MISUSE OF DRUGS AMENDMENT BILL 2021

Introduction and First Reading

Bill introduced, on motion by **Hon Dr Brian Walker**, and read a first time.

Second Reading

HON DR BRIAN WALKER (East Metropolitan) [10.06 am]: I move —

> That the bill be now read a second time.

It came as some surprise to me that the Misuse of Drugs Act 1981 had been in force for so long without a major rewrite. Indeed, such a rewrite is needed, but it is manifestly clear that doing so would take an inordinate amount of time, and while there are many areas in need of attention, it is imperative that we in this chamber, as the ones entrusted with review of legislation, take action now to correct a clear cause of injustice. I was therefore gratified—delighted—to see that the pre-eminent legal mind that is Hon Wayne Martin recently undertook a review of the Criminal Property Confiscation Act 2000, with his report tabled last year in the other place. Spanning some 105 pages, the report contains more than 60 recommendations that require consideration and action. We welcome that serious review, but it is clear that the current situation in our state, especially the COVID-19 pandemic and the multitude of issues that arise therefrom, will likely preclude any attempt to deal with it in a timely manner. Indeed, I am happy to concede that the Attorney General has a herculean task before him with the review of the whole of our confiscation regime. I do not expect him to address it quickly, if he is able to address it at all in the term of this Parliament. I do expect, however, and I hope every member of this place expects, that we make a start, and that we right injustices where we reasonably can.

Bearing in mind the Pareto principle that the most effect can be achieved with the least input, one specific recommendation can be implemented with a minimum of fuss and a maximum of benefit. I am referring to recommendation 9 of the Martin review, which recommends —

> The courts be given a discretion to decline to declare a person to be a drug trafficker if satisfied on the balance of probabilities that the person has not engaged in the trafficking …

Let us look at what this means in practice. Currently, police can use schedule VII or schedule VIII of the Misuse of Drugs Act when assessing whether a cannabis grower is to be accused of drug trafficking. Schedule VII refers to a weight of three kilograms and schedule VIII refers to 20 plants. The choice of schedule remains with the police, and anything over those limits may be deemed a trafficable quantity. In practice, it appears that anything over those limits will be deemed a trafficable offence. Although we might agree in principle with that definition—I assure members that we recommend that this should be examined in full detail at another time to come to another conclusion—currently, the practice of the police force is to measure the weight of the plants as they come from the ground. I am aware of cases in the recent past in which the weight was deemed to include the roots and stems, and also the soil around the roots, including the water in the soil. The effective portion of those plants, the useable portion, is the flower. It is harvested, dried and prepared for use. This is what is used by an individual for managing anxiety, depression, chronic pain, Parkinson's disease or whatever ailment is currently making life intolerable. It is also the portion that is collected and sold by drug traffickers. The wet soil around the roots, the roots themselves, and the stems and leaves are not considered useable.

At present, if an individual is found to have crossed that arbitrary threshold that is based upon weight or upon the number of plants—we have seen on numerous occasions tiny seedlings considered to be just as dangerous as mature, fully grown specimens—they are considered to be, de facto, a trafficker, even though there is no evidence that they were sharing their drugs with others, let alone that they intended to make a profit from them. Surely members agree that such a person should not be classified as a drug trafficker and should not have their assets confiscated unless they can actually be shown to have been trafficking. It is plain commonsense; unfortunately, that is not currently the law in Western Australia. This amendment seeks to address that clear injustice. Many more such issues within the current act need to be amended, but this is one such instance. I hope members will plainly see the injustice that exists. Indeed, this particular amendment should offend no-one, as it simply addresses the fundamental right of a court to assess and address the issues before it.

Currently, if the Director of Public Prosecutions insists on asking for a drug trafficker declaration, the court has no option other than to hand down such a declaration, regardless of the circumstances. Members need to be clear that currently no judicial discretion exists concerning a drug trafficker declaration. Rather, the court is obliged, under a law passed in a previous Parliament, to do so even if it is plain to the judge that no trafficking has taken place. Indeed, there have been cases in recent years in which a judge has commented that there was absolutely zero commerciality—no profit was being made and no money was changing hands—and yet a drug trafficker declaration was forced through. In other words, under the current legislation it is incumbent on the judge to treat many defendants with what amounts to manifest injustice.

If members wish to inform themselves of the prevalence of these types of cases in our courts, they could do no worse than begin with Patten & Anor v the State of Western Australia, a case that was before District Court Judge McCann in 2013. That case led Judge McCann to say openly in court that he was being asked to make an unjust finding and that there was no justice in our current system with regard to confiscation. Beyond that, I encourage members to read the many scholarly public articles and submissions by legal experts such as Malcolm McCusker, QC, and Tom Percy, QC. Both men are experts in their field, and both are highly respected legal minds to boot. Both tell us, as Wayne Martin does, that injustices occur on a regular basis, and it is this that we need to amend.

We need to return to the courts the fundamental right—indeed, the obligation—to assess the matters before it and to mete out a measure of justice. Our judges and lawyers recommend this; that is clear from both the submissions to and the conclusions of the Martin Review. I believe that all members would concur with the shared and congruent opinion of the legal fraternity.

Let me reinforce for the benefit of clarity: the amendment we seek has been recommended by eminent legal minds. It is supported by the legal fraternity in our state. It is not in any way radical or revolutionary. It is about the return to the court of the duty to make an informed and educated opinion based on the matters before it, and to judge accordingly.

If an individual is found to have broken a law, they should expect punishment. We might argue passionately for a change to the law in that regard, as I and my colleague do in relation to cannabis in general, but the principle holds. The state should, however, do everything in its power to avoid injustice. The bill before us—the Misuse of Drugs Amendment Bill 2021—would put a stop to that practice. It would do so by way of one simple and concise amendment: inserting a subsection that would allow a judge to decline to issue a drug trafficker declaration when satisfied that doing so would clearly be unjust.

As I said, I understand that the Attorney General has a herculean task on his hands if he is to recast the whole of the confiscation law, as Mr Martin has suggested that he should and as I hope he will. I have no desire to stand here and allow perfect to be the enemy of good. I hope that members take a similar approach.

The bill before members addresses only one of Mr Martin's recommendations, and it does so without impact upon any other area of confiscation law. It is a standalone provision and one that will, with a few simple words, reintroduce a sense of fairness and equity to a much-maligned portion of our Criminal Code. Members need refer only to the list of contributors to Mr Martin's review to see how widely this simple change is sought. Our judges want it. The legal profession wants it. Our civil liberties groups want it. Even the DPP and the Western Australia Police Force seem to accept that the system as it stands is flawed and overdue for change. I also suspect that if he had free rein and all the time and resources that he could ask for, the Attorney General would also want it.

We do not live in a perfect world, however. Let us start where we can and make incremental improvements that will make a positive impact. Let us return discretion to our judges. Let us trust them to do what is right and let us send a message that justice—true justice—does not deal in the arbitrary or the manifestly unfair.

Pursuant to standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party; nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and I table the explanatory memorandum.

[See paper 255.]

Debate adjourned, pursuant to standing orders.