

NSW Government Response to the Legislative Assembly Legal Affairs Committee Report 'Law Reform Issues Regarding Synthetic Drugs'

Comment:

The Parliamentary Legal Affairs Committee Inquiry Report: *Law Reform Issues Regarding Synthetic Drugs*, concluded that controlling the emergence of synthetic drugs or new psychoactive substances poses significant challenges and requires a multi-faceted approach. The Committee made thirteen recommendations for change to the NSW Government which highlighted the need to reform the law to more effectively prohibit new psychoactive substances, including better co-ordination between government agencies, state and commonwealth co-ordination and co-operation, use of consumer law to ban products and better public awareness.

The NSW Government accepts the recommendations of the Legal Affairs Committee and the Government response to the problem associated with psychoactive substance law enforcement goes further than the thirteen recommendations, ensuring that synthetic drugs or psychoactive substances are prohibited in this State by amending the *Drug Misuse and Trafficking Act 1985* and the *Poisons and Therapeutic Goods Act 1966*.

The NSW Government has introduced the Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013 to establish a comprehensive criminal scheme for psychoactive substances which will effectively prohibit the supply, manufacture, advertising and possession of psychoactive substances in NSW. The legislation will prohibit the retail sale of products marketed as "legal highs" and make it clear that psychoactive substances, regardless of brand name or chemical composition, cannot be legally sold in NSW.

Recommendation 1:

That the Attorney General introduce legislation to amend Schedule 1 of the *Drug Misuse and Trafficking Act 1985* to remove the requirement for analogues of prescribed drugs to have 'psychotropic properties'.

Response:

The Government supports this recommendation.

The NSW Government is committed to simplifying the analogue provisions of the *Drug Misuse and Trafficking Act 1985* to reduce any difficulties faced by law enforcement officers in enforcing and prosecuting offences. This measure will bring NSW in line with drugs laws in other jurisdictions which do not have the additional requirement for analogue drugs to have 'psychotropic properties'.

Recommendation 2:

That the NSW Government incorporate Schedule 9 of the Standard for the Uniform Scheduling of Medicines and Poisons (SUSMP) into NSW legislation, to facilitate a nationally consistent approach to emerging synthetic drugs.

As new substances are incorporated from Schedule 9, specific quantities for relevant offences will need to be prescribed in the NSW legislation.

In incorporating Schedule 9 the Government should ensure that there is provision for authorised bodies to undertake research into banned synthetic drug compounds for medical and scientific purposes.

Response:

The NSW Government supports this recommendation. The new NSW legislation will incorporate Schedule 9 of the SUSMP into NSW law through the *Poisons and Therapeutic Goods Act 1966* and a new NSW Poisons List which will result in all substances in Schedule 9 being prohibited in NSW.

Under the new legislation however a Schedule 9 substance will not automatically become a 'Schedule 1 prohibited drug' under the *Drug Misuse and Trafficking Act 1985*. This will occur following analysis and assessment of the substance by a newly established Expert Scheduling Committee who will make recommendations to the Attorney General to add the substance as a prohibited drug and determine specific quantities in the *Drug Misuse and Trafficking Act 1985*. Following such an assessment by the Expert Scheduling Committee, the substance can be listed in Schedule 1 through an amending Regulation approved by the Attorney General.

Offence provisions relating to the supply, manufacture and possession of Schedule 9 substances listed in the NSW Poisons List will be a new offence provision in the *Drug Misuse and Trafficking Act 1985* to reflect enforcement of the provisions by the NSW Police Force. Penalties will be set at 20 penalty units, two years imprisonment or both for manufacture or supply, with the penalty for possession set at 20 penalty units, 12 months imprisonment or both. The new offence provisions will not apply to a Schedule 9 substance already listed as prohibited drugs in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*.

In incorporating Schedule 9 of the SUSMP into the *Poisons and Therapeutic Goods Act 1966* to add a new schedule of prohibited substances to the NSW Poisons List the NSW Government will ensure that the Director-General for Health will have the power to approve possession, use, manufacture and supply of Schedule 9 substances for legitimate purposes, e.g. medical or scientific research, analysis, teaching or training purposes or for industrial or commercial purposes.

Recommendation 3:

That the Minister for Fair Trading issue interim bans under the provisions of the Australian Consumer Law on synthetic drug products, as consumer goods of a kind that will or may cause injury to any person.

Response:

This recommendation is supported and the NSW Government has already issued an interim product safety ban and taken significant compliance and enforcement action to remove synthetic drugs or psychoactive substances from retail shelves.

The Minister for Fair Trading issued an interim product safety ban under section 109 of the Australian Consumer Law (ACL) on 9 June 2013. The ban applied to 19 named synthetic drugs including any other products with names that are a colourable variation of those named products, any equivalent good or any goods supplied or offered for supply and represented as such an equivalent.

On 18 June 2013 the Commonwealth Minister, the Assistant Treasurer, the Hon David Bradbury announced a national interim product safety ban on the same 19 named synthetic drugs, or any similar names or are otherwise represented to be the

equivalent to the 19 named drugs. The Commonwealth ban also applies to 17 other substances listed in Schedule 9 of the Standard for the Uniform Scheduling of Medicines and Poisons. The commencement of the Commonwealth ban automatically extinguished the NSW interim ban.

At the relevant Ministerial Council, the Legislative and Governance Forum on Consumer Affairs, on 5 July 2013, Ministers agreed that in order to effectively prohibit the sale of synthetic drugs it is important that States and Territories where necessary make amendments to ensure that Schedule 9 of the Poisons Standard is incorporated into legislation. Ministers also agreed that the use of national product safety bans continue until identified legislative changes can be undertaken by jurisdictions where necessary.

Following the issuing of the ban, NSW Fair Trading undertook its largest ever compliance and enforcement program with over 1000 retailers across the state inspected and provided with information about the ban and their responsibilities. At that time, only 65 retailers were found to have any banned products on the premises and subsequent visits have found no retailers selling the products. Four retailers have more recently since been found to have products on the shelves and Fair Trading is currently considering what action to take against them.

Recommendation 4:

That the Minister for Fair Trading write to the responsible Commonwealth Minister to request an amendment to the Competition and Consumer Act 2010 (Cwth) enabling interim product bans to be imposed by state Ministers for up to 6 months.

Response:

This recommendation is supported. The Minister for Fair Trading wrote to the Commonwealth Assistant Treasurer on 11 June 2013 advising the Commonwealth of the Legal Affairs Committee Report, the NSW interim ban and the intention to seek an amendment to the ACL, to increase the interim ban period from 90 days maximum to a maximum of 6 months. At the relevant Ministerial Council, the Consumer Affairs Forum, the Minister for Fair Trading notified all consumer affairs Ministers that the NSW Government would be formally seeking an amendment to increase the interim ban period to six months.

The NSW Minister for Fair Trading will now commence the formal process of seeking an amendment to the ACL as bound by the Intergovernmental Agreement for the ACL. In order to amend the ACL, the amendment must be supported by the Commonwealth Government and four other jurisdictions of which 3 must be states.

Recommendation 5:

That NSW Fair Trading and the NSW Police Force work with retailers of synthetic drugs to ensure the products available for sale in NSW meet consumer protection requirements under the Australian Consumer Law and the *Fair Trading Act 1987* (NSW), and that the retailers are aware of their legal responsibilities and the offences associated with the sale of consumer goods that may cause injury.

Response:

The NSW Government supports this recommendation. It is noted however that following the legislative amendments, psychoactive substances will be prohibited and retailers will not be able to sell any 'legal highs' in NSW.

As part of the compliance operation to enforce the NSW interim product safety ban, Fair Trading officers provided over 1000 retailers with information on their responsibilities and possible offences that could result from selling a banned product that may cause injury. When the Commonwealth introduced a national ban, information was made available on the www.productsafety.gov.au website, the NSW Fair Trading website and via media releases by the relevant Ministers.

Information will also be available on the NSW Police Force website informing retailers and members of the public about which products and substances are banned, which substances are prohibited and what penalties apply if retailers continue to sell (see recommendation 11).

Recommendation 6:

That the NSW Police Force provide specialised training to police officers on synthetic drugs and their powers to seize them and arrest individuals suspected of committing offences.

Response:

The NSW government supports this recommendation. The NSW Police Force continues to inform police about emerging new psychoactive substance issues, police powers in relation to these substances and how interim bans operate. A comprehensive training package is in development which will be available online and will provide information as to what new psychoactive substances are, their appearance, their effects, the relevant offences and amendments to drug legislation and police powers in respect of new psychoactive substances.

Recommendation 7:

That the NSW Police Force develop guidelines for policing synthetic drugs. The guidelines should cover the appearance of synthetic drugs, their effects, relevant offences under drugs legislation and consumer laws and police powers to seize drugs. Advice on policing retailers that sell synthetic drug products should also be covered, including a template letter notifying retailers of the possible consequences of selling products containing illegal synthetic drugs.

Response:

The NSW Government supports this recommendation. The NSW Police Force continues to update and advise police regarding how to identify new psychoactive substances and how to proceed when they detect substances suspected to be psychoactive substances. Plans are also underway to update existing police operational guidelines to reflect upcoming changes to legislation regarding new psychoactive substances.

Recommendation 8:

That the NSW Government establish a specific interdepartmental senior officers group, with representatives from the NSW Police Force, the Department of Attorney General and Justice, NSW Health and NSW Fair Trading, to facilitate a co-ordinated government response to synthetic drugs.

Response:

The NSW Government supports this recommendation. Following the tabling of the Legal Affairs Committee Report, an Interdepartmental Committee was established

comprising of representatives of the NSW Police Force and the Ministry for Police and Emergency Services, the Ministry of Health and the NSW Forensic & Analytical Science Service, the Department of Attorney General and Justice, NSW Fair Trading and the Department of Premier and Cabinet. The Interdepartmental Committee assisted to develop the NSW Government response and the Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013 and will continue to meet to ensure implementation of the reforms.

As part of the reforms, the NSW Government has also established an Expert Scheduling Committee chaired by a senior officer in the Department of Attorney General and Justice, and comprising of experts from NSW Police Force and Ministry for Police and Emergency Services, NSW Ministry of Health and other experts as necessary to consider substances that are proposed to be included as a prohibited drug in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*.

This Expert Scheduling Committee will consider information on these new psychoactive substances including their chemical structure, dosage levels, risk of harm, addictive capacity and common usage quantities and make recommendations to the Attorney General regarding whether the substance should be a prohibited drug in Schedule 1 and what quantities should be set for each offence.

Recommendation 9:

That the NSW Government recommend to the Intergovernmental Committee on Drugs that a national early warning system modelled on the European Early Warning System be implemented in Australia. The system would provide knowledge and awareness of emerging synthetic drugs and the public health risks associated with them.

Response:

The NSW Government supports this recommendation in principle. The NSW Government will continue through the Intergovernmental Committee on Drugs, to advocate for and support that the Commonwealth Government to set up a national early warning system for the emergence of new psychoactive substances. The Commonwealth Government has publicly announced a commitment to work with States and Territories to develop an early warning system regarding emerging psychoactive substances. Details on the type of early warning system and whether it is modelled on the European model are not yet known.

Recommendation 10:

That the NSW Government develop and deliver a public awareness campaign to educate the community about synthetic drugs. The campaign should target vulnerable groups, including young people.

Response:

The NSW Government supports this recommendation. A public awareness campaign is being co-ordinated by the NSW Ministry of Health and NSW Police Force which will inform the NSW community including users, retailers, consumer, parents and young people about the new laws and the dangers and health risks associated with psychoactive substances. The campaign will seek to remove uncertainty around the legal status of these drugs and to disseminate information about health and other risks through the NSW Ministry of Health and other agencies already responsible for providing drug messages to target audiences and the broader community.

The public awareness campaign will be supported through a 'one-stop-shop' point for the community using the NSW Police Force website for all government messages about psychoactive substances.

Recommendation 11:

That the NSW Government develop an online website to publicise warnings about synthetic drugs to:

1. Ensure that the public is informed of potentially dangerous products being available for sale in NSW;
2. Ensure that retailers are aware of and comply with relevant legislation regarding synthetic drugs; and
3. Provide an avenue for the public to provide information to the NSW Government on synthetic drug products and on retailers who are selling products which may be prohibited or subject to an interim ban.

Response:

The NSW Government supports this recommendation. As stated above, the NSW Police Force website will be used as a one-stop-shop point for the community including retailers, users, consumer, parents and young people with information about the new laws and the dangers and health risks associated with psychoactive substances. This will provide the point at which retailers can find information about the legislation and how to comply with it and the public can access information about psychoactive substances.

Crime Stoppers would continue to be the main avenue for members of the public to inform the NSW Government about crime, including psychoactive substances and retailers supplying such products.

Recommendation 12:

That the interdepartmental senior officers group monitor the effectiveness of current scientific research and testing procedures to detect newly emerging synthetic drugs.

Response:

The NSW Government accepts that the effectiveness of current scientific research and testing procedure be monitored to detect any newly emerging psychoactive substances. The Interdepartmental Committee established to develop and implement these reforms is not the most appropriate body to monitor current scientific research and testing procedures. The Illicit Drug Specialist Advisory Group is the most appropriate body to monitor scientific research and testing. The Specialist Advisory Group includes representatives from the Commonwealth and all States and Territory illicit drug laboratories and reports back to the Senior Managers of Australia and New Zealand Forensic Laboratories and through the National Institute of Forensic Science to Australia and New Zealand Police Advisory Agency on these types of matters.

The NSW Forensic & Analytical Science Service (FASS) currently chairs the Illicit Drugs Specialist Advisory Group. FASS will be able to advise the newly formed expert scheduling Committee on scientific research and testing to ensure new substances that are identified and are testable can be recommended to be added as prohibited drugs to Schedule 1 of the *Drug Misuse and Trafficking Act 1985*.

Recommendation 13:

That the NSW Government continues its work on the Intergovernmental Committee on Drugs response to synthetic drugs, including evaluating and monitoring the implementation of the New Zealand regulatory scheme.

Response:

The Government response to the problem associated with psychoactive substance law enforcement will establish a system to criminalise synthetic drugs or new psychoactive substances in NSW by amending the *Drug Misuse and Trafficking Act 1985* and the *Poisons and Therapeutic Goods Act 1966*. The NSW Government does not propose to adopt the New Zealand regulatory model which anticipates some psychoactive substances becoming legal.

The NSW Government has introduced the Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013 to establish a comprehensive criminal scheme for psychoactive substances which will effectively prohibit the sale, supply, manufacture, advertising and possession of psychoactive substances in NSW. The legislation will prohibit the retail sale of products marketed as "legal highs" and make it clear that psychoactive substances, regardless of brand name or chemical composition, cannot be legally sold in NSW.

While this action will go further than the Legal Affairs Committee recommendations, the NSW Government remains a member of the Intergovernmental Committee on Drugs (IGCD) and will continue to work with all jurisdictions on any national and co-ordinated responses to synthetic drugs.