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BILLS DIGEST

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Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014

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Foreign Affairs, Defence and Security Section

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Date introduced: 17 July 2014**House:** House of Representatives**Portfolio:** Attorney-General

Commencement: Sections 1 to 3 and Schedule 5 commence on Royal Assent. Schedules 2, 4 and 6 commence the day after Royal Assent. Commencement of Schedules 1 and 3 will be fixed by Proclamation or six months after Royal Assent, whichever is earlier.

Links: The links to the [Bill](#), its [Explanatory Memorandum](#) and [second reading speech](#) can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

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The Bills Digest at a glance

- The Bill contains five Schedules addressing separate issues.
- **Schedule 1** will create new offences for importing **psychoactive substances** and those represented to be alternatives to illicit drugs, and allow Australian Customs and Border Protection Service (Customs) officers to exercise relevant powers (such as seizure) in relation to those substances.
 - ‘New psychoactive substances’ are substances of abuse that are not captured by the major international drug treaties. Along with other Western nations, Australia has been struggling to keep up with the number of NPS entering the drug market and has found its current regulatory approach to be inadequate.
 - The amendments in Schedule 1 will implement a measure first announced in June 2013 and represent the Commonwealth legislative component of a broader national response to new psychoactive substances developed by the Intergovernmental Committee on Drugs and endorsed by Commonwealth, state and territory ministers in July 2014.
 - The offences themselves are broad, but are subject to a range of broad exemptions (including for food, tobacco and therapeutic goods) for which a defendant will bear an evidential burden. Stakeholders have expressed concerns about whether the exemptions are adequate, and the majority report of the Senate Standing Committee on Legal and Constitutional Affairs recommended inclusion of an additional exemption for plants and plant extracts.
- **Schedule 2** will expand existing **firearms trafficking** offences to also apply to firearm parts, create new offences for international firearms trafficking, introduce mandatory minimum penalties of five years imprisonment for firearm offences and allow Customs officers to exercise relevant powers in relation to the new offences.
 - The Coalition committed to the introduction of mandatory minimum sentences for Commonwealth firearms offences during the 2013 Federal election campaign.
 - The Australian Labor Party and the Australian Greens have objected to the introduction of mandatory minimum penalties, and the measure has been criticised by stakeholders including the Law Council of Australia.
 - The majority report of the Senate Standing Committee on Legal and Constitutional Affairs did not recommend any changes to this Schedule, but did recommend additions to the Explanatory Memorandum to address stakeholder concerns.
- **Schedule 3** will make a range of amendments to clarify the application of the **international transfer of prisoners** (ITP) Scheme and streamline the processing of applications for transfer. The main amendments will:
 - make it clear that prisoners serving suspended sentences may be transferred under the ITP Scheme
 - introduce the concept of ‘close family member’, which will be relevant in demonstrating ties to a community and determining who may consent to a transfer on behalf of a prisoner who is not an adult or is otherwise unable to consent to his or her own transfer and
 - allow the Attorney-General to close unviable applications and exercise discretion in processing reapplications received within 12 months of a negative decision or the withdrawal of the previous application (such as only considering the new application if there has been a change in the prisoner’s circumstances).
- **Schedule 4** will apply the broadest level of extended geographical jurisdiction to **slavery offences** so that they apply whether or not the relevant conduct or a result of that conduct occurs in Australia.
- **Schedule 5** will retrospectively validate the use of **federal police powers** in investigations of applied State offences at designated airports between March 2014, when relevant regulations were repealed (apparently in error), and May 2014, when replacement regulations were made.
- **Schedule 6** will make several **minor and technical amendments** to the *Criminal Code*, the *Customs Act*, the *Financial Transaction Reports Act 1988* and the *Surveillance Devices Act 2004*.
- The Joint Standing Committee on Human Rights has sought further information from the Minister for Justice on the compatibility of **Schedules 1, 2, 3 and 5** with relevant human rights and freedoms. The Senate Standing Committee for the Scrutiny of Bills has sought further justification from the Minister for the retrospective validation of the exercise of powers at airports in **Schedule 5**.

Purpose and structure of the Bill

The purpose of the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the Bill) is to:

- amend the *Criminal Code Act 1995* (*Criminal Code*) by:
 - inserting new offences for importing psychoactive substances and those represented to be alternatives to illicit drugs (**Schedule 1**)
 - updating existing firearms trafficking offences and inserting new offences for international firearms trafficking (**Schedule 2**) and
 - applying the broadest level of extended geographical jurisdiction to slavery offences (**Schedule 4**)
- amend the *Customs Act 1901* to enable Australian Customs and Border Protection Service (Customs) officers to exercise relevant powers in relation to suspected psychoactive substances and those represented to be alternatives to illicit drugs (**Schedule 1**) and in relation to suspected international firearms trafficking offences (**Schedule 2**)
- amend the *International Transfer of Prisoners Act 1997* to clarify its application and streamline the processing of applications for transfer (**Schedule 3**)
- retrospectively validate the use of federal police powers in investigations of applied State offences at designated airports between March and May 2014 (**Schedule 5**) and
- make several minor and technical amendments to the *Criminal Code*, the *Customs Act*, the *Financial Transaction Reports Act 1988* and the *Surveillance Devices Act 2004* (**Schedule 6**).

Background

Psychoactive substances

The United Nations Office on Drugs and Crime (UNODC) uses the term ‘new psychoactive substances’ (NPS) to refer to ‘substances of abuse, either in a pure form or a preparation, that are not controlled by the 1961 *Single Convention on Narcotic Drugs* or the 1971 *Convention on Psychotropic Substances*, but which may pose a public health threat’.¹ ‘New’, in this context, refers to the availability or misuse, rather than the invention, of the substance. The term NPS also has the advantage of including new plant-based drugs. While they may fall outside the international drug treaties and are sometimes referred to or marketed as ‘legal highs’, some NPS are prohibited under a number of countries’ national and/or state laws, including Australia’s. However, one of the main challenges of dealing with NPS, and that which the amendments in **Schedule 1** of the Bill are designed to address, is that once a substance is prohibited, it is quickly replaced by something similar that evades the specific prohibition.²

International and domestic trends

While the issue has been developing for some time, the availability and recreational use of NPS (often referred to as synthetic or designer drugs) has reached new prominence in the 2010s. In mid-2012, the number of NPS reported to the UNODC (251) exceeded the number of substances under international control (234) for the first time.³ That total rose a further 97 to 348 by December 2013, a 38.6 per cent increase in 18 months.⁴ The *World Drug Report 2013* indicates that at the global level, the production and use of substances under international control such as cannabis, cocaine, heroin and amphetamine-type stimulants has stabilised over the past decade, but that NPS are a different story:

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1. United Nations Office on Drugs and Crime (UNODC), [The challenge of new psychoactive substances](#), UNODC, Vienna, 2013, p. 1, accessed 26 August 2014.
 2. C Barker, ‘[New psychoactive substances: key challenges and responses](#)’, FlagPost weblog, 3 July 2013, accessed 28 August 2014.
 3. UNODC, [World drug report 2013](#), UNODC, Vienna, May 2013, p. xi, accessed 26 August 2014.
 4. UNODC, [World drug report 2014](#), UNODC, Vienna, June 2014, p. 51, accessed 26 August 2014. This increase may be due in part to improved detection and reporting of substances in light of increased awareness of the issue.

While new harmful substances have been emerging with unfailing regularity on the drug scene, the international drug control system is floundering, for the first time, under the speed and creativity of the phenomenon known as new psychoactive substances (NPS).⁵

NPS do not appear to be present in Australia on the same scale that they are in Europe.⁶ However, they have become established here, as in other Western countries, and both sides of federal politics agree that there is a need to develop a better response.⁷ Drugs and alcohol specialist Professor Michael Farrell assesses Australia's difficulties with NPS as 'still modest, but the issues that are arising are new problems'.⁸

The Australian Crime Commission's (ACC's) annual Illicit Drug Data Reports provide a statistical overview of illicit drug arrests and seizures for the preceding financial year and detail the current situation, national impact and emerging trends related to illicit drugs in Australia and internationally. While there were occasional mentions of specific substances now regarded as NPS in earlier reports, the 2009–10 report was the first in which the ACC specifically addressed the issue of NPS (which it refers to as DANS/DANPS) more broadly, stating:

Drug analogues and other synthetic drugs have been present in Australia and overseas since at least the mid-2000s ... In recent years users have increasingly sought out specific analogues to the point where an analogue market has now been established.⁹

The relevant data in these reports is based only on seizures by the Australian Federal Police (AFP) at the border, examined by AFP crime scene teams, sampled and confirmed by the National Measurement Institute to contain DANPS, so do not represent all of the AFP's border seizures.¹⁰ The number of seizures in which analysis has confirmed the presence of DANPS continually increased between 2006–07 and 2011–12 before dropping significantly in 2012–13, while the weight has fluctuated significantly. A spike in the weight recorded for 2010–11 was due to three large seizures that together accounted for around 82 per cent of the total.¹¹

As is the case elsewhere, there is limited information available on the prevalence of NPS use in Australia. The 2013 National Drug Strategy Household Survey included new questions on synthetic cannabis and novel psychoactive substances. A detailed report will be published later in 2014, but key findings that have been released include that:

- 1.2 per cent of those surveyed had used synthetic cannabinoids, and 0.4 per cent had used other NPS, in the previous 12 months and
- most synthetic cannabis users had also used an established illicit drug in the same period, but 4.5 per cent had only used synthetic cannabis.¹²

Data on the use of NPS by regular Australian users of ecstasy and related drugs is available through the Ecstasy and Related Drugs Reporting System (EDRS). While these results are not representative of the broader population, they may be useful in detecting emerging trends. The results from recent annual EDRS surveys indicate:

- increasing overall usage of NPS, which had been used in the previous six months by 44 per cent of participants in 2013, compared to 40 per cent in 2012 and 28 per cent in 2010 (the 2011 results did not include an overall figure)

5. *World drug report 2013*, op. cit., p. xi.

6. Europe accounts for a large portion of the total number of NPS notified to the UNODC. For information on the situation in Europe, see European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), [2013 annual report on the implementation of Council Decision 2005/387/JHA](#), EMCDDA and Europol, 2014, accessed 28 August 2014.

7. J Clare (Minister for Home Affairs and Minister for Justice), [Government to ban the importation of 'synthetic drugs'](#), media release, 16 June 2013, accessed 27 August 2014; M Keenan (Minister for Justice), [Radical overhaul to ban synthetic drugs](#), media release, 6 July 2014, accessed 7 July 2014.

8. M Farrell in ['Expert warns against simplistic response to synthetic drug rise'](#), ABC News (online), 27 June 2013, accessed 27 August 2014.

9. Australian Crime Commission (ACC), [Illicit drug data report 2009–10](#), ACC, Canberra, June 2011, p. 85, accessed 27 August 2014.

10. ACC, [Illicit drug data report 2012–13](#), ACC, Canberra, April 2014, p. 159, accessed 8 July 2014.

11. Ibid.

12. Australian Institute of Health and Welfare (AIHW), ['Illicit use of drugs \(NDSHS 2013 key findings\)'](#), AIHW website, accessed 14 August 2014.

- decreasing use of mephedrone/4-methylmethcathinone (sometimes referred to as meph, meow or miaow-miaow), from 16 per cent of participants in 2010 to 14 per cent in 2011 and only five per cent in 2012 (rising slightly to six per cent in 2013) and
- increasing use of synthetic cannabinoids, up from six per cent in 2011 to 15 per cent in 2012 and 16 per cent in 2013.¹³

The rationale advanced for restricting NPS is the same that applies to other drugs—to reduce harms associated with them.¹⁴ NPS are often marketed as ‘legal highs’ and professionally packaged, which can give the impression that they are safer to use than illicit drugs with similar effects. However, very little is known about their health impacts, especially longer-term impacts. This is partly due to the relatively new and dynamic nature of the market, and partly because the content and concentration of different batches even of the same branded product vary over time.¹⁵ While content and purity can also be issues in relation to established illicit drugs, the problem seems to be exacerbated in the case of NPS due to the broader lack of knowledge and experience with them, both on the part of users and those in the medical profession. This may mean that users are at increased risk of overdose.¹⁶ While not conclusive, some research has suggested that at least some synthetic cannabinoids may be more harmful than cannabis itself, with users in one survey reporting more harmful effects and greater paranoia.¹⁷

Current regulatory approach

Australia’s legislative response to controlling substances of abuse has been guided by the three major international drug treaties, each of which operate on the basis that the control measures they contain must be applied by State Parties to substances listed in Schedules.¹⁸

Part 9.1 of the *Criminal Code* contains a range of serious drug offences, including trafficking controlled drugs, commercial manufacture of controlled drugs, pre-trafficking controlled precursors, import and export offences and possession offences. The maximum penalties for these offences range from imprisonment for two years and/or 400 penalty units (currently equivalent to \$68,000) to imprisonment for life and/or 7,500 penalty units (currently equivalent to \$1,275,000).¹⁹

13. N Sindicich and L Burns, ‘[Australian trends in ecstasy and related drug markets 2010: findings from the Ecstasy and Related Drugs Reporting System \(EDRS\)](#)’, *Australian Drug Trends Series*, 64, National Drug and Alcohol Research Centre (NDARC), University of New South Wales (UNSW), Sydney, 2011, pp. 63–70; accessed 27 August 2014; N Sindicich and L Burns, ‘[Australian trends in ecstasy and related drug markets 2011: findings from the Ecstasy and Related Drugs Reporting System \(EDRS\)](#)’, *Australian Drug Trends Series*, 82, NDARC, UNSW, Sydney, 2012, pp. 71–77, accessed 27 August 2014; N Sindicich and L Burns, ‘[Australian trends in ecstasy and related drug markets 2012: findings from the Ecstasy and Related Drugs Reporting System \(EDRS\)](#)’, *Australian Drug Trends Series*, 100, NDARC, UNSW, Sydney, 2013, pp. xx, 50–59, accessed 27 August 2014; R Bruno et al, ‘[Emerging psychoactive substance use among regular ecstasy users in Australia](#)’, *Drug and Alcohol Dependence*, 124 (1–2), 1 July 2012, pp. 19–25, ScienceDirect database, accessed 27 August 2014; ‘[Australian drug trends 2013: findings from the Ecstasy and Related Drugs Reporting System \(EDRS\)](#)’, 2013, accessed 21 August 2014.
14. Explanatory Memorandum, [Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), p. 89, accessed 27 August 2014. Australia’s National Drug Strategy is based around harm minimisation, comprising the three ‘pillars’ of demand reduction, supply reduction and harm reduction: Ministerial Council on Drug Strategy, [National Drug Strategy 2010–2015: a framework for action on alcohol, tobacco and other drugs](#), Commonwealth of Australia, Canberra, 2011, accessed 14 July 2014.
15. Advisory Council on the Misuse of Drugs (ACMD), [Consideration of novel psychoactive substances \(‘legal highs’\)](#), ACMD, London, October 2011, pp. 14–18, accessed 27 August 2014; ChemCentre, [Submission to Legislative Assembly of New South Wales Legal Affairs Committee, Inquiry into law reform issues regarding synthetic drugs](#), 5 April 2012, p. 4, accessed 14 July 2014; Attorney-General’s Department (AGD), ‘[Regulation impact statement: banning the importation of substances which mimic the effects of illicit drugs](#)’ (RIS: banning the importation of substances), May 2014, p. 9, accessed 14 July 2014.
16. [Consideration of novel psychoactive substances \(‘legal highs’\)](#), op. cit.; ‘RIS: banning the importation of substances’, op. cit.; MA Stott (Adolescent and Family Counsellor, Ted Noffs Foundation), [Evidence to Legislative Assembly of New South Wales Legal Affairs Committee, Inquiry into law reform issues regarding synthetic drugs](#), 15 October 2012, p. 24, accessed 14 July 2014.
17. AR Winstock and MJ Barratt, ‘Synthetic cannabis: a comparison of patterns of use and effect profile with natural cannabis in a large global sample’, *Drug and Alcohol Dependence*, 131 (1–2), 1 July 2013, pp. 106–111. See Legislative Assembly of New South Wales Legal Affairs Committee, [Law reform issues regarding synthetic drugs](#), Legislative Assembly of New South Wales, Sydney, May 2013, pp. 9–13 for a summary of submitters’ differing views on comparative harms (accessed 27 August 2014).
18. [Single Convention on Narcotic Drugs](#), opened for signature 30 March 1961, ATS [1967] No. 31 (entered into force 13 December 1964), art. 4, accessed 27 August 2014; [Convention on Psychotropic Substances](#), opened for signature 21 February 1971, ATS [1982] No. 14 (entered into force 16 August 1976), accessed 27 August 2014; [United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#), opened for signature 20 December 1988, ATS [1993] No. 4 (entered into force 11 November 1990), accessed 27 August 2014.
19. Section 4D of the [Crimes Act 1914](#) (accessed 27 August 2014) provides that a penalty specified for a Commonwealth offence is to be taken as the maximum penalty unless the contrary intention appears. Under section 4AA of the *Crimes Act*, a penalty unit is currently equal to \$170. There is also a related offence in section 85W of the *Crimes Act* of causing a controlled drug to be carried by post.

Controlled drugs and border controlled drugs are those listed by regulations, analogue drugs of those listed or drugs determined by the Minister under an emergency determination.²⁰

Substances listed in the regulations include well known plant-based illicit drugs such as cannabis, cocaine and heroin, established synthetic drugs such as 3,4-Methylenedioxymethamphetamine (MDMA, sometimes referred to as ecstasy) and newer synthetic drugs such as mephedrone and most recently added, several 'NBOMe' compounds.²¹

Two main approaches have been relied upon to date to make these existing offences more responsive to rapidly emerging NPS:

- analogue provisions, which extend prohibitions to substances that share certain structural properties with those already listed and
- enabling emergency determinations to be made by the Minister and moving the list of prohibited substances from the *Criminal Code* to regulations, to enable new listings to be made more quickly.

Further detail on the current regulatory approach is set out in the **Appendix**.

While these approaches have enabled the Commonwealth and other governments to be more responsive, ultimately they have proven ineffective. A 2011 United Kingdom report outlined a typical example:

Despite the broad chemical generic ban on psychoactive cathinones imposed in April 2010, suppliers were able to find some loopholes, and within days a naphthyl derivative, Naphthylpyrovalerone (commonly referred as NRG-1) which lay outside the generic scope was offered for sale by internet retailers – advertised as “the legal alternative to mephedrone”.²²

When NSW prohibited seven synthetic cannabinoids in July 2011, ‘manufacturers quickly re-synthesised their products, replacing banned compounds with other synthetic cannabinoids not covered by the ban’.²³ WA had the same experience in June 2011, with alternative synthetic cannabinoids on the market within days of its ban.²⁴

Proposed reforms

Schedule 1 of the Bill will implement amendments that have been under development for some time and were announced by the Labor Government in June 2013.²⁵ It represents the Commonwealth legislative component of a broader national response to NPS developed by the Intergovernmental Committee on Drugs (ICGD) and endorsed by Commonwealth, state and territory ministers at the Law, Crime and Community Safety Council on 4 July 2014.²⁶ Other elements outlined in the ICGD’s *Framework for a National Response to New Psychoactive Substances* (the Framework) include improving detection and identification capabilities, better sharing of information and intelligence across jurisdictions, public awareness and education and international engagement. On the need for a ‘broad, precautionary psychoactive substances control scheme’, the Framework states:

Due to the number and rate of emergence of NPS, controls on specific substances will always lag behind ...

The outcome is the rapid expansion of products containing psychoactive substances being sold and supplied to Australian consumers ...

20. [Criminal Code Act 1995](#), sections 301.1 and 301.4, accessed 27 August 2014.

21. [Criminal Code Regulations 2002](#), Division 3.2, accessed 27 August 2014.

22. [Consideration of novel psychoactive substances \('legal highs'\)](#), op. cit., p. 60.

23. NSW Government, [Submission to Legislative Assembly of New South Wales Legal Affairs Committee, Inquiry into law reform issues regarding synthetic drugs](#), n.d., p. 4, accessed 28 August 2014.

24. P Dillon and J Copeland, [‘Synthetic cannabinoids: the Australian experience’](#), National Cannabis Prevention and Information Centre, March 2012, p. 5, accessed 28 August 2014.

25. [Government to ban the importation of ‘synthetic drugs’](#), op. cit.

26. Intergovernmental Committee on Drugs (ICGD), [Framework for a national response to new psychoactive substances](#) (Framework for a national response), ICGD, October 2013, accessed 26 August 2014; Law, Crime and Community Safety Council, [Communiqué](#), Sydney, 4 July 2014, accessed 26 August 2014.

With so many unknown substances on the market, and more emerging all the time, it is not feasible for lawmakers to specifically prohibit every harmful substance in a timely manner, nor is it possible for law enforcement to recognise, identify or prove that suspect substances are in fact controlled by law.

The responses adopted in Ireland and New Zealand prohibit unknown psychoactive substances unless the seller can prove that they are in fact a substance which is permitted under a law or is otherwise subject to an exception.

The Commonwealth is currently developing a border control scheme to ban the import of NPS without authorisation. Such a scheme would be in addition to existing laws controlling illicit drugs, and would be intended to cover gaps in existing controls. This would not result in the removal of current criminal sanctions. Rather it would provide some measure of community protection against unknown substances which are not otherwise controlled, and where, for lack of evidence and certainty, criminal penalties for possession may not be appropriate.²⁷

The different legislative schemes adopted in New Zealand and Ireland are summarised briefly in Appendix D of the Framework. Broadly, New Zealand has pursued a more regulatory approach, while Ireland has pursued a more prohibitionist approach.²⁸ The proposed reforms more closely resemble the Irish scheme.

Firearms trafficking

Amendments to extend the application of Commonwealth firearms trafficking offences to firearm parts and introduce new offences for international firearms trafficking were previously included in the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012, which lapsed ahead of the 2013 Federal election. For background on existing offences and illicit firearms in Australia, refer to the Bills Digest for that Bill.²⁹

The Coalition committed to the introduction of mandatory minimum sentences for Commonwealth firearms offences during the 2013 Federal election campaign as part of its *Policy to Tackle Crime*.³⁰

International transfer of prisoners

The International Transfer of Prisoners (ITP) Scheme enables people imprisoned in another country to transfer to their home country to serve the remainder of their sentence:

The scheme aims to promote the successful rehabilitation and reintegration into society of the prisoner, while preserving the sentence imposed by the sentencing country as far as possible.

It contributes to community safety by making sure convictions are recorded in a prisoner's home country and that their reintegration into that country's community is able to be appropriately supported, monitored and supervised.

Transfers under the scheme are not intended to provide a more lenient or convenient alternative for prisoners.

Transfers are not automatic. They require consent to the terms of transfer by the Australian Government, the government of the foreign country and the prisoner before the transfer can take place.

Transfers of prisoners from Australia who have been convicted of a state or territory offence, and all transfers of prisoners to Australia, also require the consent of the relevant state or territory government.³¹

Australia can undertake transfers with over 60 countries under international treaties.³²

Australia's ITP Scheme is governed by the *International Transfer of Prisoners Act 1997* (Cth) (*ITP Act*) and complementary state and territory legislation.³³ Practical experience with the administration of the ITP Scheme

27. *Framework for a national response*, op. cit., pp. 19–20.

28. The relevant Acts are the [Psychoactive Substances Act 2013 \(NZ\)](#) and the [Criminal Justice \(Psychoactive Substances\) Act 2010 \(Ireland\)](#), accessed 26 August 2014.

29. M Biddington and C Barker, [Crimes Legislation Amendment \(Organised Crime and Other Measures\) Bill 2012](#), Bills digest, 64, 2012–13, Parliamentary Library, Canberra, 2013, pp. 6–11, accessed 26 August 2014.

30. Liberal Party of Australia and the Nationals, [The Coalition's policy to tackle crime](#), Coalition policy document, Election 2013, accessed 8 August 2014.

31. AGD, '[International transfer of prisoners](#)', AGD website, accessed 26 August 2014.

32. Ibid. A link to a list of participating countries is provided on that page.

since the enactment of the *ITP Act* has led to the identification of a number of anomalies and complexities that the amendments in Schedule 3 of the Bill seek to address.³⁴

Committee consideration

The Parliamentary Joint Committee on Human Rights' views on the Bill are outlined in the 'Statement of Compatibility with Human Rights' section beginning on page 11 of this Digest.

Senate Standing Committee on Legal and Constitutional Affairs

The Senate Standing Committee on Legal and Constitutional Affairs (L&C Committee) tabled its report on the Bill on 2 September 2014.³⁵ It recommended that the Bill be passed, subject to two recommendations:

- that the Bill be amended to exempt plants and plant extracts from the application of **Schedule 1** (NPS offences and related powers) and
- that the Explanatory Memorandum be amended to clarify the intended operation of the mandatory sentencing provisions in **Schedule 2** (as recommended by the Law Council of Australia), in particular that:

... sentencing discretion should be left unaffected in respect of the non-parole period; in appropriate cases there may be significant differences between the non-parole period and the head sentence; and that the mandatory minimum is not intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').³⁶

The report also includes additional comments by Australian Labor Party (ALP) Senators on the firearms offences in **Schedule 2** and a dissenting report by the Australian Greens recommending the Bill not be passed.³⁷ Details are provided in the 'Policy position of non-government parties/independents' section at page ten of this Digest.

Separately, the Legal and Constitutional Affairs References Committee is currently undertaking an inquiry into the ability of Australian law enforcement authorities to eliminate gun-related violence in the community that is of some relevance to Schedule 2 of the Bill.³⁸ The terms of reference include, among other things, consideration of:

- a. the estimated number, distribution and lethality of illegal guns, including both outlawed and stolen guns, in Australia;
- b. the operation and consequences of the illicit firearms trade, including both outlawed and stolen guns within Australia.

The reporting date for that inquiry is 2 December 2014.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) identified several issues in relation to amendments to control NPS in **Schedule 1** and the firearms offences in **Schedule 2**, most notably the introduction of mandatory minimum sentences for firearms offences. However, in light of the detailed justifications provided in the Explanatory Memorandum and the retention of judicial discretion in setting a non-parole period for a sentence imposed for a firearms offence, it left the question of the appropriateness of those provisions to the Senate as a whole.³⁹

33. [International Transfer of Prisoners Act 1997](#) (Cth) (*ITP Act*), accessed 27 August 2014.

34. Explanatory Memorandum, pp. 3–4.

35. Senate Standing Committee on Legal and Constitutional Affairs, [Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014 \[Provisions\]](#), The Senate, Canberra, 2 September 2014, accessed 3 September 2014.

36. *Ibid.*, p. vii.

37. *Ibid.*, pp. 27–29.

38. Senate Standing Committee on Legal and Constitutional Affairs, [The ability of Australian law enforcement authorities to eliminate gun-related violence in the community](#), Australian Parliament website, accessed 11 August 2014.

39. Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 10 of 2014](#), The Senate, Canberra, 27 August 2014, pp. 9–14, accessed 27 August 2014.

The Scrutiny of Bills Committee has sought further justification from the Minister for Justice for the retrospective validation of the exercise of powers at airports in **Schedule 5**, 'noting, in particular, the importance of the principle that prospective legal authorisation should be provided for the exercise of coercive powers'.⁴⁰

Policy position of non-government parties/independents

As noted above, the NPS-related amendments will implement a measure first announced by the ALP Government in June 2013.⁴¹ The ALP also introduced amendments to extend Commonwealth firearms offences to firearm parts and introduce new offences for international firearms trafficking in 2012, but the Bill lapsed ahead of the 2013 Federal election.⁴² The ALP supported the majority recommendations in the L&C Committee's report on the Bill. However, it also made an additional recommendation that the provisions in **Schedule 2** requiring mandatory minimum sentences for firearms offences be replaced with aggravated offences attracting higher penalties for dealing in 50 or more firearms or firearm parts, as it had proposed in its 2012 Bill.⁴³

The Australian Greens made a dissenting report on the Bill recommending that the provisions in **Schedule 2** requiring mandatory minimum sentences for firearms offences be removed and that the Senate not pass the Bill on the basis of the NPS-related provisions in **Schedule 1**.⁴⁴ The party's concerns with Schedule 1 concerned:

- the breadth of the proposed definition of 'psychoactive substance' and adequacy of the exemptions to the offence of importing a psychoactive substance
- the partial reversal of the onus of proof and
- the overall approach—the Australian Greens argue in favour of a regulatory rather than a prohibition-based approach to dealing with NPS.

Position of major interest groups

The Tasmanian Office of the Director of Public Prosecutions (ODPP) supports the proposed amendments dealing with NPS.⁴⁵ The Happy Herb Company supports laws to prohibit NPS in principle, but is concerned that the absence of a clear exemption for plants and botanical extracts means 'the bill in its current form will create an instance of gross legislative overreach'.⁴⁶ Similar concerns were expressed by One Health Organisation and two individual submissions to the L&C Committee's inquiry into the Bill.⁴⁷ The Law Society of New South Wales and the Bar Association of Queensland are opposed to the partial reversal of the onus of proof in the NPS-related amendments.⁴⁸

The Eros Association is more broadly critical of the proposed approach to NPS, arguing that a regulatory rather than a prohibition-based approach would be more appropriate and effective.⁴⁹ The alternative option of

40. Ibid., pp. 14–16.

41. *Government to ban the importation of 'synthetic drugs'*, op. cit.

42. Parliament of Australia, '[Crimes Legislation Amendment \(Organised Crime and Other Measures\) Bill 2012 homepage](#)', Australian Parliament website, accessed 26 August 2014.

43. *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 [Provisions]*, op. cit., pp. 27–28. See Biddington and Barker, *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012*, op. cit., for details of the 2012 Bill.

44. Ibid., pp. 29–39.

45. Tasmanian Office Director of Public Prosecutions (ODPP), [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 11 August 2014, accessed 25 August 2014.

46. The Happy Herb Company, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), n.d., p. 2, accessed 25 August 2014.

47. One Health Organisation, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), n.d., accessed 25 August 2014; A Hay, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 3 August 2014, accessed 25 August 2014; T Wiedemann, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), n.d., accessed 25 August 2014.

48. Law Society of New South Wales, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 1 August 2014, accessed 26 August 2014; Bar Association of Queensland, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 7 August 2014, accessed 26 August 2014.

49. Eros Association, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), n.d., accessed 25 August 2014.

establishing a pre-market assessment scheme (either modelled on that in place in New Zealand or one based on self-regulation) is addressed briefly in the Regulatory Impact Statement prepared for the Bill.⁵⁰

The Law Council of Australia (LCA), the Law Society of NSW and the Bar Association of Queensland are opposed to the introduction of mandatory minimum sentences for firearms offences.⁵¹ The Tasmanian ODPP considers these provisions as currently drafted could lead to unjust outcomes, including harsh sentences for vulnerable offenders, and put forward several suggestions for amendments.⁵²

Anti-Slavery Australia strongly supports the application of extended geographical jurisdiction to Commonwealth slavery offences.⁵³

Further details are provided in the relevant parts of the 'Key issues and provisions' section of this Digest.

Financial implications

The Explanatory Memorandum states that the measures in the Bill will have little or no impact on Government revenue.⁵⁴ The NSW ODPP has raised concerns about the potential impact of mandatory sentencing for firearms offences, proposed under **Schedule 2** of the Bill, on NSW court and prosecutorial resources.⁵⁵

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.⁵⁶ The Government states that:

- **Schedule 1** of the Bill (psychoactive substances) will promote the right to life and the protection of children from the illicit use of drugs by banning the import of potentially dangerous substances intended to produce similar effects as illicit drugs
- **Schedule 3** of the Bill (international transfer of prisoners) promotes rights relating to humane treatment in detention and equal rights before the law for people with a disability and
- **Schedule 4** of the Bill (slavery offences) will promote the right to freedom from slavery and the right to an effective remedy.⁵⁷

It also notes that the Bill will engage and limit the:

- presumption of innocence (**Schedules 1 and 2** (firearms trafficking offences))
- protection against arbitrary or unlawful interference with privacy (**Schedules 1 and 5** (validating airport investigations))
- right to freedom of expression (**Schedule 1**)
- prohibition on arbitrary detention (**Schedules 2 and 5**)
- right to a fair hearing (**Schedule 3**)
- right to life and prohibition on torture and cruel, inhumane or degrading treatment or punishment (**Schedule 5**)
- right to liberty and security of the person (**Schedule 5**) and

50. Attachment A to the Explanatory Memorandum, pp. 91–92.

51. Law Council of Australia (LCA), [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 4 August 2014, accessed 26 August 2014; Law Society of NSW, op. cit.; Bar Association of Queensland, op. cit.

52. Tasmanian ODPP, op. cit.

53. Anti-Slavery Australia, [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 6 August 2014, accessed 26 August 2014.

54. Explanatory Memorandum, p. 4.

55. New South Wales Office Director of Public Prosecutions, (NSW ODPP), [Submission to Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Crimes Legislation Amendment \(Psychoactive Substances and Other Measures\) Bill 2014](#), 1 August 2014, accessed 12 August 2014.

56. The Statement of Compatibility with Human Rights can be found in the Explanatory Memorandum to the Bill (see pp. 7–26).

57. Explanatory Memorandum, pp. 8–9, 18–19, 21.

- prohibition on retrospective criminal laws (**Schedule 5**).

The Government considers that the Bill is compatible with human rights and freedoms because it will promote several rights, and to the extent that it may limit other rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Bill.⁵⁸

Parliamentary Joint Committee on Human Rights

With the exceptions of those on the protection against arbitrary or unlawful interference with privacy and the right to freedom of expression, the Parliamentary Joint Committee on Human Rights was not satisfied with the justifications set out in the Statement of Compatibility for the limitations on rights and freedoms the Bill will impose. Accordingly, it has sought advice from the Minister for Justice on the compatibility of those limitations, including:

- (in some cases) whether the proposed amendments are aimed at achieving a legitimate objective
- whether there is a rational connection between the limitation and that objective and
- whether the limitation is reasonable and proportionate.⁵⁹

It also identified rights engaged by the Bill that were not addressed in the Statement of Compatibility, and has sought the Minister's advice on whether the proposed limitations are compatible with them. In particular:

- in relation to the offence of importing a psychoactive substance in **Schedule 1**, satisfaction of the 'quality of law' test, whereby 'measures which interfere with human rights must be sufficiently certain and accessible for people to understand in advance the legal effect of their actions'
- in relation to mandatory sentencing for firearms offences in **Schedule 2**, the right to have a conviction and sentence reviewed by a higher tribunal and
- in relation to the retrospective validation of the exercise of powers at airports in **Schedule 5**:
 - the right to an effective remedy and
 - rights associated with a fair hearing and fair trial.⁶⁰

The Committee also noted the conclusion in the Statement of Compatibility that potential limitations on the right to life and prohibition on torture and cruel, inhumane or degrading treatment or punishment imposed by **Schedule 5** are reasonable, necessary and proportionate. In that context, it points out that the prohibition on torture and cruel, inhumane or degrading treatment or punishment under the ICCPR is absolute—that is, there are no circumstances where its limitation could be appropriate—and accordingly seeks the Minister's advice.⁶¹

Key issues and provisions

Schedule 1—Psychoactive substances

Item 1 of Schedule 1 will insert **proposed Part 9.2** into the *Criminal Code* to provide new offences for importing psychoactive substances and substances represented to be serious drug alternatives. The new offences will be complemented by amendments to the powers of Customs officers and insertion of provisions governing procedures for the recovery of goods seized on belief or suspicion of being psychoactive substances by **items 2–13 of Schedule 1**.

Proposed section 320.1 will set out definitions for the purposes of **proposed Part 9.2**. *Consume*, in relation to a substance will include introducing the substance into any part of a person's body. *Psychoactive substance* will mean any substance that, when consumed by a person, has the capacity to induce a psychoactive effect.

Psychoactive effect, in relation to a person, will mean:

- (a) stimulation or depression of the person's central nervous system, resulting in hallucinations or in a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood; or

58. Ibid., pp. 7–26.

59. Parliamentary Joint Committee on Human Rights, [Tenth report of the 44th Parliament](#), The Senate, Canberra, 26 August 2014, pp. 9–31, accessed 27 August 2014.

60. Ibid (quote taken from p. 14).

61. Ibid., pp. 29–30.

- (b) causing a state of dependence, including physical or psychological addiction.

Serious drug alternative will mean a substance that has a psychoactive effect the same, or substantially similar to that of a serious drug; or is a lawful alternative to a serious drug.

Given the breadth of the proposed definitions, it is possible some substances would fall within the definitions of both *psychoactive substance* and *serious drug alternative*. As outlined below, there are separate offences for import of a psychoactive substance and import of a substance where the presentation of the substance includes an express or implied representation that it is a serious drug alternative. Establishing the first of those offences would require proof that the substance has the capacity to induce a psychoactive effect. Establishing the second of those offences would not—the offence relates only to the presentation of the substance (for example, its packaging or related marketing material).

Proposed subsection 320.1(2) will provide that expressions used in **proposed Part 9.2** that are defined in Part 9.1 (Serious drug offences) have the same meaning as in Part 9.1. Relevant definitions in Part 9.1 will include:

- *serious drug*, defined in section 300.2 to mean a controlled drug (defined in section 301.1), a controlled plant (defined in section 301.2), a border controlled drug (defined in section 301.4) or a border controlled plant (defined in section 301.5) and
- *import*, which is defined to mean, in relation to a substance, to import the substance into Australia, including bringing it into Australia and dealing with it in connection to its importation.

Proposed subsection 320.2(1) will provide that it is an offence if a person:

- intentionally imports a substance and
- is reckless as to whether the substance is a psychoactive substance.⁶²

The maximum penalty for the offence will be imprisonment for five years, 300 penalty units (currently equivalent to \$51,000) or both. This penalty appears appropriate compared with the penalties that apply under Part 9.1 for serious drug offences. The penalty for importing or exporting a border controlled drug or border controlled plant under Part 9.1 is imprisonment for ten years, 2,000 penalty units or both; higher maximum penalties apply for importing or exporting marketable or commercial quantities.⁶³

Proposed subsection 320.2(4) will provide that it is not necessary to prove that a defendant was reckless as to the *particular identity* of the substance or whether it had a *particular psychoactive effect* in order to establish an offence against **proposed subsection 320.2(1)** (emphasis added). However, the prosecution will have to prove that the substance had the capacity to induce a psychoactive effect. Based on evidence to its inquiry into the Bill, including from the Tasmanian ODPP, the L&C Committee had concerns about practical difficulties in proving the offence:

The committee is concerned that, in the event an individual is prosecuted for importing a psychoactive substance, there will be significant challenges in successfully prosecuting a case because of the difficulty in proving that a substance, when consumed, has the capacity to induce a 'psychoactive effect', as defined in the proposed amendments. Of particular concern is the inherent subjectivity in this definition, along with the real possibility that there would be no published research on the effects of many new psychoactive substances.⁶⁴

Proposed subsection 320.2(2) will provide a defence to the offence in **proposed subsection 320.2(1)** by listing categories of substances that are excluded from the operation of that offence because their import is already regulated under other legislation. In particular, it provides that subject to **proposed subsection 320.2(3)**, the offence does not apply to a substance that is:

- food, within the meaning of the *Food Standards Australia New Zealand Act 1991* (FSANZ Act):

62. This description of the offence takes account of the automatic application of the fault element of intent to physical elements of conduct and of the fault element of recklessness to physical elements of circumstance or result by reason of section 5.6 of the *Criminal Code*.

63. *Criminal Code*, op. cit., sections 307.1, 307.2 and 307.3.

64. *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 [Provisions]*, op. cit., p. 25 (see also the discussion on pp. 18–20).

- for which there is a standard or
- in the form in which the substance is presented, there is a tradition in Australia and New Zealand of using the substance as food for humans
- a tobacco product (as defined in relevant legislation)
- listed goods or registered goods within the meaning of the *Therapeutic Goods Act 1989* (TG Act)
- goods that are represented in any way to be for therapeutic use or use as an ingredient or component in the manufacture of therapeutic goods (within the meaning of the TG Act), other than those represented as a serious drug alternative
- therapeutic goods that are exempt goods, exempt under section 18A, the subject of an approval or authority under section 19 or the subject of an approval under section 19A of the TG Act
- a substance or mixture of substances that is, or would but for certain regulations be, an agricultural chemical product (as defined in relevant legislation)
- a substance or mixture of substances that is, or would but for certain regulations be, a veterinary chemical product (as defined in relevant legislation) or to which paragraph 5(4)(a) of the *Agricultural and Veterinary Chemicals Code Act 1994* (AgVet Code) applies
- a substance or mixture of substances that is an active constituent for a proposed or existing chemical product (within the meaning of the AgVet Code) and that meets certain other conditions
- an industrial chemical (as defined in relevant legislation)
- a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor
- a prohibited import within the meaning of the *Customs Act* or
- prescribed by, or included in a class of substances prescribed by, the regulations.

Proposed subsection 320.2(3) will provide that the exclusions do not apply to a substance that contains any psychoactive substance that is not of a kind specified in **proposed subsection 320.2(2)**. The purpose of this provision is to prevent people from modifying a substance that would otherwise fit within an exclusion to the offence, to include a substance that would otherwise be captured by the offence, in an attempt to evade the new restrictions.⁶⁵

A defendant will bear an evidential burden in relation to establishing a defence under **proposed subsection 320.2(3)** in accordance with section 13.3 of the *Criminal Code*. An evidential burden requires a defendant to adduce or point to 'evidence that suggests a reasonable possibility that the matter exists or does not exist'.⁶⁶ It is a lesser burden than a legal burden, which would require the defendant to prove the matter on the balance of probabilities.⁶⁷ Defendants will also have access to the general defences set out in Part 2.3 of the *Criminal Code*.⁶⁸

Proposed subsection 320.3(1) will provide that it is an offence if a person:

- intentionally imports a substance and
- is reckless as to whether, at the time of the importation, the presentation of the substance includes an express or implied representation that the substance is a serious drug alternative.

Under **proposed subsection 320.3(2)**, the presentation of a substance includes, but is not limited to, matters relating to its name, labelling and packaging and any advertising or other informational material associated with the substance. NPS are often labelled as other products, such as incense or plant food, and may contain warnings stating that they are not intended for human consumption. However, such warnings sit alongside

65. Explanatory Memorandum, p. 37.

66. *Criminal Code*, op. cit., section 13.3.

67. Ibid., section 13.4 and 13.5. For further explanation see AGD, [A guide to framing Commonwealth offences, infringement notices and enforcement powers](#), Australian Government, Canberra, updated September 2011, pp. 51–52, accessed 13 August 2014

68. There are a number of defences outlined in the *Criminal Code* that apply generally across Commonwealth law.

marketing and other information on the packaging that suggest the product has other uses.⁶⁹ For example, some substances labelled as plant food contain specific information on the correct 'dose' for plants and warnings to gardeners.⁷⁰

The maximum penalty for the offence will be imprisonment for two years, 120 penalty units (currently equivalent to \$20,400) or both. This penalty appears appropriate compared with the penalties that apply under Part 9.1 for serious drug offences and under **proposed section 320.2** for importing a psychoactive substance.

Proposed subsection 320.3(4) will provide that it is not necessary to prove, in order to establish an offence against **proposed subsection 320.3(1)** (emphasis added), that:

- the representation of the substance to be a serious drug alternative related to a *particular serious drug*
- the defendant intended to cause any person to believe that the substance was a *particular serious drug*, has a psychoactive effect that is the same as or similar to a *particular serious drug* or is a lawful alternative to a *particular serious drug* or
- a defendant knew or was reckless as to the *particular identity* of the substance or whether it had a *particular psychoactive effect*.

Proposed subsection 320.3(3) will provide a defence to the offence in **proposed subsection 320.3(1)** by listing categories of substances that are excluded from the operation of that offence because their import is already regulated under other legislation. The list of exclusions is similar to that under subsection 320.2(2), but is less extensive (it does not include, for example, tobacco products, industrial chemicals, controlled and border controlled drugs and plants or prohibited imports). As with that subsection, there is an exclusion for substances prescribed by, or included in a class of substances prescribed by, the regulations.

A defendant will bear an evidential burden in relation to establishing a defence under **proposed subsection 320.3(3)** in accordance with section 13.3 of the *Criminal Code*. Defendants will also have access to the general defences set out in Part 2.3 of the *Criminal Code*.

Issue: adequacy of exclusions

Submissions to the L&C Committee's inquiry into the Bill from The Happy Herb Company, One Health Organisation and two individuals raised concerns that the exclusions provided for would not capture certain legitimate items such as:

- seeds, bulbs and other propagation materials for plants 'normally propagated for non-drug purposes which happen incidentally to contain psychoactive substances'
- medicinal plants
- medicinal herbs and herbal products and
- culinary herbs and herbal products.⁷¹

While the Bill would enable additional exclusions to be listed through regulations, the Regulatory Impact Statement indicates that this power is 'intended to ... accommodate unanticipated changes to the regulation of the importation of chemical substances' rather than to exclude further broad categories of goods.⁷²

Mr Hay (a retired Senior Research Scientist at the Royal Botanic Gardens) argues that there appears to be no practical benefit in criminalising imports of propagation materials for plants that are already readily available in Australia, and where there is little or no evidence of an associated drug market. He also considers most importers of such plants would be unaware and uninterested in their psychoactive properties.⁷³

69. P Griffiths et al, 'Editorial: how globalization and market innovation challenge how we think about and respond to drug use: 'Spice' a case study', *Addiction*, 105(6), June 2010, pp. 951–953, accessed 20 August 2014.

70. Ibid.; *Consideration of novel psychoactive substances ('legal highs')*, op. cit., p. 28.

71. Happy Herb Company, op. cit.; One World Health, op. cit.; A Hay, op. cit.; T Wiedemann, op. cit (quote taken from A Hay).

72. Explanatory Memorandum, p. 100.

73. A Hay, op. cit.

The exclusion for food appears to capture herbs, which come within Standard 2.3.1 (Fruit and Vegetables) of the Australia New Zealand Food Standards Code.⁷⁴ However, it is not clear whether this would extend to herbal extracts. It is also not of relevance to ornamental plants or propagation materials.

The Happy Herb Company and Mr Wiedemann both suggested inclusion of an additional exclusion based on the *Drug Misuse and Trafficking Act 1985* (NSW) as amended by the *Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Act 2013* (NSW). Paragraph 36ZE(1)(h) of the *Drug Misuse and Trafficking Act 1985* (NSW) provides that Part 2C of the Act (offences involving psychoactive substances) does not apply to 'any plant or fungus, or extract from a plant or fungus, that is not, or does not contain, a substance specified in Schedule 1' (Schedule 1 lists prohibited plants and drugs for the purposes of illicit drug offences in Part 2).⁷⁵

The L&C Committee recommended that the Bill be amended to exempt plants and plant extracts from the application of **Schedule 1** of the Bill, and noted that the Attorney-General's Department (AGD) was examining the possibility of such an exemption.⁷⁶

Amendments to the Customs Act

Division 1 of Part XII of the *Customs Act* sets out the powers available to Customs officers under the Act, including search powers and seizure of goods imported unlawfully. **Items 2–13** of Schedule 1 will amend definitions in that Division and provisions governing how goods seized as forfeited goods are to be dealt with to complement the new offences in **proposed Part 9.2** of the Criminal Code.

Section 183UA of the *Customs Act* contains definitions for the purposes of Division 1 of Part XII. **Item 2** will insert definitions of *prohibited psychoactive substance* and *prohibited serious drug alternative*, with each essentially meaning a thing of that type within **proposed Part 9.2** of the *Criminal Code*, that has been imported into Australia.

Section 229 of the *Customs Act* sets out a range of goods that are to be forfeited to the Crown. Section 183UA includes definitions of *forfeited goods* and *special forfeited goods* that draw upon section 229. **Item 3** will amend the definition of *special forfeited goods* to include forfeited goods referred to in paragraph 229(1)(a) that are prohibited psychoactive substances and prohibited serious drug alternatives (other types of goods specified in the definition include narcotic goods and goods consisting of a border controlled precursor).

The effect of **items 2 and 3** will be to:

- allow Customs officers to use existing powers in relation to forfeited goods under Division 1 of Part XII to deal with suspected prohibited psychoactive substances and prohibited serious drug alternatives. These include seizure under warrant (sections 203 and 203A) and seizure without a warrant (section 203B) and
- extend existing procedural provisions that apply to forfeited goods to suspected prohibited psychoactive substances and prohibited serious drug alternatives.

Subdivision G, Division 1 of Part XII of the *Customs Act* governs how goods seized as forfeited goods are to be dealt with. These provisions will apply to forfeited goods that are suspected or believed to be a *prohibited psychoactive substance* and *prohibited serious drug alternative*, except as set out below.

Item 7 will insert **proposed sections 205EA–205EC** to set out different procedures that will apply if a person makes a claim for the return of goods seized because they are suspected or believed to be a prohibited psychoactive substance. Under **proposed section 205EA**, if a claim for the return of those goods may be made under section 205B, and is made within 30 days of a seizure notice being served, the goods must, subject to any other relevant law, be returned unless:

- the goods have been immediately disposed of under section 206 or
- within 30 days of the claim, the Customs CEO gives the person who made the claim a written notice stating that the goods will be condemned as forfeited if the person does not institute proceedings against the Commonwealth within 30 days of receiving the notice:
 - to recover the goods or

74. [Australia New Zealand Food Standards Code—Standard 2.3.1—Fruit and Vegetables](#), accessed 13 August 2014.

75. [Drug Misuse and Trafficking Act 1985](#) (NSW), accessed 13 August 2014.

76. *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 [Provisions]*, op. cit., pp. 16–18, 25.

- for a declaration that the goods are not forfeited.

Extensions of time for instituting proceedings may be granted under **proposed section 205EB** if a magistrate is satisfied of certain matters.

Proposed section 205EC will apply to proceedings initiated under **proposed section 205EA**. **Proposed subsection 205EC(1)** will clarify that proceedings may be initiated or continued even if the relevant goods are disposed of or destroyed. **Proposed subsection 205EC(3)** will require that where that is the case, and a court decides that it would otherwise have ordered that the goods be returned, the court must order the Commonwealth to pay the claimant the market value of the goods at the time they were disposed of or destroyed.

Proposed subsection 205EC(2) is the most significant, as it provides that in the relevant proceedings:

- (under **proposed paragraph (2)(a)**) the Commonwealth bears the onus of proving that the goods were imported and
- (under **proposed paragraph (2)(b)**) the person instituting the proceedings relating to recovery bears the onus of proving that the goods:
 - are not a psychoactive substance (that is, it does not have the capacity to induce a psychoactive effect if consumed) or
 - do not fall within the proposed *Criminal Code* offence of importing a psychoactive substance because one of the exclusions set out in subsection 320.2(2) of the *Criminal Code* applies.

This means it will be up to a claimant to prove, on the balance of probabilities, one of the matters in **proposed paragraph 205EC(2)(b)**. The Explanatory Memorandum justifies this reverse onus of proof on the basis that:

- it is necessary to assist in protecting public health
- it is incumbent on an importer to be aware of the purpose for which he or she is importing a substance, obtain the relevant authorisations or permissions and, where an exemption available under subsection 320.2(2) of the *Criminal Code* does not apply, to be aware of whether the substance has the capacity to induce a psychoactive effect if consumed
- it will be ‘peculiarly within the importer’s knowledge’ whether one of those exemptions applies to the substance
- if the substance has a legitimate use and is not being imported as an alternative to an illicit drug, ‘proving this on the balance of probabilities will not be an onerous task’ and
- the importer will have several opportunities prior to instituting proceedings to persuade Customs or the AFP that the substance is not a prohibited psychoactive substance (before seizure, when a claim for return of the goods is lodged and at the commencement of proceedings).⁷⁷

Items 4–6, 8, and 13 will make consequential amendments resulting from the proposed provisions inserted by **item 7**.

Section 206 of the *Customs Act* allows for immediate disposal of certain types of goods that have been seized under the Act, such as perishable goods and those likely to constitute a danger to health or safety. **Item 9** will insert **proposed subsection 206(2A)** to provide that if goods that the CEO or a Regional Director for a state or territory is satisfied are a prohibited psychoactive substance or a prohibited serious drug alternative have been seized, that person may cause those goods to be dealt with as he or she considers appropriate, including by destruction.

Schedule 2—Firearms trafficking

Division 360 of the *Criminal Code* contains offences relating to domestic cross-border trafficking of firearms.⁷⁸

77. Explanatory Memorandum, pp. 46–47.

78. Trafficking of firearms within a state or territory is dealt with under state and territory criminal law. For a summary of relevant offences see S Bricknell, [Firearm trafficking and serious and organised crime gangs](#), Australian Institute of Criminology, Canberra, 2012, pp. 13–17, accessed 27 August 2014.

Items 2–5 of Schedule 2 will amend section 360.1 to amend definitions of disposal and acquisition of a firearm for the purposes of Division 360 to also include disposal and acquisition of firearm *parts*.

Item 7 will amend section 360.2 to expand the offence of cross-border disposal or acquisition of a firearm to also apply to firearm parts.

Items 10–12 will expand the taking or sending a firearm across borders to also apply to firearm parts.

Items 8 and 13 will insert definitions of *firearm part* for the purposes of sections 360.2 and 360.3 respectively. As these offences rely upon conduct that would constitute an offence under a state or territory firearm law, the definition in each case is a firearm part or a part of, or for, a firearm or weapon within the meaning of the relevant state or territory law. The Explanatory Memorandum does not address why it is necessary to refer to a part of, or for, a weapon, in the definitions of *firearm part* when the definition of *firearm* includes no reference to weapons.

Item 14 will insert **proposed section 360.3A**, which will implement a commitment made in the lead up to the 2013 Federal Election by introducing mandatory minimum penalties for the offences in sections 360.2 and 360.3.⁷⁹ It will require a court to impose a sentence of imprisonment of at least five years on a person convicted of an offence against Division 360, unless it can be established on the balance of probabilities that the person was under 18 when the offence was committed. The maximum penalty of imprisonment for ten years, a fine of 2,500 penalty units (currently equivalent to \$425,000), or both, will remain unchanged. **Proposed section 360.3A** will not set a minimum non-parole period. This means that while a court must sentence a person to imprisonment for at least five years, it will retain discretion as to the proportion of the total sentence it requires to be served in custody.

Section 360.4 provides that Division 360 is not intended to exclude or limit the concurrent operation of any state or territory law. **Item 16** will insert **proposed subsections 360.4(2) and (3)** to further clarify the application of that general principle, and **proposed subsection 360.4(4)**, which will provide that a person punished for an overlapping state or territory offence cannot be punished for an offence under Division 360 for the same conduct.

Item 18 will insert **proposed Division 361** into Part 9.4 of the *Criminal Code* to provide for new offences of international firearms trafficking.

Proposed section 361.1 will provide definitions for the purposes of Division 361. *Firearm* and *firearm part* will both have the same meanings as in the Customs (Prohibited Imports) Regulations 1956.⁸⁰ *Import* a thing is defined to include 'deal with the thing in connection with its importation'. 'Deal' will not be defined, so will hold its ordinary meaning. The definition of traffic will be as follows:

traffic in a thing that is a firearm or a firearm part means:

- (a) transfer the thing; or
- (b) offer the thing for sale; or
- (c) invite the making of offers to buy the thing; or
- (d) prepare the thing for transfer with the intention of transferring any of it or believing that another person intends to transfer any of it; or
- (e) transport or deliver the thing with the intention of transferring any of it or believing that another person intends to transfer any of it; or
- (f) guard or conceal the thing with the intention of transferring any of it or the intention of assisting another person to transfer any of it; or
- (g) possess the thing with the intention of transferring any of it.

For the purposes of paragraph (d), preparing a thing for transfer includes packaging the thing or separating the thing into discrete units.

79. *The Coalition's policy to tackle crime*, op. cit.

80. [Customs \(Prohibited Imports\) Regulations 1956](#), accessed 27 August 2014.

Proposed section 361.2 will provide for two offences for trafficking prohibited firearms or parts into Australia. Under **proposed subsections 361.2(1) and (2)**, it will be an offence if:

- a person intentionally imports a thing
- the person is reckless as to whether the thing is a firearm or firearm part
- the person imports the firearm or firearm part with the intention of trafficking in the firearm or firearm part and
- importing the firearm or firearm part was prohibited under the *Customs Act* absolutely (absolute liability will apply to this element).⁸¹

Under **proposed subsections 361.2(3)–(5)** it will be an offence if:

- a person intentionally imports a thing
- the person is reckless as to whether the thing is a firearm or firearm part
- the person imports the firearm or firearm part with the intention of trafficking in the firearm or firearm part
- importing the firearm or firearm part was prohibited under the *Customs Act* unless certain requirements were met (absolute liability applies to this element) and
- the person fails to meet any of those requirements (strict liability will apply to this element).⁸²

Proposed section 361.3 will provide for three offences for trafficking prohibited firearms or parts out of Australia. The provisions mirror the import offences in section 361.2, except that they apply to the export or entering for export of a firearm or firearm part with the intention of trafficking.

The maximum penalty for each of these offences is imprisonment for ten years, a fine of 2,500 penalty units (currently equivalent to \$425,000), or both. This penalty is the same that applies to domestic cross-border trafficking of firearms or parts under Division 360 and offences of intentionally importing or exporting tier 2 goods (which include prohibited firearms, firearm accessories, firearm parts, firearm magazines, ammunition and components of ammunition) under subsections 233BAB(5) and (6) of the *Customs Act* respectively.

The offences set out in **proposed section 361.2** and **proposed subsections 361.3(1) and (3)** closely mirror subsections 233BAB(5) and (6) of the *Customs Act*, except for inclusion of the additional element of intention to traffic. The application of absolute and strict liability is also consistent with the approach taken in the existing *Customs Act* offences. It means that no fault element needs to be proved for those elements, but that the defendant may raise a defence of mistake of fact with respect to whether the required approval had been obtained at the time of import or export.⁸³ The application of absolute and strict liability to these elements is justified in the Explanatory Memorandum and appears reasonable in the circumstances.⁸⁴

Proposed section 361.4 will provide a defence to an offence against Division 361 of reasonable belief that the defendant's conduct was justified or excused by or under a Commonwealth or state or territory law. A defendant will bear an evidential burden in relation to such a defence, in accordance with subsection 13.3(3) of the *Criminal Code*.

Proposed section 361.5 will apply mandatory minimum penalties to the offences in sections 361.2 and 361.3. It will require a court to impose a sentence of imprisonment of at least five years on a person convicted of an offence against **proposed Division 361**, unless it can be established on the balance of probabilities that the person was under 18 when the offence was committed. It will not set a minimum non-parole period. This means that while a court must sentence a person to imprisonment for at least five years, it will retain discretion as to the proportion of the total sentence it requires to be served in custody.

81. This description of the offence takes account of the automatic application of the fault element of intent to physical elements of conduct and of the fault element of recklessness to physical elements of circumstance or result by reason of section 5.6 of the *Criminal Code*.

82. This description of the offence takes account of the automatic application of the fault element of intent to physical elements of conduct and of the fault element of recklessness to physical elements of circumstance or result by reason of section 5.6 of the *Criminal Code*.

83. *Criminal Code*, op. cit., sections 6.1 and 6.2.

84. See pages 55–56 of the Explanatory Memorandum.

Proposed section 361.6 will ensure the principle of double jeopardy is maintained by clarifying that a person punished for an offence against **proposed Division 361** cannot also be punished under section 233BAB of the *Customs Act* for the same conduct. **Item 23** of Schedule 2 will insert an equivalent provision into section 233BAB of the *Customs Act*.

Items 19–22 of Schedule 2 will make other consequential amendments to the *Customs Act* to:

- amend section 183UA to include an offence against Division 361 in the definition of offence for the purposes of Division 1 of Part XII of the *Customs Act* (which relates to powers of officers) and
- amend section 210 to include an offence against Division 361 among the categories of offence for which an arrest may be made without warrant under the *Customs Act* where there are reasonable grounds to believe a person has committed or is committing such an offence.

Issue: mandatory minimum penalties

Mandatory minimum penalties have rarely been applied to Commonwealth offences and when they have been used,⁸⁵ they have attracted criticism.⁸⁶ The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* advises against fixed and minimum penalties for several reasons, including that they:

- interfere with judicial discretion to impose a penalty appropriate to all the circumstances of a particular case
- can 'create an incentive for defendants to fight charges, even where there is little merit in doing so'
- preclude the imposition of alternative sanctions such as community service orders that would otherwise be available under Part IB of the *Crimes Act* and
- may encourage the judiciary to look for technical grounds to avoid the restriction on sentencing discretion, leading to anomalous decisions.⁸⁷

The NSW ODPP has raised concerns going to the second of these issues in its submission to the L&C Committee's inquiry into the Bill. Noting that it is sometimes the case that a prosecution will involve a combination of Commonwealth and state offences, the submission states:

The offences ... are matters that the ODPP is likely to prosecute. My concern about this amendment relates to the possible impact that these mandatory minimum sentence offences may have on NSW court and prosecutorial resources.

It was the experience in NSW when there were a number of people smuggling cases before the NSW Courts that the accused did not enter pleas of guilty because of the mandatory minimum sentence and all the trials ran the full course. This had significant impact on the District Court to dispose of other work and on the resources of the CDPP [Commonwealth Director of Public Prosecutions].⁸⁸

Broader concerns about interference with judicial discretion and the associated potential for harsh, unjust and disproportionate sentences were raised by the LCA, Law Society of NSW, Bar Association of Queensland and the Tasmanian ODPP.⁸⁹ The Law Society of NSW's submission also questions the actual deterrent value of mandatory minimum sentences, while the Tasmanian ODPP also states that they potentially increase recidivism by inappropriately placing people in a 'learning environment for crime'.⁹⁰

85. Certain people smuggling offences in the [Migration Act 1958](#) are a notable exception (see section 236B); section 120 the [Excise Act 1901](#) imposes a minimum penalty, but in the form of a fine, not imprisonment.

86. See for example the views of submitters summarised in Senate Standing Committee on Legal and Constitutional Affairs, [Anti-People Smuggling and Other Measures Bill 2010 \[Provisions\]](#), The Senate, Canberra, May 2010, pp. 18–21, accessed 13 August 2014; W Martin, 'Sentencing issues in people smuggling cases', paper presented to the Federal Crime and Sentencing Conference, Canberra, 11 February 2012, accessed 13 August 2014.

87. A guide to framing Commonwealth offences, infringement notices and enforcement powers, op. cit., pp. 37–38.

88. NSW ODPP, op. cit.

89. LCA, op. cit.; Law Society of NSW, op. cit.; Bar Association of Queensland, op. cit.; Tasmanian ODPP, op. cit. The LCA also refers to a paper it released earlier in the year that contains more detailed arguments: LCA, [Policy discussion paper on mandatory sentencing](#), LCA, May 2014, accessed 13 August 2014.

90. Law Society of NSW, op. cit.; Tasmanian ODPP, op. cit. Both issues are expanded upon in *Policy discussion paper on mandatory sentencing*, op. cit.

The Tasmanian ODPP recommended that if mandatory sentencing is to be retained in the Bill, amendments be made to enable a court to depart from the mandatory penalty in the following circumstances:

- The offender was under 18 or over 18 but under 21 at the time the offence was committed or at the time of sentencing; and/or
- The offender suffered with a cognitive impairment; and/or
- The imposition of the mandatory minimum sentence would not be in the public interest; and/or
- Exceptional circumstances exist that would justify a sentencing judge departing from the mandatory minimum sentence.⁹¹

The majority report of the L&C Committee did not recommend any amendments to **Schedule 2**. However, as noted in the 'Committee consideration' section beginning on page nine of this Digest, it did recommend the Explanatory Memorandum be amended to make clear the intended operation of the mandatory sentencing provisions.

Schedule 3—International transfer of prisoners

Part 1—Suspended sentences

Section 4 of the *ITP Act* sets out definitions for the purposes of the Act. *Prisoner* is defined to mean a person who is serving a sentence of imprisonment, including a mentally impaired prisoner and a person who has been released on parole. *Sentence of imprisonment* is defined in turn to mean:

... any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate or indeterminate period in the exercise of its criminal jurisdiction and includes any direction or order given or made by the court or tribunal with respect to the commencement of the punishment or measure.⁹²

The reference to 'involving deprivation of liberty' makes it unclear whether prisoners serving suspended sentences, or the suspended parts of a partially suspended sentence, may be transferred under the *ITP Act*.

Item 2 will repeal and replace the definition of *sentence of imprisonment* in subsection 4(1) to make it clear that prisoners serving suspended sentences may be transferred under the *ITP Act*. The revised definition will be similar, but will apply instead to any punishment or measures involving:

- deprivation of liberty or
- unless in relation to a Tribunal offence, potential deprivation of liberty.⁹³

Item 4 will insert **proposed section 4B** to provide related definitions of *serving* (a sentence of imprisonment) and the *suspended part* (of a sentence of imprisonment).

Items 5–14 will make consequential amendments to various sections of the *ITP Act*.

Part 2—Close family members

Prisoners' family relationships are of relevance under the *ITP Act* in the context of:

- establishing whether a prisoner has community ties with another country to which they have applied for transfer, or an Australian state or territory to which they have applied for transfer and
- who may consent to the transfer of a prisoner under section 6 where the prisoner is not an adult or is otherwise incapable of consenting to his or her own transfer (referred to as the *prisoner's representative*).

91. Tasmanian ODPP, op. cit.

92. *ITP Act*, op. cit., section 4.

93. *Tribunal offence* is defined in subsection 4(1) to mean an offence that the Former Yugoslavia Tribunal or the Rwanda Tribunal has the power to prosecute.

Under sections 12 and 13 of the *ITP Act*, a prisoner (other than a Tribunal prisoner) must have community ties (as defined in subsections 4(4) and (5)) with a transfer country or the relevant state or territory to be eligible for transfer from or to Australia respectively.

Sections 6, 12 and 13 currently refer specifically to a number of particular relatives.

Item 18 will insert **proposed section 4AA** to provide a definition of close family member for the purposes of the Act, as follows:

(1) A **close family member** of a person is:

- (a) the person's spouse or de facto partner; or
- (b) a parent, step-parent or grandparent of the person; or
- (c) a child, stepchild or grandchild of the person; or
- (d) a brother, sister, stepbrother or stepsister of the person; or
- (e) a guardian or carer of the person.

Note: **De facto partner**, **parent** and **child** are defined in subsection 4(1).

(2) For the purposes of, and without limiting, subsection (1):

- (a) if one person is the child of another person because of the definition of **child**, relationships traced to or through the person are to be determined on the basis that the person is the child of the other person; and
- (b) someone is the **stepchild**, **stepbrother**, **stepsister** or **step-parent** of another person if this would be the case except that 2 persons who are each other's de facto partner are not legally married.

Item 15 will insert definitions of *child*, *de facto partner* and *parent* into subsection 4(1).

Items 16 and **17** will amend the definitions of community ties in subsections 4(4) and (5) to replace references to particular relatives with references to 'close family members'. **Items 19** and **20** will do the same for section 6.

Together, these amendments will expand the categories of relative who may serve as a prisoner's representative, and the relationship to whom can be relied upon to establish community ties.

Part 3—Other amendments

Part 3 of Schedule 2 will make a range of amendments to the *ITP Act*, mostly to clarify and streamline processes and make the operation of the scheme more straightforward. The need for these amendments has become apparent through the administration of the *ITP Act* since its enactment in 1997, which has identified a number of unnecessary complexities in the practical application of the ITP Scheme.⁹⁴ With the exception of **items 22** and **41** the proposed amendments are straightforward machinery changes and should be uncontroversial.

Part 2 of the *ITP Act* sets out requirements that apply across applications for transfer both to and from Australia, including eligibility and conditions for transfer. Section 10 sets out the criteria that must be met in order for a transfer to take place, including that the prisoner is eligible for transfer, the conditions for transfer have been met, and that the consent of all relevant parties has been given.

Item 22 will insert **proposed section 10A** to provide that the Attorney-General is not required to progress an application for transfer in certain circumstances. **Proposed subsection 10A(1)** will address circumstances where, for reasons outside the Attorney-General's control, a transfer cannot proceed. It will give the Attorney-General discretion not to take any steps for making a decision on an application for transfer if any of the following apply:

- the prisoner is not eligible for transfer
- the other country has not consented to the transfer
- the prisoner or the prisoner's representative have not consented to the transfer
- a state or territory minister whose consent would be required has not consented to the transfer
- the relevant conditions for transfer (as set out in sections 14 and 15) are not satisfied or

94. Explanatory Memorandum, pp. 3–4.

- the transfer is likely to prevent the surrender of the prisoner to an extradition country known to have requested, or reasonably likely to request, the prisoner's extradition.

Proposed subsection 10A(2) will address situations where a prisoner reapplies for transfer shortly after their application had been refused or withdrawn. It will provide the Attorney-General with a discretion not to take any steps for making a decision on an application for transfer if:

- (a) the prisoner had made an earlier application or request; and
- (b) the Attorney-General received the current application or request less than 12 months after the later of either:
 - (i) the day the prisoner was informed under section 52 that the earlier application or request did not meet one or more of the requirements in section 10;
 - (ii) the day the prisoner informed the Attorney-General that the prisoner was withdrawing the earlier application or request.

The Explanatory Memorandum states that reapplications received shortly after an application has been refused by the Attorney-General, a state or territory minister or another country, or after a prisoner has chosen to withdraw an earlier application, are problematic:

... when there is no new information or change in circumstances to support a request for transfer. The processing of these reapplications is not resource or time efficient, especially when the outcome is not going to change due to the lack of new information or a change of circumstances.

...

This new provision is intended to reduce the number of reapplications being processed where there is no likelihood that the original outcome will change. This provision is not intended to unreasonably restrict reapplications within the time limit where new circumstances or information manifests. For example, the provision will give the Attorney-General the flexibility to consider reapplications from a prisoner who has demonstrated new information or a change in circumstances that is relevant to their request to transfer.⁹⁵

The Explanatory Memorandum explains the intended scope of the proposed discretion, but the provisions themselves do not explicitly provide that the discretion only applies where the reapplication does not provide new information or demonstrate a change of circumstances. It would be open to a prisoner whose reapplication is not processed on the basis of the proposed discretion to apply for a review of that decision under the *Administrative Decisions (Judicial Review) Act 1977* if it appeared the discretion had been unfairly applied.⁹⁶ However, it might be preferable to clarify the scope of the proposed discretion in the provision itself.

Section 53 provides for the Attorney-General to delegate in writing all or any of his or her powers under the *ITP Act* or associated regulations to the Secretary of AGD or a person holding or performing the duties of a Senior Executive Service officer in AGD. **Item 41** will insert **proposed paragraph 53(c)** so that delegations may also be made to an APS employee holding or performing the duties of an Executive Level 2 or equivalent position in AGD. The Explanatory Memorandum states that this is appropriate on the basis that 'a number of the Attorney-General's powers in the *ITP Act* are administrative and non-contentious in nature'.⁹⁷ This is the case with, for example, provisions requiring the Attorney-General to pass on prisoners' applications to state ministers (section 17) and keeping a prisoner or their representative informed of an application's progress (section 52). However, other provisions relate to more significant powers, such as a decision whether or not to consent to a transfer (section 5) or determining that certain conditions that must normally be met for a transfer to take place need not be satisfied in a particular case (subsections 14(3) and 15(3)). If the delegation provision is to be expanded as proposed, consideration should be given to excluding certain powers from its ambit.

95. Explanatory Memorandum, p. 71.

96. [Administrative Decisions \(Judicial Review\) Act 1977](#), accessed 27 August 2014.

97. Explanatory Memorandum, p. 78.

Other provisions

Schedule 4—Jurisdiction of slavery offences

Section 270.3 of the *Criminal Code* contains two offences for slavery. **Item 1** of Schedule 4 will insert **proposed section 270.3A** to apply the broadest level of extended geographical jurisdiction (category D) to the offences in the section, such that they apply whether or not the relevant conduct or a result of that conduct occurs in Australia.⁹⁸ It will also insert **proposed section 270.3B** to require the Attorney-General's consent for prosecution where the conduct constituting the offence occurs wholly outside Australia, consistent with the general principle set out in section 16.1 of the *Criminal Code*.⁹⁹

Schedule 5—Validating airport investigations

The AFP takes primary responsibility for airport policing and security at designated state airports.¹⁰⁰

Subsection 5(3A) of the *Commonwealth Places (Applications of Laws) Act 1970* (COPAL Act) allows members and special members of the AFP to access investigatory powers set out in the *Crimes Act* within designated state airports for this purpose.¹⁰¹

Airports are prescribed as designated state airports under regulations made under the COPAL Act. There was an approximately eight week period (19 March to 16 May 2014) between the repeal of the Commonwealth Places (Application of Laws) Regulations 1998 and the commencement of the Commonwealth Places (Application of Laws) Regulation 2014. However, the same airports were prescribed in both. **Schedule 5** will retrospectively validate the use of the relevant Commonwealth powers in designated state airports from 19 March to 16 May 2014 only in order to cover the gap otherwise left between the two sets of regulations.

The Explanatory Memorandum does not address how and why the gap between the two sets of regulations arose. However, on the basis of information contained in the Explanatory Statement to the Spent and Redundant Instruments Repeal Regulation 2014 (which repealed the 1998 regulation) and that for the Commonwealth Places (Application of Laws) Regulation 2014, it appears that the 1998 regulation was repealed in error.¹⁰²

98. *Criminal Code*, op. cit., section 15.4.

99. Ibid., section 16.1. An equivalent provision applies to the foreign bribery offences in Division 70 of the *Criminal Code*.

100. Australian Federal Police (AFP), '[Aviation](#)', AFP website, accessed 13 August 2014.

101. [Commonwealth Places \(Application of Laws\) Act 1970](#), accessed 13 August 2014.

102. Explanatory Statement, [Spent and Redundant Instruments Repeal Regulation 2014](#), accessed 2 September 2014; Explanatory Statement, [Commonwealth Places \(Application of Laws\) Regulation 2014](#), accessed 2 September 2014. The former states 'The [Commonwealth Places (Application of Laws) Regulations 1998] were primarily created to deal with an anomalous situation relating to a property known as Vicars Winery, where the Commonwealth's separation of powers doctrine was found to be incompatible with NSW's liquor licensing arrangements. The relevant *Liquor Act 1982* (NSW) was superseded in 2007 and these regulations are now redundant. Their repeal does not alter existing arrangements.'

Appendix: Application of existing drugs legislation to NPS

Australia's legislative response to controlling substances of abuse has been guided by the three major international drug treaties, each of which operate on the basis that the control measures they contain must be applied by State Parties to substances listed in Schedules.

The *Single Convention on Narcotic Drugs* (1961) (*Single Convention*) requires State Parties to apply control measures so as to 'limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession' of substances and products listed in its Schedules, which include traditional plant based drugs such as opium, heroin, cannabis and cocaine and some synthetic narcotics such as methadone and pethadine.¹⁰³

The *Convention on Psychotropic Substances* (1971), established in response to an expanding range of synthetic drugs, requires State Parties to apply control measures to substances listed in its Schedules, which include hallucinogens such as Lysergic acid diethylamide (LSD), stimulants such as amphetamine, and depressants such as barbiturates.¹⁰⁴

The *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988) requires State Parties to establish additional enforcement and international cooperation mechanisms relating to substances controlled under the earlier treaties. It also requires them to apply control measures to substances used in the illicit manufacture of narcotic drugs or psychotropic substances (referred to as precursors) listed in an annex.¹⁰⁵

Additional drugs or substances may be added to the Schedules or annex by the Commission on Narcotic Drugs (CND) at the recommendation of the World Health Organization (WHO) in the case of the earlier treaties and by the CND on advice from the International Narcotics Control Board in the case of the 1988 treaty.¹⁰⁶ The last time a drug was brought under control through the *Single Convention* was oripavine (an opiate) in 2007, and for the *Convention on Psychotropic Substances*, it was amineptine (an atypical tricyclic antidepressant) in 2003.¹⁰⁷

WHO has been finding it difficult to convene meetings of the Expert Committee on Drug Dependence to discuss scheduling issues. For example, six years passed between its 34th meeting in 2006 and the 35th in 2012. Even when the system was working normally, the Expert Committee only met every two years, and the scheduling process is lengthy.¹⁰⁸ While Australia, like many other member states, has taken steps to deal with NPS in the absence of any international controls, its approach to date has been largely based on a similar system of scheduling substances.

Commonwealth legislation

Commonwealth and state and territory governments share responsibility for drug control. In the area of criminal law, the Commonwealth has had a longstanding role through import and export-related offences. More recently it has enacted offences that overlap with those traditionally within state and territory responsibility such as possession.¹⁰⁹ Recent prosecution statistics indicate that import and export related offences remain the key focus for the Commonwealth, accounting for 316 of the 394 prosecutions for serious drug offences under Part 9.1 of the *Criminal Code Act 1995* in 2012–13.¹¹⁰

103. *Single Convention on Narcotic Drugs*, op. cit.

104. *Convention on Psychotropic Substances*, op. cit.

105. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, op. cit.

106. *Single Convention on Narcotic Drugs*, op. cit., art. 3; *Convention on Psychotropic Substances*, op. cit., art. 2; *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, op. cit., art. 12. For further detail and background to these treaties, see J Sinha, [The history and development of the leading international drug control conventions](#), Library of Parliament, Canada, 21 February 2001, accessed 15 April 2014.

107. UNODC, *World drug report 2013*, op. cit., pp. 103–5.

108. *Ibid.*, pp. 103–107.

109. The [Law and Justice Legislation Amendment \(Serious Drugs Offences and Other Measures\) Act 2005](#) repealed offences for importing and exporting prohibited narcotics and being in possession of prohibited narcotics reasonably suspected of being imported from the *Customs Act* and inserted Part 9.1 into the *Criminal Code* (accessed 27 August 2014).

110. Commonwealth Director of Public Prosecutions (CDPP), [Annual report 2012/13](#), CDPP, 2013, pp. 55–6, accessed 8 July 2014.

Criminal code offences

Part 9.1 of the *Criminal Code* contains a range of serious drug offences, including trafficking controlled drugs, commercial manufacture of controlled drugs, pre-trafficking controlled precursors, import and export offences and possession offences. The maximum penalties for these offences range from imprisonment for two years and/or 400 penalty units to imprisonment for life and/or 7,500 penalty units.

Controlled drugs and border controlled drugs are those listed by regulations, analogue drugs of those listed or drugs determined by the Minister under an emergency determination.¹¹¹ Controlled precursors and border controlled precursors are those listed by regulations, a salt or ester of those listed or precursors determined by the Minister under an emergency determination (the definition of border controlled precursor also includes an immediate precursor of a listed border controlled precursor).¹¹² As at 27 August 2014, the Criminal Code Regulations 2002 listed:

- 249 controlled drugs
- 209 border controlled drugs
- 13 controlled precursors and
- 14 border controlled precursors.¹¹³

These totals include well known plant-based illicit drugs such as cannabis, cocaine and heroin, established synthetic drugs such as MDMA (sometimes referred to as ecstasy) and newer synthetic drugs such as 4-MMC (sometimes referred to as meph, meow or miaow-miaow) and most recently added, several 'NBOME' compounds. They also include licit substances for which large quantities fall within the scope of the serious drug offences. For example, ten grams of codeine (an active ingredient used in smaller quantities in painkillers such as Panadeine) is considered a trafficable quantity.

Substances may only be listed in the regulations or in an emergency determination if the Minister is satisfied of certain matters. Emergency determinations may only be made in circumstances of an imminent and substantial risk associated with the substance, and can only be in effect for up to eighteen months, including any extensions.¹¹⁴

Analogue provisions

Provisions to capture analogues of listed drugs were first inserted in 1990 by the *Customs and Excise Legislation Amendment Act 1990*, before the drugs offences were moved from the *Customs Act* to the *Criminal Code*.¹¹⁵ Analogue provisions are designed to avoid the situation of laws requiring constant amendment to individually include each new substance by extending prohibitions to substances that share certain structural properties with those already listed.

As at 27 August 2014, 'drug analogue' was defined in section 301.9 of the *Criminal Code* as follows:

(1) For the purposes of this Part, a substance is a **drug analogue** of a listed controlled drug, or a listed border controlled drug, if the substance is any of the following in relation to the listed drug (or in relation to a primary analogue of the listed drug), however the substance is obtained:

- (a) one of the following (a **primary analogue**):
 - (i) a stereoisomer;
 - (ii) a structural isomer having the same constituent groups;
 - (iii) an alkaloid;

111. *Criminal Code*, op. cit., sections 301.1 and 301.4.

112. *Criminal Code*, op. cit., sections 301.3 and 301.6.

113. *Criminal Code Regulations 2002*, op. cit., Division 3.2.

114. *Criminal Code*, op. cit., Subdivision C, Division 301.

115. [Customs and Excise Legislation Amendment Act 1990](#), accessed 28 August 2014.

- (b) a structural modification obtained by the addition of one or more of the following groups:
- (i) alkoxy, cyclic diether, acyl, acyloxy, mono-amino or dialkylamino groups with up to 6 carbon atoms in any alkyl residue;
 - (ii) alkyl, alkenyl or alkynyl groups with up to 6 carbon atoms in the group, where the group is attached to oxygen (for example, an ester or an ether group), nitrogen, sulphur or carbon;
 - (iii) halogen, hydroxy, nitro or amino groups;
- (c) a structural modification obtained in one or more of the following ways:
- (i) by the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures;
 - (ii) by the addition of hydrogen atoms to one or more unsaturated bonds;
 - (iii) by the replacement of one or more of the groups specified in paragraph (b) with another such group or groups;
 - (iv) by the conversion of a carboxyl or an ester group into an amide group;
- (d) any other homologue, analogue, chemical derivative or substance substantially similar in chemical structure.
- (2) However, a **drug analogue** does not include a substance that is itself a listed controlled drug or a listed border controlled drug.

The Explanatory Memorandum for the Bill that first introduced such provisions at the Commonwealth level stated that the analogue provision was expected to ‘adequately cover newly synthesized drugs’.¹¹⁶ However, this has not been the case. While in some cases similarities in chemical structure are easily identified, other cases are less clear cut. Further, analogue provisions rely upon assumptions that chemicals with similar structures will have the same effects and vice versa— which is not necessarily the case. Synthetic cannabinoids are a case in point. Many of the compounds used in synthetic cannabinoids are not chemically similar to tetrahydrocannabinol (found in cannabis), or to each other, making analogue provisions an ineffective solution.¹¹⁷

Expedited scheduling

As noted above, serious drug offences in the *Criminal Code* apply to controlled and border controlled drugs and precursors listed in regulations or a determination. Until recently, substances subject to indefinite controls were listed in Division 314 of the *Criminal Code*, with temporary listings of up to 12 months able to be made under the Criminal Code Regulations and emergency determinations able to be made by the Minister for up to 56 days. This changed with the enactment of the *Crimes Legislation Amendment (Serious Drug, Identity Crime and Other Measures) Act 2012* and the making of the Criminal Code Amendment Regulation 2013 (No. 1), which together:

- moved the lists of substances from the Act to the Regulations
- replaced the temporary and emergency listing mechanisms with a single emergency listing mechanism based on Ministerial determinations and
- extended the maximum period for which emergency listings may be in effect to 18 months (including any extensions).¹¹⁸

116. Explanatory Memorandum, [Customs and Excise Legislation Amendment Bill 1990](#), p. 44, accessed 27 August 2014.

117. *Consideration of novel psychoactive substances ('legal highs')*, op. cit., pp. 37–41; LA King et al, [Analogue controls: an imperfect law](#), Independent Scientific Committee on Drugs and UK Drug Policy Commission, 2012, accessed 27 August 2014; *Law reform issues regarding synthetic drugs*, op. cit., pp. v, 13.

118. [Crimes Legislation Amendment \(Serious Drugs, Identity Crime and Other Measures\) Act 2012](#) and the [Criminal Code Amendment Regulation 2013 \(No. 1\)](#), accessed 27 August 2014.

These changes commenced on 28 May 2013.¹¹⁹ Moving the indefinite listings from the Act to the Regulations and enabling Ministerial determinations in place of regulations for temporary bans will enable the Commonwealth's drug control framework to be more responsive to a fast moving NPS market.

Other criminal laws

The *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* includes a range of additional offences enacted to facilitate Australia's compliance with the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.¹²⁰ The substances to which the offences apply are listed in Schedules to the Act (Schedule 2 lists narcotic drugs and Schedule 3 lists psychotropic substances).

The Customs (Prohibited Imports) Regulations 1956 and the Customs (Prohibited Exports) Regulations 1958, both made under the *Customs Act*, regulate the importation and exportation of drugs and precursor substances listed in those regulations.¹²¹ Part XIII of the *Customs Act* contains offences for unlawful import and export of regulated substances.

Poisons standard

The Poisons Standard is a legislative instrument made under the *Therapeutic Goods Act 1989 (TG Act)* that incorporates decisions made about the classification of poisons into Schedules as recommendations to state and territory governments.¹²² The *Standard for the Uniform Scheduling of Medicines and Poisons (SUSMP)* at Schedule 1 of the Poisons Standard contains nine Schedules of substances to which different levels of control and access should apply, from pharmacy medicines to prohibited substances. Schedule 9 (Prohibited substances) lists substances that the Secretary of the Department of Health and Ageing or the Secretary's delegate considers:

... may be abused or misused, the manufacture, possession, sale or use of which should be prohibited by law except when required for medical or scientific research, or for analytical, teaching or training purposes with approval of Commonwealth and/or State or Territory Health Authorities.¹²³

The Secretary or delegate may amend the Poisons Standard on his or her own initiative or upon receiving an application for amendment under section 52EAA of the *TG Act*.¹²⁴ Before making an amendment, the Secretary or delegate must have regard to the following factors, as well as any other matters he or she considers necessary to protect public health:

- the risks and benefits of the use of a substance
- the purposes for which a substance is to be used and the extent of use of a substance
- the toxicity of a substance
- the dosage, formulation, labelling, packaging and presentation of a substance and
- the potential for abuse of a substance.¹²⁵

The Secretary or delegate must also comply with relevant guidelines and consider any recommendations or advice from the Advisory Committee on Medicines Scheduling or the Advisory Committee on Chemicals Scheduling and may seek the advice of other committees or individuals.¹²⁶ Records of decisions to amend the Poisons Standard and the reasons for such decisions are published on the Therapeutic Goods Administration's website.¹²⁷

119. *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012*, op. cit., section 2; Criminal Code Amendment Regulation 2013 (No. 1), op. cit., Regulation 2.

120. *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, accessed 27 August 2014.

121. *Customs (Prohibited Exports) Regulations 1958*, accessed 27 August 2014.

122. The *Poisons Standard 2013* (*Standard for the Uniform Scheduling of Medicines and Poisons* No. 3) of June 2013, is the most recent compilation. Amendments to the Poisons Standard made since that compilation are available on 'The Poisons Standard (the SUSMP)' page of the Therapeutic Goods Administration's website. The *Therapeutic Goods Act 1989* (TG Act) is available on the ComLaw Website (accessed 27 August 2014).

123. Poisons Standard 2013, Introduction.

124. *TG Act*, section 52D.

125. *Ibid.*, section 52E.

126. *Ibid.*

127. Therapeutic Goods Administration (TGA), '[Reasons for scheduling delegate's final decisions](#)', TGA website, accessed 28 August 2014.

A number of NPS are listed in Schedule 9 of the SUSMP individually (including 4-MMC, Benzylpiperazine (BZP) and several synthetic cannabinoids) and under group entries (including synthetic cannabinomimetics, except those identified separately in one of the Schedules).

Australian Consumer Law

Consumer laws were relied upon to ban NPS for the first time in Australia in 2013.¹²⁸

The Australian Consumer Law is included as Schedule 2 to the [Competition and Consumer Act 2010](#) (previously the *Trade Practices Act 1974*).¹²⁹ Under section 109, a responsible Commonwealth, state or territory Minister may impose an interim ban on consumer goods of a particular kind if:

- it appears to the Minister that:
 - consumer goods of that kind will or may cause injury to any person or
 - a reasonably foreseeable use (including a misuse) of consumer goods of that kind will or may cause injury to any person or
- another responsible Minister has imposed an interim ban on consumer goods of that kind, or which includes those goods, and the ban is still in force.

Bans imposed by the Commonwealth Minister are effective nationwide, while those imposed by other Ministers are effective only in the relevant state or territory. Interim bans remain in force for 60 days and may be extended by 30 days up to two times (the second must be by the Commonwealth Minister).

Under section 114, the Commonwealth Minister may also impose a permanent ban if one of the same thresholds is met.

Under section 118, financial penalties may be imposed on a person who offers for supply, supplies, manufactures, possesses or has control over consumer goods subject to a ban. Section 224 provides that the maximum penalty is \$1.1 million for a body corporate, or otherwise \$220,000.

In June 2013, the New South Wales Minister for Fair Trading, the South Australian Minister for Business Services and Consumers and the Commonwealth Assistant Treasurer issued interim bans on 19 products containing NPS, mostly synthetic cannabinoids.¹³⁰ The Commonwealth ban applied to goods '(other than food, confectionary, tobacco or tobacco products, or goods entered on the Australian Register of Therapeutic Goods) the use of which involves, or includes, the good being introduced into the body (whether through ingestion, injection, inhalation, smoking, or any other means)' that:

- are known by, or contain any of the 19 listed names (or any similar names) or are otherwise represented to be equivalent to those goods or
- contain a substance proscribed by Schedule 9 of the Poisons Standard 2012 and listed in the notice (again, most of those listed are synthetic cannabinoids).¹³¹

Importantly, the ban applied 'whether or not a statement to the effect that the goods are not intended for human consumption is made.'¹³²

The Commonwealth ban was always intended as a 'stop-gap' measure that would operate only until all states and territories had provisions in place to automatically ban all substances listed in Schedule 9 of the SUSMP, and was allowed to lapse on 13 October 2013 once this had happened.¹³³ In the Framework for a National Response to New Psychoactive Substances, Commonwealth, state and territory governments agreed that 'NPS are more appropriately controlled through drug legislation administered by health and law enforcement agencies'.¹³⁴

128. Australian Competition and Consumer Commission, telephone conversation, 2 August 2013.

129. [Competition and Consumer Act 2010](#), accessed 24 September 2014.

130. [Consumer Protection Notice No. 3 of 2013 - Imposition of Interim Ban on Certain Consumer Goods Containing Synthetic Drug Substances](#), accessed 27 August 2014. The NSW and South Australian bans were previously published on the '[Bans](#)' page of Product Safety Australia, but have been removed.

131. Ibid.

132. Ibid.

133. D Bradbury (Assistant Treasurer), [National ban for synthetic drugs](#), media release, 16 June 2013, accessed 4 July 2013; B Bilson (Minister for Small Business), [State action overtakes 'stop gap' synthetic drug ban](#), media release, 13 October 2013, accessed 11 July 2014.

134. *Framework for a National Response to New Psychoactive Substances*, op. cit., p. 19.

State and territory legislation

Key criminal laws

State and territory drug laws contain offences for possession, sale, supply, manufacturing and trafficking of illicit drugs and controlled substances. A number of individual NPS and groups of NPS are included among the substances to which these offences apply; however, the substances listed are not uniform across the states and territories.

Drug offences relevant to NPS are included in the legislation listed below as indicated.

- **ACT:** the *Drugs of Dependence Act 1989* and *Criminal Code 2002* contain offences that apply in relation to prohibited substances listed in the Criminal Code Regulation 2005.¹³⁵
- **NSW:** the *Drug Misuse and Trafficking Act 1985* contains offences that apply in relation to prohibited drugs listed in Schedule 1 to that Act.¹³⁶
 - The Act was amended by the *Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Act 2013* to include new offences relating to supply, manufacture and advertisement of psychoactive substances (see Part 2C).¹³⁷
- **NT:** the *Misuse of Drugs Act 1990* contains offences that apply in relation to dangerous drugs listed in Schedules 1 and 2 to that Act.¹³⁸
- **Queensland:** the *Drugs Misuse Act 1986* contains offences that apply in relation to dangerous drugs and controlled substances listed in the Drugs Misuse Regulation 1987.¹³⁹
 - The definition of ‘dangerous drug’ in the Act was amended by the *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* to include a thing that has a pharmacological effect that is, or is intended to be, substantially similar to a listed dangerous drug (see section 4).¹⁴⁰
- **SA:** the *Controlled Substances Act 1984* contains offences that apply in relation to controlled drugs listed in the Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014 or a declaration made under section 12A of the Act.¹⁴¹
 - The Act was amended by the *Controlled Substances (Offences) Amendment Act 2013* to include new offences relating to manufacture, promotion, sale and supply of any substance intended to have similar pharmacological effects to a controlled drug or to be a legal alternative to a controlled drug (see Division 4A of Part 5).¹⁴²
- **Tasmania:** the *Misuse of Drugs Act 2001* contains offences that apply in relation to controlled drugs listed in Schedule 1 to that Act.¹⁴³
- **Victoria:** the *Drugs, Poisons and Controlled Substances Act 1981* contains offences that apply in relation to controlled substances and drugs of dependence listed in Schedules to that Act.¹⁴⁴
- **WA:** the *Misuse of Drugs Act 1981* contains offences that apply in relation to prohibited drugs listed in Schedules to that Act.¹⁴⁵

Like the Commonwealth laws, provision is made for analogues of listed substances, but different definitions are used across the jurisdictions.

135. [Drugs of Dependence Act 1989](#); [Criminal Code 2002](#); [Criminal Code Regulation 2005](#), accessed 11 July 2014.

136. [Drug Misuse and Trafficking Act 1985](#), accessed 27 August 2014.

137. [Drugs and Poisons Legislation Amendment \(New Psychoactive and Other Substances\) Act 2013](#), accessed 11 July 2014.

138. [Misuse of Drugs Act 1990](#), accessed 11 July 2014.

139. [Drugs Misuse Act 1986](#); [Drugs Misuse Regulation 1987](#), accessed 11 July 2014.

140. [Criminal Law \(Child Exploitation and Dangerous Drugs\) Amendment Act 2013](#), accessed 11 July 2014.

141. [Controlled Substances Act 1984](#); [Controlled Substances \(Controlled Drugs, Precursors and Plants\) Regulations 2014](#), accessed 24 September 2014.

142. [Controlled Substances \(Offences\) Amendment Act 2013](#), accessed 11 July 2014.

143. [Misuse of Drugs Act 2001](#), accessed 11 July 2014.

144. [Drugs, Poisons and Controlled Substances Act 1981](#), accessed 11 July 2014.

145. [Misuse of Drugs Act 1981](#), accessed 11 July 2014.

Poison laws

Most of the states and territories have incorporated Schedule 9 of the Poisons Standard into their poisons control laws, some with modifications. SA has not done so, instead maintaining its own separate list of prohibited substances.

The relevant legislation is:

- *Medicines, Poisons and Therapeutic Goods Act 2008* (ACT)¹⁴⁶
- *Poisons and Therapeutic Goods Act 1966* (NSW)¹⁴⁷
- *Medicines, Poisons and Therapeutic Goods Act 2012* (NT)¹⁴⁸
- Health (Drugs and Poisons) Regulation 1996, made under the *Health Act 1937* (Qld)¹⁴⁹
- *Controlled Substances Act 1984* (SA)
- *Poisons Act 1971* (Tasmania)¹⁵⁰
- *Drugs, Poisons and Controlled Substances Act 1981* (Victoria) and
- *Poisons Act 1964* (WA).¹⁵¹

146. [Medicines, Poisons and Therapeutic Goods Act 2008](#), accessed 27 August 2014.

147. [Poisons and Therapeutic Goods Act 1966](#), accessed 27 August 2014.

148. [Medicines, Poisons and Therapeutic Goods Act 2012](#), accessed 27 August 2014.

149. [Health \(Drugs and Poisons\) Regulation 1996](#); [Health Act 1937](#), accessed 27 August 2014.

150. [Poisons Act 1971](#), accessed 27 August 2014.

151. [Poisons Act 1964](#), accessed 27 August 2014.

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