MISUSE OF DRUGS AMENDMENT (PSYCHOACTIVE SUBSTANCES) BILL 2015

Consideration in Detail

Resumed from 11 August.

Clause 4: Part IIIB inserted —

Debate was adjourned after the clause had been partly considered.

Mrs M.H. ROBERTS: Before consideration in detail on this bill was adjourned previously, I had asked a question. The minister was about to respond. I was waiting for that response when we were interrupted. I am hopeful that we might get that response before she moves an amendment.

Mrs L.M. HARVEY: I have a response for the member for Midland. She asked a question relating to the definitions under proposed section 8N on page 3 of the bill, which states that a substance includes a natural organism, which could be a plant, animal or bacteria because psychoactive substances are not always synthetically constituted. There is an exemption on page 4, under proposed section 8O(1)(g), which is a plant or fungus, or an extract from a plant or fungus. It would seem that the definition and this exempting clause are at odds. I will further explain that. There is an exemption for plants or fungus because people sell legitimate garden plants and fungi that we do not want to be inadvertently affected by the legislation. We need the exemption because many plants and fungi contain psychoactive substances; that is, plants and seeds. Acacia, nutmeg, frangipani and angel's trumpet, for example, can contain psychoactive substances. We do not anticipate that this exemption will be used very often but it is important that we include that exemption in the bill to ensure that we are not capturing people inadvertently who have a legitimate reason to sell those plants or fungi, even though they may contain minute quantities of psychoactive substances. We want to capture the people who are selling the psychoactive substances for other purposes.

Any plants or fungi with significant quantities of psychoactive substances are captured by legislation in other parts of the Misuse of Drugs Act 1981 or the Poisons Act 1964. For example, as we know, opium poppies are already prohibited. This allows us to capture any newly emerging plants or fungi with a psychoactive substance that may be of concern. We can deal with these using the existing schedules in the Poisons Act. Even though, on the face of it, it would appear that those two parts of the clause are at odds with each other, it is important that the exemption remains to ensure that we do not inadvertently capture substances that we do not intend the legislation to include.

Mrs M.H. ROBERTS: I thank the minister for that explanation. That adds some clarity to the issue.

I have been looking at legislation that has been used in other countries. Rather than referring to psychoactive substances, I note that we were talking about substances that include natural organisms and so forth. Other legislation refers to analogues. Why was it determined not to use that definition or use that term?

Mrs L.M. HARVEY: I am advised that analogues are already covered in the Misuse of Drugs Act so they did not need to be included in this amendment bill.

Ms M.M. QUIRK: I was under the impression that the current substances that are not covered by law were not covered because they were not analogues. Is that correct? If they were already covered, why do we need this legislation? Does the minister understand what I am saying?

Mrs M.H. ROBERTS: I understand what the member for Girrawheen is saying. An analogue is effectively something very similar to something that might be covered under the Misuse of Drugs Act but generally that is why it is required in legislation in other places. We want to cover not just the listed substances but also the analogues.

Mrs L.M. HARVEY: We have a more general description of "substance" in the definitions. We have not specified analogues per se. The general description of substances, being a more general term, will be inclusive of analogues.

Ms M.M. QUIRK: I note, for example, that proposed section 8Q(1) states —

> A person commits a simple offence if the person manufactures a psychoactive substance.

The penalty is a fine and/or imprisonment for four years, which seems to belie the proposition that it is a simple offence. Is that to limit the jurisdiction to the Magistrates Court as opposed to other courts? Surely a fine of $48 000 and four years' imprisonment deserves determination in a higher court.

Mrs L.M. HARVEY: It is important that we look at proposed section 8Q in the context of the broader use of the Misuse of Drugs Act. This bill is trying to capture the sale or supply of psychoactive substances that may not necessarily have proved to be harmful to people. This offence around the manufacture, sale or supply of

psychoactive substances will capture people who are manufacturing these substances. Once the substances have been proved to be harmful, they are then captured under schedule 9 of the Poisons Act. That legislation carries a much higher penalty for people who manufacture and supply; that is, 25 years' imprisonment or a $100 000 fine.

Ms M.M. QUIRK: I am a bit perplexed about this. The bill states —

> **psychoactive substance** means any substance that, when consumed by a person, has the capacity to induce a psychoactive effect …

A psychoactive effect is defined in proposed subparagraph (a) as —

> the effect of stimulating or depressing the central nervous system of the person, resulting in hallucinations or a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood; or

What part of that will not produce some harmful effects?

Mrs L.M. HARVEY: It is a level of harm. We found, for example, that there have been deaths and hospital admissions as a result of people taking psychoactive substances that are listed under schedule 9 of the Poisons Act. We have clearly defined that extensive harm is occurring as a result of their use. We are capturing the psychoactive substances that people are charged with manufacturing or selling under this legislation in which the harm has not been determined to the point at which we can confidently list them under schedule 9. That is why it is a lower offence than the offence for manufacturing and selling those substances that are listed under schedule 9 of the Poisons Act.

Ms M.M. QUIRK: That brings me back to my original question. If the minister is saying that proposed section 8Q is effectively believed to be a lesser harm section, is the penalty of $48 000 or four years' imprisonment appropriate? It seems to me that we cannot have it both ways.

Mrs L.M. HARVEY: It relates to having a graded offence provision for a presumption of harm versus proven harm. That is why it is graded. There are also substances that people can be prosecuted for manufacturing that promote the psychoactive effect rather than the substance being proven to cause the effect. We are capturing a broad range of substances. Some of them may have a psychoactive effect. Some of them may be sold or manufactured and marketed as though to cause a psychoactive effect, but until we have proven that a psychoactive effect is induced and harm occurs as a result of that psychoactive effect, it is not appropriate to charge those people with a higher penalty.

Ms M.M. QUIRK: Am I correct in presuming that someone who sells lawn clippings to another individual and says, "This will make you high", would be covered by that proposition? The minister is saying that there is no nexus between harm, and the need to prove harm and the sale of the substance. All that is needed is the assertion that these things will make someone high, and they could be lawn clippings.

Mrs L.M. HARVEY: That is correct; it is a rebuttable assumption. However, if the member has a look at the definition of "psychoactive substance", we are capturing any substance that is marketed as having or is purported to have a psychoactive effect, whether or not it in fact does. That is so that we can capture the substances being sold through these businesses. Most of the substances are sold on the basis of inducing a psychoactive effect, so that is correct. If somebody was selling lawn clippings and purporting them to have a psychoactive effect on people, they could be captured by these penalties; however, there would obviously be an opportunity for them to have some kind of rebuttal in court, but the legislation could have them captured and they could be charged with an offence under the legislation.

Ms M.M. QUIRK: What is the presumption they need to rebut—that they will cause harm, or that they are not psychoactive substances?

Mrs L.M. HARVEY: That it is not a psychoactive substance and that it was not purported to have a psychoactive effect.

Ms M.M. QUIRK: At the risk of sounding flippant, that means that lawnmower men might become expert witnesses on these matters!

Mrs M.H. ROBERTS: I thank the minister for clarifying the matter that she undertook to clarify when we last covered this in consideration in detail. I am referring to the definition in the legislation "substance includes a natural organism", which apparently contradicts what appears, in part, in proposed section 8O(1)(g), "a plant or fungus" et cetera. Prior to us being interrupted on Tuesday I asked a question about proposed section 8Q, which provides for the actual penalties: a fine of $48 000 or imprisonment for four years, or both. The member for Girrawheen has already referred to the simple offence aspect of that. How were those penalties determined? Was

any consideration given to utilising penalty units rather than an exact fine? Many jurisdictions use penalty units; obviously they are used under the Road Traffic Act in Western Australia, and I think in some other Western Australian acts. Other states also tend to do that, which means that fines generally keep better pace with inflation and it is not necessary to have to constantly amend penalties. I ask why it has been determined in that way and why that quantum has been determined, and perhaps what it compares with in the Misuse of Drugs Act.

Mrs L.M. HARVEY: I apologise, member. I had forgotten that we had left the conversation around penalty units. Penalty units do not at present appear in the Misuse of Drugs Act, so we have put the prescribed maximums as a fine of $48 000 or four years' imprisonment, consistent with the language and prescription of penalties in the rest of the Misuse of Drugs Act. Generally speaking, while penalty units are used broadly in the Western Australian Road Traffic Act, they are generally not referred to in other legislation, so this is really more for drafting consistency. As to the level of the penalties that we have arrived at, we have landed on four years because it is similar to penalties in other jurisdictions. The formula for each year of imprisonment, as the member knows, usually works out to be about $12 000 per year, so the maximum penalty is linked to the maximum term of four years' imprisonment for those offences.

Mrs M.H. ROBERTS: I note that the penalty is identical for proposed subsections 8Q(1) and (2); that is, if someone manufactures a substance, it is a penalty of $48 000 or four years' imprisonment, or both. If someone sells or supplies a psychoactive substance, it is also a fine of $48 000 or four years' imprisonment, or both. Can I ask why it was determined to be the same? Are there the same penalties for other drugs within the Misuse of Drugs Act? My question from before really was: how do those penalties equate to or compare with other penalties under the Misuse of Drugs Act for other drugs?

Mrs L.M. HARVEY: We have arrived at these penalties to have some consistency with similar penalties being applied in South Australia and New South Wales. There are a range of different penalties under section 34 of the Misuse of Drugs Act that relate to manufacture, possession, sale or supply; they are different from these penalties. I bring the member back to the provision that psychoactive substances may not necessarily have been proven to cause harm, as we are capturing people for manufacture and possession with intent to sell or supply. It is really more so that we have some consistency with our colleagues in other states that we have arrived at the maximums with respect to these penalties.

Mrs M.H. ROBERTS: I understand that these penalties will now be significantly higher than those that will apply to marijuana, keeping in mind that Kronic and some other drugs are purported to have the same effect as marijuana. What I am really asking here is: why are these penalties significantly higher than those for the use of marijuana? The minister said that she has chosen these penalties to compare with other states; I have asked the question: how do they compare with penalties for the manufacture or supply of other drugs in this state under the Misuse of Drugs Act?

Mrs L.M. HARVEY: Under the penalties prescribed for cannabis resin, the penalty for someone convicted of a crime relating to the intent to sell or supply it is a penalty not exceeding $20 000 or imprisonment for a term not exceeding 10 years, or both. This sits lower than the current penalties for cannabis, which the member can find under section 34(2) of the Misuse of Drugs Act.

Mrs M.H. ROBERTS: I point out that in terms of the monetary fine, the fine applicable here is higher. The minister just said that for cannabis it would be $20 000, whereas here the fine is $48 000. Depending on the level of offence, if only a fine is given, the actual penalty could, in effect, be higher. It also appears that the consistency the minister spoke of, with $48 000 somehow equating to four years' imprisonment, does not apply in the rest of the Misuse of Drugs Act, because $20 000 will not therefore equate to 10 years' imprisonment. Again, I do not think there is a lot of consistency here and I think a complete overhaul of the Misuse of Drugs Act would be in order to get some consistency in penalties. In considering that, I urge the minister to look at using penalty units rather than dollar amounts.

Mrs L.M. HARVEY: I am in furious agreement with the member for Midland that the Misuse of Drugs Act needs review, because, as she knows, new and emerging issues become prevalent in the community. I agree with her that the grading of penalties is somewhat out of step. That is certainly something I have raised with the Attorney General and, between the two of us, I expect that there will be a review of the Misuse of Drugs Act in the near future. At present, though, I think it is important that we pass this legislation so that we do not waste any time in giving the police the ability to prosecute the people selling these psychoactive substances.

Mrs M.H. ROBERTS: To finalise the point about the comparison of penalties, I wonder whether the minister can put on the record the comparison in respect of proposed section 8R, "Promoting psychoactive substances", which provides for a fine of $24 000 or imprisonment for two years, or both, for promoting a psychoactive substance. I wonder whether the minister can put on record what penalty would apply to someone promoting marijuana or whether that is something she has turned her attention to.

Mrs L.M. HARVEY: The short answer is that we did not consider amending any other section of the Misuse of Drugs Act around cannabis. That has not been considered as part of this legislation. This bill deals only with psychoactive substances.

Mrs M.H. ROBERTS: On that same point, effectively, there will be an anomaly. Based on the minister's response to the last question, it would seem that someone can promote cannabis and its effects and not receive a penalty, but if they promote one of these other substances, there will be a penalty. That is what I deduce from the minister's answer. However, I am seeking some further clarification. Proposed section 8R(1) states —

> A person commits a simple offence if the person —
>
> (a) promotes a substance as having a psychoactive effect on a person who consumes the substance; …

On a simple English reading of that provision, if a person promotes cannabis as having a psychoactive effect, maybe the person has committed a simple offence and maybe it would be covered by this provision. If it is not, can the minister explain to me why that simple reading of proposed section 8R(1) is not true or why cannabis would not be covered as a substance that would have a psychoactive effect?

Mrs L.M. HARVEY: Cannabis is exempted because it is already a schedule drug. A person who attempts to sell or supply or offers to sell or supply a prohibited drug is subject to a range of other penalties. Cannabis is in fact already covered by the Misuse of Drugs Act by virtue of the fact that it is a schedule drug and is defined as a prohibited drug.

I move —

> Page 6, line 18 — To insert after "premises" —
>
> (other than residential premises)

Mrs M.H. ROBERTS: I wonder whether the minister can clarify what is meant by "residential premises". I am not being cute. Does it have to be a place that is used exclusively as a home or dwelling place, or could residential premises be anywhere someone resides; for example, someone might reside at the back of or upstairs from their shop?

Mrs L.M. HARVEY: This part of clause 4 relates to the powers of entry for police officers. The broad purpose is to provide police with the power to enter without a warrant the premises of a person suspected on reasonable grounds of manufacturing, selling or supplying a psychoactive substance under proposed section 8Q, promoting a substance as having a psychoactive effect under proposed section 8R(1)(a) or providing information on how or where a psychoactive substance can be acquired. The amendment will have the effect of excluding residential premises from the meaning of premises under this provision, which will result in police having to obtain a search warrant when the premises where the activities are suspected of being undertaken is a residential property. The standard definition of a residential property is the intended definition for the purposes of this amendment. I am advised by police that their general practice is to obtain a search warrant even if they are entering non-residential premises. This provision will ensure that if police officers wish to enter premises that are predominantly residential premises, they are required to obtain a search warrant prior to entering that residential dwelling. We have moved this amendment to protect the sanctity of people's homes, based on the general premise that special status is given to people's homes in law. This will ensure that police give appropriate consideration to the rights of residential homeowners by obtaining a search warrant prior to entry.

Ms M.M. QUIRK: I certainly agree with the proposition that police should not be given carte blanche to search all premises without a warrant, but it concerns me that this will create a loophole that, frankly, we could drive a truck through. If I were in this kind of business, I would maybe operate part of my business out of my residential premises—my home—in order to ensure that the police would need to get a search warrant to pursue these matters. What consideration has been given to the fact that this will displace the activity to possibly residential areas as opposed to business premises, such as the one the member for Victoria Park has raised in recent weeks?

Mrs L.M. HARVEY: This is consistent with other sections of the Misuse of Drugs Act and the Criminal Code that require police officers to require a search warrant to enter residential premises. I do not believe it creates any new kind of loophole. In fact, excluding residential premises from this particular provision was an inadvertent oversight in drafting and that is why the amendment has been moved to ensure that police officers do not have carte blanche powers of entry into our homes, regardless of their intention in doing so. We intend for police officers to obtain a search warrant before they search a person's residential property.

Amendment put and passed.

Mrs M.H. ROBERTS: I will continue with proposed section 8R, which relates to some questions that I asked the minister on Tuesday. Proposed subsection (2) states —

> For the purposes of subsection (1)(a), a person promotes a substance if the person takes any action that is intended or apparently intended to publicise or promote the substance, whether visual or auditory means are employed and whether the substance is directly depicted or referred to or symbolism of some kind is employed, including action of a kind prescribed by the regulations.

I asked the minister some questions the other day about the promotion of these types of substances via the internet, particularly via social media. I asked whether someone was effectively promoting something if there was something on a Facebook page that they decided to "Like" or on a Twitter page that they decided to re-tweet, which is effectively re-promoting or republishing it. In fact, in republishing it, a person may be sending it to a wider audience than perhaps the first person to put it up on the page. The original person to publish it might be interstate and so forth. I asked the minister questions with respect to that. A significant part of the minister's answer to my questions was that this would rely upon intent. Her initial answer was that just "Liking" something on Facebook promoting a substance such as this would not necessarily contravene this legislation but that it would be a matter of intent that would have to be looked at on a case-by-case basis. This seems to be a lesser bar than intent because there is now something that is effectively "apparent intent". I am curious about why those additional words need to be in the legislation, especially clause 8R(2), which states —

> … if the person takes any action that is intended or apparently intended …

What is meant by "apparently intended" and why do we need those additional two words in that clause as well as just "intended"?

Mrs L.M. HARVEY: Member, the clause is meant to be read as it is printed; that is, whether the action is intended or apparently intended. If it is apparent to any other reasonable person that there was an intention to promote the substance, it would be captured by this clause. As with all the offences that police investigate, obviously, they would analyse the time, place and circumstance to decide whether they were going to charge someone with an offence. They would consider all the circumstances of that particular scenario and then determine whether they would be able to successfully prosecute someone. No legislation is perfect. It really depends on the investigating officers and the information they have available as to whether they can prove someone was intending to promote a substance or there was an intention to promote the substance, and that would be captured by this penalty.

Mrs M.H. ROBERTS: Can the minister simply explain for me the difference between "intent" and "apparent intent"?

Mrs L.M. HARVEY: I probably need a dictionary to read to the member. It is if someone has an intention or it is apparent that an intended action is occurring—it is just the language, member.

Mrs M.H. ROBERTS: If it is to be apparent, to whom does it have to be apparent?

Mrs L.M. HARVEY: The ultimate test is the court, so the state would have to prove the elements of this offence, as it does with every other offence.

Ms M.M. QUIRK: This is very perplexing because, as the member for Midland has alluded to, ordinarily the courts make a finding about intention based around the objective circumstances and the facts of the case. They will either make a finding that there was or there was not intent. The member for Midland is asking about this new concept of "apparent intent" because it adds nothing to the prosecution's duty to prove intention. That is my first question. My second question is: why do there need to be regulations? Is this legislation not sufficiently clear? My third question is: by way of clarification, if a person had a packet of some substance with no text but an image of a red kite on it, would that be the sort of thing that would be a symbol, as referred to in this subclause? The inference being that if a person consumes this substance, they will get as high as a kite. Is that the sort of thing the minister meant? I am really concerned about this new notion of "apparent intent" because it really does lower the bar. As far as I am concerned, there are a few other precedents, and, frankly, it adds nothing to the prosecution's duty to prove intent.

Mrs L.M. HARVEY: If something is apparent, it is in the context of it being apparent to an ordinary member of the public —

Ms M.M. Quirk: Where does it say that?

Mrs L.M. HARVEY: That is just the general English definition of those words, member for Girrawheen. It is whether an ordinary member of the public would believe that the promotion was intended—that is what that language means.

Ms M.M. Quirk interjected.

Mrs L.M. HARVEY: To go back to the regulations, the regulations are for two forms and a fee. One of the forms that would form part of the regulations is a destruction notice, which would be served on a person from whom psychoactive substances had been obtained. The notice is provided for in proposed new section 8T(4)(a), which will be created by clause 1, on page 8 of the bill. When police seize a psychoactive substance from a person, they have to issue them with a destruction notice, and the person from whom the goods have been seized has 21 days to notify police that they do not want the substance to be destroyed or that they wish to prove that it is not a psychoactive substance. One of the regulations is for the form for the destruction notice. The other form is an application form for the analysis of a substance. If a person has been issued with a destruction notice, they can apply to have a substance analysed. That form for the application for analysis of a substance is the other part of the regulations that needs to be prescribed. The other part of the regulations is the fee. There will be a prescribed fee for a person making an application for analysis and we expect that will probably be around $500, but we have not actually finalised the cost. They are the regulations that need to be drafted. I have been further advised by the police that they are looking at a maximum of three months for that process.

Mrs M.H. ROBERTS: The minister suggested that "apparent intent" is a common thing. Can she give me any other example or any other precedent in which that term is used in the Misuse of Drugs Act, the Criminal Code or anywhere else? To me, the terms "apparent intent" and "apparently intended" appear to be new terms. Can the minister give me a single other example in which they are used? If the minister cannot give me an example today, can she undertake to give me one at the third reading stage?

Mrs L.M. HARVEY: I can certainly undertake to give the member an example, if one exists, at the third reading stage, but I do not have that information available to me at this point.

Clause, as amended, put and passed.

Title put and passed.

House adjourned at 5.09 pm