

Misuse of Drugs Amendment Bill 2018 – Second Reading Speech

16 October, 2018

Madam President, I don't rise to my feet with any illusions, proposing a change to the *Misuse of Drugs Act*. I know that certain members – I can almost name them ahead of time – will accuse me of being soft on crime, which I'm not. And they will claim that I'm attempting to dismantle a system that's working. They're wrong there as well. It isn't working. And while I would love to take a ball-peen hammer to it, I'm really only proposing a small amendment which would help to ensure that the law does what it was originally intended to do, and doesn't continue to have unintended, and detrimental consequences, as is currently the case.

Members will be aware that I have taken an interest in confiscation law since taking office. They might also have read about some of the clear injustices being inflicted on innocent parties here in Western Australia as a result of them.

To be entirely honest, I would have liked to have been in a position to present a suite of changes today, aimed at ensuring that those innocents could no longer be targeted with impunity – amendments that would have ensured that no more little old ladies were thrown out of their homes, and onto the street, by the DPP, with the tacit backing of the government.

Unfortunately, the mess that is confiscation law is taking longer to untangle than I would have hoped, and so wholesale changes to the *Criminal Confiscation Act* will have to wait for another day. I'd rather get them right, than rush them into the chamber, but rest assured that if the government won't act, then I will certainly bring forward proposals of my own.

In the meantime, I want to do what I can to make the system more equitable and transparent. You should have to actually *be* a drug trafficker to attract a drug trafficker declaration, and the confiscations which flow from that status. Members may be surprised to hear that isn't necessarily the case. I certainly was, and the *Misuse of Drugs Amendment Bill 2018* is intended to correct that anomaly.

As the law currently stands, all you need do to be declared a "drug trafficker" is to have in your possession more than the arbitrary quantity of a given drug than is specified by regulation. Here in Western Australia, that is currently 3 kg of cannabis, for example, or in excess of 20 plants.

Now I can see members doing the maths in their own heads, and concluding that either of those is a serious quantity of drugs. However, we need to be clear that when we're discussing a weight of cannabis under Schedule 7 of the Act, we're not talking about *usable* cannabis. Rather, we're talking about the whole plant, pulled from the ground, roots, stalk, wet soil and all. I know of one case in which a man who had grown five plants in his back garden for personal use had those plants seized and weighed, only to find himself charged with having 9 kg – three times the permissible limit – in his possession. That number was eventually whittled down to 2.9 kg of useable cannabis, but it was the headline figure that was presented in court.

Alternatively, when counting the number of plants under Schedule 8, it isn't uncommon for even the smallest of seedlings to be counted. If it's sprouted by a matter of millimeters, it will be held against you.

Let me come back to the case of the gentleman with the five plants, though, because it's a very informative one. If members want to inform themselves further, it was *Patten & Anor v The State of Western Australia*, back in 2013.

The defence argued – and, indeed, the DPP freely conceded – that there was no commerciality involved, and only the barest minimum of supply. The accused was a fly-in fly-out worker, who had trouble sleeping when he was home from the mines. So, he turned to cannabis as a means of self-medication. And rather than buy his drugs from a street-corner thug, he decided to grow enough for his own use.

Was he in breach of the law? Yes. Was he a drug trafficker? Not under any definition I, or the majority of Western Australians would recognise, no.

The worst the prosecution could accuse him of was occasionally having a friend around who would bring his own cannabis, drop it into a communal pot on the table, and the pair would then share it together. Again, illegal, but surely it's a stretch to call it trafficking?

Unfortunately, that's just what the DPP chose to do. They asked the judge to declare the man to be a drug trafficker, and the judge, whose hands were tied by the legislation as it currently stands, had no choice but to comply.

The transcript from that sentencing hearing makes for disturbing reading, and I will table a copy of the relevant portion of it, so that members can inform themselves more broadly as to His Honour's concerns. In essence though, he said, and I quote, "the law requires me to make an unjust order. There is no justice ... I have no discretion and this is not a judicial decision."

That's a pretty damning statement from a District Court Judge. "I'm being asked to make orders which bear no relationship to the offending," he concluded. And again I quote from the sentencing transcript, "The order for him to be declared a drug trafficker was legal but unjust."

His Honour *did*, of course, have discretion when it came to a just and proportionate sentence – he gave the man a 12 month suspended sentence, noting once again as he did so that there had been no commerciality involved. No prison time served, because the judge did what society expected of him – he weighed the evidence, and he came to a nuanced, and just conclusion.

The DPP wasn't done though. It might not have got a prison sentence, but it now had the one piece of paper it needed – the Drug Trafficker Declaration – to allow it to go after the man, and everything he currently owned, or had ever owned prior to his conviction. It went after his house. It went after his car, and his savings. Nothing he or his partner owned was safe.

Now I don't claim to speak on behalf of other members when it comes to what is considered right and proper. I have my own standards, other members will have theirs. I am as one with the sentencing judge on this, though – here we had a clear injustice; a punishment which did not fit the crime, and a punishment which would almost certainly not have been inflicted upon the defendant if the Court had been given any degree of leeway when it came to the granting of the Declaration.

Nor was this an isolated case. The sentencing judge referred to another, just hours before, with the same unjust and disproportionate outcome, and I have been made aware of many others in recent months.

The advice I have received is that the DPP does, in fact, have discretion as to whether or not it applies for a declaration in an individual case, and I have forwarded that advice to the

Attorney General for his consideration. It is my hope that he will share it with the DPP, and encourage her to consider the circumstances of each individual case before proceeding to lodge a request.

I am enough of a realist to acknowledge that that may not happen, however. The same people who will doubtless rush to call me "soft on crime" will, I am sure, make similar, baseless accusations towards anyone who tries to untangle the mess which previous governments have left to us.

Therefore, I introduce this simple amendment, which would allow our judges the discretion to say "no."

The Bill does so by the simple insertion a new section which states that "the court is not required to declare the person to be a drug trafficker if the court is satisfied that the making of the declaration would be clearly unjust, having regard to the circumstances of the commission of the offence, or any other matter the court considers relevant," and a further section then requires that the judge provide his or her reasons for declining the application.

Madam President, we trust our judiciary to see justice done on a daily basis. Blind justice is all well and good, but shackled justice is no justice at all. Let's return discretion to those experts we appoint on the basis of their learning and their ability, and let's ensure that there are no further unintended consequences as a result of this badly worded, and ill-thought-out law.

Pursuant to Standing Orders, 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 it, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the Bill to the house, and table the explanatory memorandum.