

I write to you as nothing more than a concerned citizen. Only one of potentially tens of thousands of gay men in Australia that the TGA has effectively proposed to be turned into a criminal if I choose to continue to rely on any formula of alkyl nitrites, the drug culturally known as “poppers”.

I write to you in order to make my protest at what appears to be a reaffirmation of “a government about to do something fantastically stupid” to paraphrase the parliamentary speech by Crispin Blunt, the gay male Conservative MP who identified in that speech he would be “directly affected” by a similar change of law by legislation that was proposed not long ago in the United Kingdom.

It took just 90 seconds of speech for Mr Blunt to outline the dangerous consequences of treating poppers as a drug no less illicit than drugs of addiction (which poppers overwhelmingly is not). You can watch the video online – it’s not hard to find, only making the TGA’s evasive interim decision all the more ironic.

Neither was it difficult to find out why the TGA’s “stroke of a pen” interim decision made within an executive branch of power is much less accountable to the public good than any properly debated change in legislation might bring about, the parliamentary debate that at least brought the United Kingdom to realise it was a bad idea and bad proposition.

For at least as long as the pop song ‘Let’s talk about sex’ by Salt-N-Pepa has been released (the year 1991) and probably for decades before this, poppers use has become part of what David Nimmons described in his 2002 publication as gay men having “elaborated a parallel set of acceptable cultural norms” resulting in having “elaborated the most complex, flourishing, nuanced sexual culture the planet has ever known”. (with an emphasis on the word “planet” given the TGA’s interim decision ignores every other western jurisdiction’s laws and mostly and directly affects a culture not sufficiently addressed in that decision), [1]

David Nimmons describes this culture in 2002 at a time HIV was no longer destined to be a death sentence for gay men but also at a time before social media, the rise of dating and hook-up phone apps and a return to a significant number of gay men having casual sex without condoms

A local expression of this set of acceptable cultural norms amongst gay men that run parallel to the rest of society was captured in a 2016 survey of 2886 men which revealed 32 per cent of the survey to be in a sexually open relationship while another 23 per cent to be engaged in only casual sex. These two numbers compared with 31 per cent surveyed that were in monogamous relationships. [2]

Within what is intended to be understood here as a less sexually monogamous culture are ongoing complex changes in the response by gay men to the threat of HIV infection and other sexually transmitted infections.[3] This includes an uptake in the use of PrEP medication recently approved by the TGA.

Unfortunately, we do not know all there is to know about the efficacy of this new form of HIV prevention drug, including any negative consequences that might arise from reductions in condom use, rises in casual sex, new forms of drug resistance imposed on gay men by HIV, and – of most concern to this submission – the contribution of binge drug-taking by gay men when combined with casual sexual practices as a factor contributing to “PrEP fails” with at least one reported case raising this concern [4]

That 1991 Salt-N-Pepa song offers surprisingly accurate advice to an executive decision-maker such as the TGA to take certain matters into account in exercising powers:

Don't be coy, avoid, or make void the topic
Cause that ain't gonna stop it

Yet what does the TGA have to say in its interim report about any negative consequences of erasing the distinctions between akyl nitites (poppers) and addictive, illicit substances?

What does it have to say about the dangers of placing sales of poppers in the hands of drug dealers, potentially exposing gay men to higher uptake of addictive illicit substances also on offer and **how might this negative consequence lead to further failures of the PrEP drug approved by the TGA?**

Does the heavy reliance on a small number of eye health cases to justify a full ban of poppers have anything to do with taking a **coy** approach to the issues surrounding poppers use that required the TGA to **avoid** taking S52(1)(d) into account, even though this submission reminds the TGA that it **must** take it into account to avoid merits review or judicial review that any affected person has a right to initiate proceedings into within 28 days of a final decision that bans poppers?

The reason I draw attention to this subsection of consideration is in particular concern over the way various brands of poppers are marketed – the result being particularly confusing for consumers who I believe have had certain general protections under Australian Consumer Law (ACL) for almost as long as eye doctors have had concerns about poppers use or abuse:

To quote the ACL:

The ACL prohibits misleading or deceptive conduct in trade or commerce. It is unlawful for a business to make statements in trade or commerce that are misleading or deceptive, or which are likely to mislead or deceive. Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive.
[5]

In particular, failure to disclose relevant information that informs poppers users of knowing and assessing their risks on each and every bottle of poppers sold, at least in the jurisdiction the ACL functions (Australia) is inconsistent with the persistent education provided to gay men about knowing their sexual risks and practicing safe (or safer) sex.

If ACON can fit their knowtherisk.org.au message on a drinks coaster at a gay men's club in Sydney, what exactly is the reason for not substituting deceptive labelling on a bottle of poppers with such similar safety messages.....given the ACL general protections arguably require it by law?

Geez, no wonder the TGA's interim decision avoids an entire subsection of its decision-making duties!

Think about it. Salt-N-Peppa's plea for talking about sex has been around since 1991. The ACL has existed since 2010. While the TGA brings about this coy interim decision in 2018 that so directly affects gay men yet dares not speak of them as affected, avoiding a entire subsection of their duties in order not to.

Fantastically stupid, only potentially less legal, procedural, rational and accountable than the United Kingdom example! [5]

Furthermore, this may only be one example of where the rights of gay men could be infringed by the foreshadowed ban of poppers and I'm trusting that other submissions will more expertly address this concern in its broader context.

But I do suspect amongst the relevant considerations of the principles of the rule of law include equality before the law (the law's treatment of potentially binge/addictive substances like cigarettes and alcohol versus the law's treatment of poppers as one example of what might result in legal inconsistency) and checks and balances on the use of power by the TGA.

Two checks and balances available to affected gay men and their community include applying for merits review or judicial review of a TGA decision they don't agree with within 28 days of a final decision.

As my ACL example highlights, it is glaringly obvious that the TGA's interim decision isn't comprehensive as it evades an entire subsection of its decision-making duties and that's a starting point for understanding the administrative law and how it contributes to the future governing of poppers.

To quote The College of Law:

"To fully understand administrative law, it is helpful to have a sound understanding of Australia's federal system of government, the role of the Commonwealth of Australia Constitution Act, the various sources of law and intersection of the different arms (legislature, executive and judiciary). [7]

I urge the TGA to move away from its heavy reliance on the views of eye doctors and be more respectful of the overall legal framework it must operate within so that **many more perspectives** are allowed to inform its final decision, knowing how many affected gay men there will be and knowing this community has a right to appeal your decision.

REFERENCES

[1] Nimmons, David. The Soul beneath the skin. The unseen hearts and habits of gay men, pages 85 and 81. St. Martins Press.

[2] The Melbourne Gay Community Periodic Survey 2016 – article found at <http://www.starobserver.com.au/news/national-news/victoria-news/open-relationships-most-common-partnership-for-gay-and-bisexual-men/149928>

[3] Williams Institute survey – local analysis of issues – article found at <https://www.news.com.au/lifestyle/health/health-problems/new-study-disputes-claims-prep-is-leading-to-a-rise-in-sti-rates/news-story/d87b689988cd5f7a769f7524301995e3>

[4] Drug Resistance does not explain third example of PrEP failure - article found at <https://www.poz.com/article/prep-fails-third-man-time-hiv-drug-resistance-blame>

[5] Australian Consumer Law – A Framework Overview – Page 13 – article found at http://consumerlaw.gov.au/files/2015/06/ACL_framework_overview.pdf

[6] Duties of the (executive) decision-maker listed in detail on Page 147 of Administrative Law Practice, The College of Law Victoria Practice Papers 2017-2018 Lexis Nexis Butterworths

[7] Page 143 The College of Law Victoria Practice Papers 2017-2018 Lexis Nexis Butterworths