some instances of use of Kronic or K2 by Drug Court participants. The use of these substances is particularly problematic for that jurisdiction as it is unable to be detected in urine samples.

Accordingly my comments in regard to this reference are limited to some observations in general and about developments in other jurisdictions.

The current legislative scheme in NSW is similar to many other jurisdictions and may be criticised as not being able to meet the challenge of keeping up with new substances created. However I would make a preliminary observation from a prosecution perspective namely, that there is an inherent tension in this area created by the need for certainty in the criminal law and facility of producing analogue chemical substances, that is not easily resolved.

It is important that the scheme of drug regulation is consistent and easy to apply. I note that there are problems in regard to synthetic cannabinoids as some analogues are prohibited in NSW and in other Australian jurisdictions and others are not. This creates a situation where consumers of these products, who cannot readily discern illicit substances by look or smell and may inadvertently be in contravention of the law. Related to this is the delay involved forensic analysis of substances. In NSW it can take up to 6 months. This may create hardship for those charged with offences where the substance is ultimately found not to be on the *DMT* schedule.

In regard to the approach taken in other jurisdictions to address these problems, I understand that some jurisdictions such as USA, (the *Federal Analogue Act 1986*) have introduced "analogue legislation" to meet the challenge of making chemically and pharmacologically

similar substances automatically illegal. While this type of legislation appears to have some advantages over the approach taken in the *DMT Act*, there does seem to be significant disadvantages, as chemists may legitimately argue about the similarities between substances. This would inevitably lead to prosecutions becoming a contest between experts, and so technical in nature, that juries would have difficulty in following the evidence. I note in the USA the scope of the legislation has been become more restricted by case law and it is thought that eventually the Act's application will be no different to a carefully considered generic definition.<sup>1</sup>

In Queensland, bearing in mind the that the legislative scheme is different in many aspects to NSW, I note the *Drug Misuse Act 1986* defines "dangerous thing"<sup>2</sup> as including analogues as

"(c) a thing that has a chemical structure that is substantially similar to the chemical structure of a thing referred to in paragraph (a) or (b) and that has a substantially similar pharmacological effect;

Further it was recently proposed to extend that definition<sup>3</sup> to meet the challenges of new synthetic substances by including the words: -

"or

(ii) is intended, or apparently intended, to have a substantially similar pharmacological effect;"

This definition is more expansive than the approach in the *DMT Act* but I consider it would be problematic from a prosecutor's point of view for the reasons noted above about the use of expert evidence. Further the proposed extended definition would potentially criminalise all sorts of chemical compounds and frustrate medical research.

The United Kingdom has introduced a system of temporary bans on new "legal highs", called Temporary Class Drug Orders. The ban operates while the substance is assessed by experts. The rationale for these orders is to enable a quick response to a new substance becoming available. This appears to be a pragmatic approach to the issue of emerging dangerous substances.

Yours faithfully

**Lloyd Babb SC**  
**Director of Public Prosecutions**

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<sup>1</sup> Advisory Council on the Misuse of Drugs (UK) "Considerations of the Novel Psychoactive Substances ("Legal Highs") October 2011 p37 - 41.

<sup>2</sup> Section 4

<sup>3</sup> Criminal and Other Legislation Amendment Bill 2011 (Qld) - lapsed