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LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Law and Justice Legislation Amendment (Serious Drug Offences and
Other Measures) Bill 2005**

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SENATE
LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE
Wednesday, 3 August 2005

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Kirk, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Knowles, Lightfoot, Ludwig, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen and Watson

Senators in attendance: Senators Crossin, Kirk, Ludwig and Mason

Terms of reference for the inquiry:

Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005

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Committee met at 2.33 pm

ACTING CHAIR (Senator Crossin)—I declare open this meeting of the Senate Legal and Constitutional Legislation Committee. This is the hearing for the committee's inquiry into the provisions of the **Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005**. The inquiry was referred to the committee by the Senate on 15 June 2005 for report by 9 August 2005. The bill proposes to insert a range of serious drug offences into chapter 9 of the Criminal Code Act 1995 and also makes a number of minor amendments to other legislation.

The committee has received 12 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of these are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give such evidence in camera.

[2.34 pm]

NORTH, Mr John, President, Law Council of Australia

ACTING CHAIR—Welcome. The Law Council of Australia's submission has been lodged with the committee and has been numbered 10. Do you wish to make any amendments or alterations to that submission?

Mr North—No, thank you.

ACTING CHAIR—I invite you to make a short opening statement and at the conclusion of that we will ask you a number of questions.

Mr North—Senators, I am pleased to attend this public hearing on behalf of the Law Council of Australia, which is the peak national representative body of the Australian legal profession. It is made up of the 14 bars and law societies throughout Australia and it has a total membership of approximately 50,000 Australian lawyers. I say at the outset that the Law Council support the federal government in its effort to stop drug supply. The Law Council acknowledge the need to strengthen laws and develop effective strategies. We have reviewed the proposed amendments and made our submission. We have raised concerns in five areas. Our concerns relate to, firstly, the use of interim regulations; secondly, the introduction of a number of legal presumptions and the application of absolute liability which operate in favour of the prosecution's case; thirdly, providing recklessness as the standard of criminal responsibility—a fault element; fourthly, the application of alternative verdicts; and, finally, the extension of the Australian Federal Police functions to assist particular authorities in foreign jurisdictions. I will briefly go to each of those in order.

The interim regulations concern us because they will have an effective life of 12 months and they will allow authorities to proscribe substances that have not yet been checked by experts. The Law Council are concerned that interim regulations could take effect without any adequate public consultation and there would be great uncertainty created by regulations due to lack of public knowledge. There is an absence of full consideration by experts. The possibility of not enacting the legislative amendments prior to the lapse of the interim regulations is also of concern.

Senators, I might digress to take you to a brief matter from the case of Sinclair against Brown Coal Liquefaction [1992, 1 Victorian Reports, page 190]. On page 14 of the judgment an important principle that we say is affected by things such as interim regulations and one of our other concerns, alternative verdicts, is mentioned. It says:

Barwick CJ said in a last mentioned case—

and I am happy to provide this to the committee later—

that to bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny.

Stephen J, in the same case, quoted approvingly from the judgment of Scott LJ in Blackpool Corporation against Locker [1948, 1 King's Bench at 349, at page 361]. When speaking of delegated legislation, His Lordship said:

There is one quite general question ... of supreme importance to the continuance of the rule of law under the British Constitution, namely, the right of the public affected to know what the law is.

Speaking of the maxim that ignorance of the law is no excuse, His Lordship continued that its justification:

... is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, that, at any rate, its legal advisers have access to it at any moment as of right.

That is a problem that we see in this proposed legislation with interim regulations that would not be understood by the public, because, as you know, ignorance of the law is no excuse and it also has an effect, we say, on allowing alternative verdicts, which was the fourth of the points that we raised.

Briefly, a matter of major concern to us is the operation of presumptions and absolute liability. They are all set out in our submission. The effect of these presumptions is that the prosecution is not required to prove that the defendant either knew about or was reckless in relation to the intention to sell or to manufacture drugs. The onus is on the defendant to rebut the presumption on the balance of probabilities. Absolute liability has an operation that is similar in terms, and once again the onus is on the defendant to prove on the balance of probabilities that a lesser quantity of drugs was involved pursuant to the defence of mistake as to quantity, which is in proposed section 313.4 of the bill.

The Law Council is opposed to this scheme of shifting the burden of proof upon the defendant by introducing a raft of presumptions and absolute liability. We say that that undermines the presumption of innocence in international law under article 14.2 of the International Covenant on Civil and Political Rights and what should be embraced by Australian society. This favours the prosecution and is unfair and unjust.

We are also opposed to recklessness as the fault element. That says that the higher threshold of guilty knowledge under section 233B(1) of the Customs Act would be replaced by a lower standard of recklessness. We set out in our submission why that is so. We are opposed to that. A person convicted of many of these drug offences faces the real possibility of losing their liberty and serving prison terms that amount at the maximum to life imprisonment. One major objective of the criminal law of deterring criminal behaviour is better achieved, we say, by punishing a person who knowingly and intentionally commits an offence. We also say, in relation to combining parcels of different drug transactions into the one amount to get a greater amount, that you must specify the date and you must specify the quantities. Other uncertainty is really quite unfair in the criminal law.

I have spoken briefly about alternative verdicts. We say in relation to alternative verdicts that, in the determination of any criminal charge against any person, as a minimum they should be informed in detail of the charges against them and have adequate time and facilities for the preparation of a defence. That does not occur if you allow alternative verdicts, even at the time the judge is summing up.

Finally, in relation to the Federal Police extension of powers, we say that the AFP should not assist countries that impose sanctions that are harsh, cruel and inhumane by international standards. We say that this must not occur in relation to any country that has the death penalty and we suggest that there should be a memorandum of understanding between Australia and

relevant governments that states that cruel, harsh or inhumane treatment or punishment such as the death penalty would not be applied where the AFP assisted in the process of conviction. Thank you, Senators.

ACTING CHAIR—Thank you, Mr North. I will start by asking about your objection to the interim regulations. What alternative is there if the interim regulations are not used?

Mr North—We think you would have to legislate very quickly following the obtaining of the relevant expert advice. What happens with these proposed interim regulations is that a substance can be put on the list and someone could be convicted, including a sentence of up to life imprisonment, when the experts themselves are not even in agreement as to whether or not it is a properly prohibited substance. So we say that before you put anything down by way of regulation you should at least have expert agreement on it.

ACTING CHAIR—Is it the issue that the interim regulation is a problem?

Mr North—Yes.

ACTING CHAIR—If you had expert advice as to what should go into the regulation, are you saying it should immediately then be encased in legislation and there should be no need for an interim regulation at all?

Mr North—Yes, because the interim regulation leads us to that bit. I am sorry; I was at some lengths to leave that out. It was much more eloquently expressed by those judges than by me. That is the heart of all of this. What we are trying to get across is that, although the drug trade is an insidious and horrible thing, the people who are brought before the courts under these new bills need to have the presumption of innocence and they need to understand the law. You cannot understand the law if you do not even know that a substance is prohibited because it is there by way of an interim regulation.

ACTING CHAIR—What would stop a person knowing that a substance was under an interim regulation? Are interim regulations not made publicly available and accessible? Are they secret documents or something?

Mr North—I suppose you may have seen the list of drugs that are already there on the schedules in relation to the drug acts. There are literally dozens of them, with names that I do not understand. For members of the public trying to come to grips with that, we say you really do need the experts to convince the legislators that this is a harmful substance that can be used in the illicit drug industry, because members of the public would not know. There are hundreds of prescribed substances on those lists. I have to look them up when I am trying to do drug cases at some stages.

ACTING CHAIR—Is it that the interim regulations prevent people from understanding or having that list accessible, or is it the way in which that list is formulated?

Mr North—I suppose that is right. It is the nature of the regulations themselves. At least when you have the schedule, which is there now and which is legislated, you can look on it and say to your client: ‘Yes, that is a prohibited drug. You are in trouble.’ But, if you are making interim regulations on a substance that has not been ticked off by experts, I think we are leading into that territory that I was talking about in relation to the unknown—and the

penalties which are proposed under this legislation are so severe. They range from 10 years to 25 years to life imprisonment.

ACTING CHAIR—Can I ask you about the application of the absolute liability. I know from my time on the scrutiny of bills committee that there is great concern about shifting the burden of proof and shifting that assumption of innocence—that is, that you are deemed to be guilty and you have to prove that you are not. Is this a change that you believe is not applicable to any area of law, or just to this particular law?

Mr North—Any area. It is a good question. We believe that it should not be applicable to any area of law. We have reached the presumption that you are innocent and that the crown should prove matters beyond reasonable doubt after hundreds of years of trial and effort. We should not lightly give it away, particularly when the person who is convicted then faces such draconian penalties, because they just may not be guilty when convicted under those lower standards.

ACTING CHAIR—If the idea is to come down hard on drug traffickers and people who trade in this area, would it not be, perhaps, an acceptable argument that this is a way to shift in this area of law to prove how tough you are going to be? What is your response to that?

Mr North—There would probably be a great deal of public sympathy for that point of view, but the trouble is if you are the innocent person who is caught up in the absolute liability or in the presumptions and find yourself incarcerated for 20 years to life on a serious matter when you are not guilty. That is the reason why, for murder and everything else, we say that when the crown, with all of its resources, goes against the individual, the crown should prove things beyond reasonable doubt—and no Senate and no government should walk away from that just because we currently have a very, very serious problem of drug use in our community, which we acknowledge.

ACTING CHAIR—The amendments to the Australian Federal Police Act—and I suppose this might be a very controversial question—in relation to the recent publicity around the Bali nine: your suggestion would apply to that case, wouldn't it?

Mr North—Yes, it would.

ACTING CHAIR—There should have been a memorandum of understanding with Indonesia? Is this a practical application of what you are suggesting?

Mr North—Yes. The Bali nine is an unfortunate situation because, as we understand it, the AFP cooperation with the Indonesians occurred at the police to police level, not at the government level. I understand that had our Attorney-General and others been involved the Bali nine would not be open to charges that carry the death penalty. The Australian government at this moment understands that the death penalty should not be there. I believe that the cooperation was at the police to police level, and we are saying that needs to be looked at.

Senator MASON—The acting chair raised an interesting issue about interim regulations, and I want to return to that. Is the mischief that the legislation attempts to address that new drugs can be created that are slightly different from drugs in the schedule? I do not know anything about making drugs.

Mr North—I am glad to hear that, Senator!

Senator MASON—By slightly changing the chemistry of the drugs you could in effect be making very harmful substances that it is not technically illegal to make; is that the mischief?

Mr North—I suppose that is why they want to introduce interim regulations. We say there is no need for that. If something is not classified and has not been ticked off by the experts, there is no need to put it on a list. As you may know, all the drugs that are sold in Australia take methylamphetamine, speed and things like that. When you get the analysis back, they are only six or seven per cent quite often. But as long as there is one per cent or a measurable quantity, and it happens to fall on the list of hundreds of drugs, that is enough. So I do not think that really is the mischief. I think that interim regulations are a lazy and dangerous way of convicting people. The experts should tick off that it is an illegal drug and then you as the government and legislators should put it on the list, not leave it out in the ether so that people will not know without a really tortuous bit of investigation whether it is on an interim list.

Senator MASON—Let us be precise. Is your objection because criminal liability flows from regulations and/or is it because the experts have not yet had a chance to look at the proposed drugs?

Mr North—Both, because the case I quoted to you shows that we as citizens deserve to know what is illegal and what is not.

Senator MASON—Let us go back to part 1 and look at the regulations themselves before we go to part 2 and look at the experts. Looking just at the regulations would it really make a difference—I accept that regulations generally should not impose criminal liability—to the average citizen whether they are looking through a schedule in an act or looking through a schedule in a regulation? Would it make any difference to the liberty of the suspect in terms of their culpability? I am not so sure it would. Is your argument simply one of principle? It is a powerful argument.

Mr North—Yes. It is one of principle. Also, the case that I read to you talks about people being able to find out readily whether something is legal or illegal. As you know, ignorance of the law is not a defence. You cannot say, ‘I didn’t know that substance was on your interim list.’

Senator MASON—But you can still find out in a regulation.

Mr North—It is much harder. I think it is unnecessary.

Senator MASON—Assuming, Mr North, that people will go and look at the legislation at all to determine whether in fact that drug is on it, and I do not buy that. I understand what you are saying, but I do not buy it as an argument. I would like to go now to part 2. Who are the experts reviewing the particular drugs and how long would that process take?

Mr North—I do not know. It would be the department of analytical laboratories and everybody else. They would look at it to see whether it is a hallucinogenic or whatever the new drug of the week is in the dance studios. You need people who are experts, not lawyers.

Senator MASON—No, I understand that—you need scientists.

Mr North—Yes, scientists.

Senator MASON—Do you know how long that takes?

Mr North—I do not.

Senator MASON—As a matter of interest, recklessness is the fault element in this context. You say that is inappropriate because it is, in a sense, lowering the standard. Once again, are you saying that that is inappropriate in this context? You say it is a serious offence—it is a very serious offence—but I recall from law school days that recklessness was sufficient for murder. Why should it not be sufficient for drug importation?

Mr North—It depends. Under the Customs Act—out of which you want to take the drug matters to put them all into here, which is laudable and will give us something that we can understand—you needed to at least have guilty knowledge. But here, just to be reckless might bring somebody in who really we say does not deserve life imprisonment or 25 years—which they will get under that standard.

Senator MASON—So you think the embrace is simply too broad.

Mr North—Yes.

Senator MASON—But it is not too broad for murder. Or they are different offences—is that what you are saying?

Mr North—It is different. For murder you need intention. That intention does not mean that you need intention to murder; you only need intention to cause grievous bodily harm, and if death results that is then murder. But it still is an intentional crime. Here you have an element of recklessness being brought in. It is the recklessness that can reduce murder to manslaughter.

Senator MASON—Isn't recklessness still sufficient? Maybe it is not anymore; it used to be.

Mr North—No. For murder you need an intention to kill—I am talking about New South Wales, by the way—or an intention to cause grievous bodily harm.

Senator MASON—Not the common law, I understand. I am with you.

Mr North—We are at cross-purposes, I am sorry.

Senator LUDWIG—We are informed under the EM about the interim regulation and emergency determination. There are two. I take it that you are opposed to both the emergency determination and the interim regulation.

Mr North—Yes.

Senator LUDWIG—We are advised that they will be disallowable instruments and will therefore also be subject to some level of parliamentary scrutiny. I take it that that is not sufficient to satisfy your objection to those two provisions?

Mr North—No, it is not. If they are sitting there unacted on during that 12 months and not legislated then somebody could go to jail for life.

Senator LUDWIG—And the ability to have that reopened, if they are proved not to be or it is subsequently not finalised? In other words, if some of the issues that you raise come to

fruition, and they do not provide a regulation within 12 months, I suspect that provision would then lapse, would it not?

Mr North—Yes. According to the legislation, if the provisions are not enacted after 12 months, the interim regulation lapses—too bad if you have done eight months in jail.

Senator LUDWIG—Yes; that is the point that I was getting to. If someone had already been convicted and was serving a sentence for the offence, what is your view of what would happen in that instance? Hopefully, they would find a reasonably decent lawyer to reopen the case.

Mr North—Yes, but because it was an interim regulation, presumably validly enacted by the Australian parliament, I wonder whether they would have any redress.

Senator LUDWIG—Yes. In respect of the other provision that you were asked questions about, are you aware of whether an MOU in fact does exist between the Australian Federal Police and other law enforcement agencies overseas? I refer to where you specify cruel, harsh or inhumane treatment or punishment or where the death penalty may apply.

Mr North—I do not know about MOUs between the AFP and anybody else. I understand that the Australian government's position is that they will not assist in matters overseas where someone will face the death penalty. The AFP are setting up, as I understand it, cooperation with other people, as they did in the Bali nine situation with the Indonesian authorities, but I do not understand that that is any more than their own AFP internal policy.

Senator LUDWIG—What I was curious to explore with you was your state of knowledge in relation to what in fact the position was. I will have an opportunity to talk to the AFP, obviously, to see what we can elicit from them in respect of the arrangement. I was curious as to what knowledge you acted upon to write your submission.

Mr North—We were disturbed by the Bali nine situation, which was a difficult one, I assume, for the authorities, because the question was whether or not they should have allowed these people to come back onto Australian soil and then be arrested and therefore not face the death penalty or whether they felt they needed to cooperate at that stage knowing full well that they did face the death penalty. The real question for us is: what information did the AFP have, what information did they share and were they alerted to the fact that all of this was going on? In a few months it will probably make the Schapelle Corby case look like Mickey Mouse, because you are going to have nine young Australians possibly facing the death penalty in Bali. It is an extremely important matter for this committee and for the government to decide how the AFP cooperate with overseas police forces in the future and how the Australian government deals with it. As I understand it, the Australian government was not talking to the Indonesians in the Bali nine case; that was just a matter of the AFP and the Indonesian authorities. That is why nine Australians are facing the death penalty.

Senator LUDWIG—I do see it as an important issue. However, I was trying to establish what knowledge you had in relation to the current state of play as to whether there was an MOU or any other provision currently applying. That was the nub of the question.

Mr North—I am not certain—we can get back to you—but I do not think there is an MOU.

Senator LUDWIG—I am only asking for your knowledge upon which you wrote your submission —whether you are acting on any understanding or whether it was a question that was more at large; in other words, acting on newspaper reports and the like. That was the issue I was trying to explore with you.

Mr North—Our information is that the AFP acted according to internal policy and not with any MOU or any other government interference in place, because we wonder whether the Australian government would have wanted them arrested there and be subject to the death penalty. I have spoken personally to the Attorney-General, and the Australian government, as I understand it, remains very much opposed to placing Australians in jeopardy of the death penalty.

Senator KIRK—I had one question following up a question that the chair asked in relation to the use of presumptions and the change in relation to certain offences that this bill is seeking to bring about. Are there other offences that you are aware of that change the presumption in the manner that this bill seeks to do?

Mr North—I do not think so. No, I am not aware of that. When you are thinking about whether you are going to support these changes as a committee, just look at the penalties open to the authorities, which start with life and go down to 10 years. I would be very careful because I would not like to face raised presumptions that assist the prosecution, who have all the forces of money and intelligence behind them, against individual Australians or perhaps overseas citizens.

Senator KIRK—This sets quite a bad precedent, which might be followed in relation to lesser offences, perhaps, down the track.

Mr North—It would be the start of a slippery slope.

Senator KIRK—Exactly. The DPP says in its submission that, without the provisions I have referred to, the prosecution would face formidable difficulty in securing convictions. What is your response in relation to that?

Mr North—That is not so. People get caught on a daily basis coming into Australia with suitcases of drugs or drugs hidden in machinery or anything else, and convictions are regularly obtained. What you must not do is be hoodwinked by that. If someone is found bringing drugs in on their person then the presumption is there—it is the poor old Schapelle case. It is a very difficult presumption to get over. In other ways they are getting convictions on a daily basis in the courts under the existing law. There is not an outcry that lots of drug smugglers or drug dealers are walking the streets having been freed.

Senator MASON—Can I ask a question playing the devil's advocate in response to Senator Kirk's questions. Mr North, let us take one of the presumptions on page 3 of your submission, the fourth one down: presumption of intention to sell where a person has manufactured a substance. You are in some clandestine laboratory somewhere and it is packed to the rafters with speed or whatever. What is wrong with there being a presumption of intention to sell where someone has been manufacturing piles of the stuff? It is logical that they are likely to sell it. You understand the point. I do not find that particularly evil.

Mr North—It is not evil; it is just changing the presumption that is evil. At the moment, if you are in that laboratory when the police burst in and all of those drugs are there, you are pushing it very hard uphill to try to get an acquittal; the existing law will convict you.

Senator MASON—You think that would be enough?

Mr North—Yes. And they do have, under the existing law in the states, the Drug Misuse and Trafficking Act, deemed supply charges and so on. But you are changing the onus here. The only way you can get out of this presumption is by putting a heavy onus back onto the accused on the balance of probabilities to get away from that presumption. You do not need it. Your existing law is good; it is robust.

Senator MASON—Are you worried that this will be used as a principle—even if it might not make much difference in practice—in another context?

Mr North—Exactly.

ACTING CHAIR—Mr North, thank you very much for appearing before us today and taking the time to send in a submission to the committee.

[3.09 pm]

BUSH, Mr William Murdoch, Member, Families and Friends for Drug Law Reform

McCONNELL, Mr Brian Peter, President, Families and Friends for Drug Law Reform

CHAIR—Welcome. Your association has lodged a submission with the committee. We have numbered that as No. 8. Do you wish to make any amendments or alterations to that submission?

Mr McConnell—No, thank you.

CHAIR—I now invite you to make a short opening statement and at the conclusion of that we will proceed to ask you some questions about your submission.

Mr McConnell—Thank you. The Families and Friends for Drug Law Reform submission focuses on aspects of the bill that deal with drugs, in particular those aspects that affect drug users. The attention given to the commercial manufacture of controlled drugs is appropriate, but that is the top end of the market. Families and Friends for Drug Law Reform are more concerned about the bottom end of the market. We have grave concerns that the bill characterises as serious drug offences a host of activities among users at the bottom of the drug distribution pyramid. In plain language, these may be drug offences but they are not serious drug offences. They are offences involving possession and dealing in small quantities. A number of these are not even recommended in the report of the Model Criminal Code Officers Committee.

The penalties that the bill lays down for these activities are grossly disproportionate to their gravity. The bill is far from being confined to serious drug offences by large-scale suppliers. It is a radical and heavy-handed extension of the Commonwealth's legislative authority into the criminal law on drugs, with potential application to every drug user in the country. By way of example, under clause 302.4 a young person who has grown just one mature cannabis plant weighing at least 250 grams could be expected to be found guilty of trafficking and could be liable to be imprisoned for 10 years or fined \$220,000 or to suffer both penalties. Given the quantity, the onus of proof would fall on him to prove that he did not intend to sell any of it. As another example, a young woman who bought ecstasy tablets for a night out with a few friends would face similarly draconian consequences.

Such minor offences are not serious drug offences. Parents do not want their children's life chances destroyed by a conviction for a serious drug offence. If the government has failed in its obligation to keep drugs away from their children, and the evidence is clear that there has been a failure—and the fact that this bill has been put forward also supports that view—those children should not be disproportionately punished for the youthful indiscretion of dabbling in drugs. The whole point of drug laws should be to protect our young. The question therefore has to be asked: how will the legislation alleviate the problems associated with drugs among them? The committee should assess this having regard to the real world of young people and their families. We should not implement the ruminations of deskbound lawyers and public servants. Much of the bill has been drafted for the convenience of police and prosecutors,

without regard to the welfare of those involved in drugs, whom law and policy should be there to help.

The government proposes to propel this serious drug offences legislation into an environment where children may find drug use attractive and where drugs are widely available. It is known that children are prone to experimentation, but under this bill a big proportion of Australian children will become serious drug offenders. Those who are caught for such activity are likely to be motivated by a sense of rebellion, by stress, by a desire for risk taking, by boredom or even by depression. They may have their lives transformed for the worse. The committee must ask itself how this legislation will: (a) make illicit drugs significantly less available to children; (b) alleviate the serious harm that drug use causes to some children; and (c) not in itself cause enormous harm to the lives of young people. Neither the second reading speech nor the explanatory memorandum provides answers to these questions. The principle of least possible harm should be applied when examining the legislation. For example, would the application of the heavy-handed blunt instrument of the criminal justice system and the possibility of time in jail, where a young person could be brutalised be appropriate for youthful experimentation? Or could there be more appropriate approaches?

The prime objective of the bill, as announced by the Attorney-General, is to 'reduce the supply of illicit drugs by strengthening anti-drug laws', but where is the evidence that this will occur? We are quite sceptical about this. In the past, user level law enforcement, about which we are most concerned, has never produced an overall reduction in drug use.

The committee should also be sceptical that the bill will reduce supply at a higher level. In the past there has been only a five to 20 per cent seizure rate of drugs. The National Crime Authority, in 2000, put the seizure rate for heroin at about 12 per cent. Put another way, this represents an 80 to 90 per cent failure to achieve the goal of reducing the supply of illicit drugs. The bill may make it easier for apprehension and prosecution but without any real progress towards the stated goal.

Some point to the heroin drought as an example of how law enforcement reduced supply, but, as we submit, that had more to do with weather conditions, increased demand from China and a business decision by organised crime than it had to do with law enforcement. If this committee thinks it was law enforcement then I encourage you to ask these questions of the witnesses who follow us: now that the heroin has returned to the streets, why can law enforcement not replicate the exercise and cause another heroin drought? If law enforcement caused the heroin drought, why is it that quantities of methamphetamine were shipped at the same time from the same crime gangs and the same source and reached Australian streets without detection?

The profit motive, among other things, drives the black market in drugs. The demand for drugs appears, from analysis of household surveys, to be relatively constant, even though different drugs may be preferred from time to time. Increased risk of apprehension increases the price, thus adding to the profit and, for some, overriding the fear of arrest. Given this cycle, the market is self-sustaining. Nothing in this bill undercuts the black market.

In all, we have made eight recommendations. They are intended to restore some balance in this bill so that its application does not cause more harm to the young people we should protect and does not undermine some of the basic tenets that form the foundation of our criminal justice system.

Senator MASON—Gentlemen, how many members does the Families and Friends for Drug Law Reform have?

Mr McConnell—We have around 300 members. The majority are here in the ACT but we do have members across Australia.

Senator MASON—Why was that group founded?

Mr McConnell—We were founded in 1995, when, here in the ACT, there were a large number of heroin overdoses. A father whose son had died during the period between Christmas and Easter in 1995 called a public meeting with a member of the Legislative Assembly. My wife and daughter and I were founding members. We were interested because our son had died from a heroin overdose in 1992 and we felt that some fundamental things that were not quite right needed some attention.

Senator MASON—Mr McConnell, to cut to the chase: your concern is that these laws will not do what the government thinks they might do—that is, catch large-scale drug dealers—but will apply to and collect people who are recreational drug users, for want of a better term. Is that your point?

Mr McConnell—We are sceptical that these changes to the laws will make a real difference at the high end. But the real thrust of our submission and what we are putting to you today is that the laws are very harsh at the lower end of the market.

Mr Bush—The whole process by which this law comes before you is one that has been on a train track for many years. It goes back to the Williams royal commission. The proposal was to get similar laws across the country. The Attorney-General established an officers' standing committee which ploughed on for many years and wrote a very voluminous report. This was a group of lawyers. The mindset was one involving the establishment of a criminal code. At no stage was it brought into the overall government's policy in relation to drugs. That policy has a number of wings. This was a wing of supply reduction, which has gone on independently without anything like adequate coordination with the other wings. This bill adds, as it were, to the concern that one has in relation to this recommendation in adding a number of other offences which were not mentioned and not recommended by the officers' committee report, particularly the possession offences and some of the presumptions. It adds them into this, and it puts them under the level of serious drug offences. Under this, 2¼ million Australians will be serious drug offenders.

Senator MASON—If we are talking about generalities, let me ask you a general question of principle: wouldn't you agree, though, that the government is on the right track in trying to make it easier to prove serious drug crimes against serious drug offenders? I am sure you will agree with that general principle.

Mr Bush—No, of course not. The government's intention should be to police existing drug laws and, if necessary, to put more resources into the policing of those laws. But to remove

those protections which, as the Law Council has said before us, are protections that were established through many centuries and of which we are the inheritors—to do it for this particular end, or for any reason, is unsound. But, as I said, this is not why we are here. We are here in relation to the lower end offences. Our concern is for them, not so much for the serious end offences. But you are applying those presumptions of some of the serious end offences to some of the possession offences. These presumptions will be used in relation to young people who, although they should not be engaged in them, are engaged in activities on a regular basis. They are now the victims of those very presumptions. Instead of being engaged in a minor offence, which it is, they can potentially, for actions they are normally engaged in, end up as serious offenders liable to 15 or 20 years imprisonment.

Senator MASON—In other words, you argue that it is criminalising a group of people who perhaps should not be. I raised the general principle before because, as I understand it, it is not the government's intention to reach out and criminalise, for want of a better word, recreational drug users—it is a bad term, perhaps, but I think you know what I mean. Rather, it is to make it easier to prosecute serious drug traffickers. That is the conundrum that the committee is faced with. It is the executive's view that we have to do that and that law enforcement will be assisted by these provisions. Your concern is that they are catch-all provisions that will seriously criminalise people who should not be.

Mr Bush—Yes.

Senator KIRK—You were just discussing with Senator Mason the impact of the bill on people lower down in the drug supply chain—if that is how I can describe them. Is it not the case that there are already some similar offences that apply to that group of people in state and territory legislation?

Mr Bush—Unfortunately, there are.

Senator KIRK—So your objection is extending it to the Commonwealth level?

Mr Bush—Our objection is to this whole serious drug crime exercise. The ACT passed some law last year, and I would urge you to read the parliamentary debates in relation to that and the speeches of the members of the assembly who were opposed to those laws. Two wrongs do not make a right, and the Commonwealth is topping this off by adding some extra dimensions which were not in the recommendations.

Senator KIRK—From what you said, in the ACT these changes were introduced 12 months ago or thereabouts.

Mr Bush—Yes.

Senator KIRK—Has there been any study or report done on the impact of those changes on drug users in the ACT on the lower end of the scale?

Mr McConnell—No, not yet. We have an undertaking from the Chief Minister that he will look at this and review the laws that they have introduced. I suspect—although I do not have any evidence to support it—that he introduced it without examining that part of the legislation and the effect that it would have on users. There are quite serious consequences for users.

Senator KIRK—Speaking from your practical experience and observations, what impact have those ACT laws had on users?

Mr McConnell—To date, as far as I understand it, they have not used those parts of the legislation. They have made a number of large seizures of cannabis in the ACT. Those seizures were made, and could have been made, under the previous legislation, so for those particular seizures it was unnecessary to have the changes that they introduced.

Senator KIRK—I understand that the report by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General suggested that there could well be opportunities for the exercise of prosecutorial discretion and sentencing discretion in relation to drug users and user dealers. In other words, the law still applies as written but there is some discretion in the way that the offences are prosecuted or the sentences that are imposed. What is your response to that?

Mr Bush—Why don't we just have, under the penal code, one sentencing provision: life imprisonment and a \$10 million fine? The fact is that in the media the seriousness of the prescribed offence is used as an argument in relation to the expectations of the community of the penalty that should be imposed. It is an indication to the police in their work as to the seriousness of the offence for which they should be deploying their resources. It means something. It is not just an irrelevant thing.

Senator KIRK—I was just suggesting that if there is the opportunity there in sentencing and/or in making the decision as to whether or not to prosecute, it perhaps 'softens' the impact of this type of law.

Mr Bush—It always does. This is as it has always been, but I think the effect of a particular level of penalty affects the response of those who administer the law and it affects the response of the courts. They have to get their cue as to what the parliament regards as the level of penalty to be applied. That is done by the reference to the penalty that is imposed in the act. It means something.

Senator KIRK—Of course. It sends a message.

Mr Bush—It sends a message, yes.

Mr McConnell—If the intention is to provide some system of expiation, such as the cannabis offence notices and those sorts of things, then it should be prescribed in law, not left to the point where it gets to the court system.

Senator MASON—Could I ask a very specific question. It is about the weight of single cannabis plants. On page five of your submission, paragraph 24, you say:

On its face mere possession of a single growing cannabis plant would be an offence under cl. 303.6 because that provision requires that the plant be cultivated "for a commercial purpose".

Is that right? That is a trafficable quantity? Someone growing a single cannabis plant in their backyard, or whatever they do, would be thrown into—

Mr Bush—This is an example of the combination of the presumption—

Senator MASON—Sure.

Mr Bush—The person has this plant. The question is, first of all, how you weigh it. Are you going to use the dry weight or the fresh weight? They are really gone if it is the fresh weight.

Mr McConnell—And does it include the dirt on the bottom of the plant?

Mr Bush—I think that is clear in the definition. It should not include the dirt, whether or not the police manage that. But it includes the stalk. The definition in the act includes—

Senator MASON—It is not clear whether it is fresh or dry?

Mr Bush—It is not clear whether it is fresh or dry and the definition includes parts of the plant that no cannabis user, as I understand it, would ever think of using. They have that and then they have the presumption. If, say, it is a 250 gram plant in dry weight, they have to prove that they do not intend selling even half a gram of it. If there is a doubt that they did, at least on the balance of probabilities, then they get caught by this trafficking presumption.

Senator MASON—It is not perhaps a bad example of the issue that you are raising. I do not know, but I suspect it is a fairly common practice. This is just one plant, isn't it?

Mr Bush—Just one plant of that dimension can get you up.

ACTING CHAIR—Wouldn't state legislation provide for what you would term a minor offence?

Mr Bush—That raises another question. I think the committee needs to ask itself: why is the Commonwealth at this stage enacting general drug legislation applying across the Commonwealth? Presumably, in its exercise of the external affairs power, it is doing this for the first time. The explanatory memorandum gives some examples of what are all new types of offences where the Commonwealth is doing it, where you have Commonwealth legislation sitting beside state legislation. That is all very well for new legislation. But drug legislation has been here for years and years, and it has been regulated, as you say, Madam Chair, on the basis that it has been adequately covered by state legislation which is nuanced. There are expiation notice systems in South Australia, Western Australia and the ACT. That is not provided for here. There is one provision for the diversion scheme under possession offences. This seems to be potentially a clumsy attempt, certainly not one that seems to have been done with much thought about its implications.

Senator MASON—I just wonder whether the nuances are preferable to consistency and uniformity. I do not know.

ACTING CHAIR—I have one final question. Your submission also states, 'The genuine home cultivator and consumer of cannabis would be caught by these provisions.' What do you define as a 'genuine home cultivator'?

Mr Bush—The person who grows it for their own use. "Genuine" is probably a wrong choice. It refers to someone who genuinely has that purpose.

ACTING CHAIR—It is still an offence, isn't it?

Mr Bush—Yes. However much we would like noncriminalisation of many of these activities, we are not saying that this is something that the committee is to consider, but it is to consider the severity of it and not put these activities under the umbrella of serious drug offences. The punishment should fit the crime.

Mr McConnell—Perhaps I could just explain that the expiation notice system was intended to separate a person who was using cannabis from the criminal market. People are

now allowed in the ACT to grow two plants. It is still an offence, but it is not a criminal offence. It is an offence for which an expiation notice can be given and there is a fine of \$100, or thereabouts, for the offence. It was intended to separate the market so that the person who was going to use or experiment with cannabis did not get caught up with the criminal trade if they went out to, say, buy some drugs off the street and their dealer said: 'I haven't got any cannabis today. I've got some nice white powder for you.' It was intended to separate those.

There were some early figures in the statistics produced by the ACT that gave an indication that there was a slight difference between the ACT and the states that did not have that. There were fewer people going to dealers to get their cannabis plants. So there was a suggestion that it might actually be doing that—separating the criminal market from a person who was growing for their own purpose. People grow for their own purposes not only for the enjoyment of the drug, if I could use that term, but for various pain relief and medical purposes.

ACTING CHAIR—Mr Bush, Mr McConnell, thank you very much for taking the time to appear before the committee today and putting effort into sending the committee your submission.

[3.38 pm]

COCKSHUTT, Ms Melinda, Principal Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

GRAY, Mr Geoff, Acting Assistant Secretary, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

VALE, Ms Corinne, Senior Legal Officer, Criminal Law Branch, Criminal Justice Division, Attorney-General's Department

BEVERIDGE, Federal Agent John, National Coordinator, Border (Drugs), Australian Federal Police

PHELAN, Federal Agent Michael, National Manager, Border and International Network, Australian Federal Police

CARTER, Mr James Edwin, Acting Assistant Director, Commonwealth Director of Public Prosecutions

PEDLEY, Mr Mark William, Acting Deputy Director, Commonwealth Director of Public Prosecutions

HILL, Mr Paul Maurice David, Director, Law Enforcement Policy, Australian Customs Service

ACTING CHAIR—I welcome representatives of the Attorney-General's Department, the Australian Federal Police, the Commonwealth Director of Public Prosecutions and the Australian Customs Service. We have a submission from the Commonwealth Director of Public Prosecutions, which is submission No. 3. I will ask those representatives: do you wish to make any amendments or alterations to that submission?

Mr Pedley—No.

ACTING CHAIR—Before we commence, I remind my colleagues at the table that under the Senate's procedures for the protection of witnesses appearing before us departmental representatives should not be asked for opinions on matters of policy and, if necessary, they must be given the opportunity to refer those matters to the appropriate minister. I now invite witnesses to make a short opening statement. At the conclusion of that we will go to questions. Mr Gray, we will start with you.

Mr Gray—Thank you for the opportunity to appear before the committee today. I do not plan to say a great deal in relation to the bill, because hopefully the bill and the explanatory memorandum will speak for themselves. However, it is worth noting that, if the bill is enacted, it will introduce new and important legislation. For the first time there will be a comprehensive range of drug offences at Commonwealth level and that will give Commonwealth agencies the flexibility to deal with the full range of conduct that they come across in the course of drug investigations.

The objective of this bill is not to override state and territory drug laws. They will be preserved by the operation of section 300.4. The aim is to avoid a situation where Commonwealth agencies need to prosecute under state law or refer a case to state authorities

in order to deal with the full range of conduct that comes to light in a Commonwealth investigation.

There are really two parts to the drug offences in the bill. The first part deals with the import and export of drugs. Those bits basically replicate the existing provisions in the Customs Act. There were some comments made earlier suggesting that there is a change of law. I think on analysis you will find that there is not and that the provisions are basically the same as appear in the Customs Act. That was done deliberately. The approach that has been taken is that there should be no diminution of existing law dealing with drug offences at Commonwealth level or with the penalty levels that apply to them.

The second part of the bill enacts a range of new domestic offences which apply for the first time at Commonwealth level. As I said, those offences are not designed to override state and territory law but to give Commonwealth agencies the full range of options that they require.

The domestic offences, as you are probably aware, are based on the recommendations made by the MCCOC committee in 1998. At the Leaders Summit On Terrorism And Multijurisdictional Crime in 2002 all jurisdictions made a commitment to implement the MCCOC model offences. This bill will enable the Commonwealth to honour that commitment.

There have been some changes made to the MCCOC model, some of which have been referred to. It is not surprising—those recommendations were made seven years ago, and things have changed a little since then. There is a broader range of offences under the bill than was recommended by MCCOC, including more offences to deal with precursors, which is becoming a much more recognised problem, and offences to protect children who come into contact with the drug trade. Those are an important part of this legislation.

The Commonwealth is conscious of the need to work towards greater consistency in drug laws in Australia. Implementing the MCCOC recommendations will be part of that process. That really is the driving thing behind this bill.

The Commonwealth is also working with the states and territories on a body called the Intergovernmental Committee on Drug Scheduling Working Party on Controlled Substances. That body is working to develop model schedules on drug types and quantities that can apply across Australia. What we hope will come out of that is far more consistent laws in relation to the drugs that are covered and the penalties that apply. The plan is to review the schedules that appear in this bill when the working party has provided a report. However, government takes the view that this bill is too important to hold in abeyance until that project has been completed.

There are a number of other schedules to the bill. We are quite happy to answer any questions that the committee has in relation to those, but I do not plan to speak to those at this stage. That was really all I wanted to say by way of preliminary comments. I think Mr Pedley has some comments as well.

Mr Pedley—The Commonwealth DPP is responsible for the prosecution of the offences against the laws of the Commonwealth in accordance with the prosecution policy of the Commonwealth. The existing offences in the Customs Act involving narcotic goods imported

from overseas are amongst the most serious offences prosecuted by our office. Offences involving a commercial quantity or more carry a maximum penalty of life imprisonment. For example, in the 2003-04 financial year the office prosecuted on indictment some 241 charges for offences against the Customs Act. Most of those were under section 233B of the Customs Act, which includes the current Commonwealth offences of importing or exporting and possessing narcotics. It is our submission that it is most important that the strength of the existing laws be maintained. The current offences in the Customs Act are directed towards breaches of Australia's border integrity and division 307 of the bill, which deals with the import/export offences, also has that focus.

The provisions of the bill have been drafted in accordance with the Criminal Code and with this in mind. They do not involve lowering the proof; the stated aim was to replicate the current proof requirements of the Customs Act in the proposed offences in division 307 of the bill. We agree with Mr Gray in respect of that particular issue and we disagree with the Law Council's submission on that point.

The bill includes new offences which have no counterpart in the Customs Act. From our point of view, the trafficking offences are of significance. Currently it is not uncommon for charges of importing to be joined, in an indictment, with state counts of trafficking. This is so where the defendant is alleged to have been involved not only in the commercial dealing of drugs within Australia but also in the importation of them. Having a Commonwealth trafficking offence will be of assistance, as this will mean that some of the complications of running trials involving both Commonwealth and state charges will not arise.

Senator LUDWIG—We will deal with the Australian Federal Police first. The Law Council made a submission—I particularly note the last page. Starting at page 7 and going through to page 8, it goes effectively to the issue that the proposed schedule 4 provides that the function of the Australian Federal Police extends to providing assistance to and cooperating with Australian and foreign law enforcement agencies. They support the amendments which authorise the AFP to assist particular authorities in other jurisdictions. They did indicate on the record today that they were concerned about the circumstances of the Bali nine. You may be limited as to what you can say in relation to that issue, but we can deal with the substantive matter. Is there a memorandum of understanding in place to deal with these types of cases that may arise? Have you had the opportunity to have a look at the Law Council's submission?

Federal Agent Phelan—Yes, I have briefly had a look at it. An MOU in relation to the death penalty issues?

Senator LUDWIG—Yes, or how it operates as far as the Australian Federal Police uses it.

Federal Agent Phelan—The Australian Federal Police have an internal guideline which replicates government policy in relation to how we go about investigating offences that may attract the death penalty. It clearly sets out what information we will pass over to foreign law enforcement agencies, what we will not and at what stages we will do that. I believe that may have been tabled at the last round of Senate estimates hearings.

Senator LUDWIG—Are you referring to the AFP's practical guide on international police-to-police assistance in death penalty charge situations?

Federal Agent Phelan—That is what I am referring to, yes.

Senator LUDWIG—What happens—we can use, impolitely, the Bali nine situation—prior to charging them? If that policy relates to assistance in death penalty charge situations, when there is the absence of a charge—so when a dossier in a civil law country is being prepared for prosecution and therefore there is no pending prosecution or even a charge—what guides the police-to-police cooperation? Clearly, it could not be this policy.

Federal Agent Phelan—If no changes have been laid—

Senator LUDWIG—Yes.

Federal Agent Phelan—which could be the case—and, indeed, is the way it currently stands with the Bali nine.

Senator LUDWIG—That would not apply in those circumstances?

Federal Agent Phelan—No, it does apply because no charges have been laid. Those guidelines clearly talk about the existing arrangements for police-to-police cooperation, in which case we would continue to supply that information as required.

Senator LUDWIG—So the way it would work is that prior to charging—as I understand it, and correct me if I am wrong—you would provide police-to-police cooperation. On what basis and under what guidelines or procedures?

Federal Agent Phelan—It depends. Sometimes we have an MOU with that particular country; sometimes we do not. Sometimes it is done on an ad hoc arrangement, in which we would be relying on the current provisions within the Australian Federal Police Act. Under section 8, the provision of services in relation to the laws of the Commonwealth and safeguarding the Commonwealth's interests; and also under section 8(a) to (c) we would, say, do anything incidental to that. Depending on the particular circumstances of the case, we would rely on those provisions, which means we might be relying on existing treaties that the Australian government has signed in relation to particular crime types or it could be other arrangements that exist: government-to-government MOUs or police-to-police MOUs. If no MOU exists then we would use our discretion as to whether or not we would cooperate.

Senator LUDWIG—So in effect this policy would not apply in this instance? At the last dot point on page 1—there are not too many dot points; there are two—it says:

Where the assistance of the AFP is sought by the police or another law enforcement agency of a foreign country in relation to a matter in which a charge has been laid under the law of that foreign country for a crime attracting the death penalty, no action is to be taken, nor should any indication be given as to the decision likely to be taken in respect of that request.

Then it says that all requests are to be notified to the Director, International and Operations as soon as possible after receipt. In essence, that would only apply where someone has been charged.

Federal Agent Phelan—That is right. And if someone has been charged then we require the permission of the Attorney-General and/or the Minister for Justice and Customs to be able to continue to hand over that information, which of course has occurred in the past.

Senator LUDWIG—But prior to charging do you notify the Attorney-General or the Minister for Justice and Customs of what information you are sharing?

Federal Agent Phelan—Not as a matter of course. That is at the AFP's discretion.

Senator LUDWIG—What policy dictates that? If we take a person who has been apprehended in a civil law country, they are not charged. In a common law country the charge is usually the thing that starts the arrest and subsequent incarceration and detention until trial—the fact that the charge has been laid. But in a civil law country the charge is usually only after a dossier is prepared, only after the evidence is gathered, only after the case is made.

Federal Agent Phelan—That is right. In those particular circumstances, up until the point where a charge has been laid then we would continue to provide the assistance.

Senator LUDWIG—So if a dossier is being prepared for a likely charge which will eventuate in the death penalty then in that instance you will cooperate up to the point of the charge and then cease cooperation.

Federal Agent Phelan—Without ministerial approval, yes.

Senator LUDWIG—But the point might be that there is no requirement to assist, because all the assistance has been done prior to the charging.

Federal Agent Phelan—Not necessarily. There are circumstances even in a common law country or jurisdictions that have the civil system where further information is required post charging. In most cases that is sought under mutual assistance, which of course goes directly to the Attorney-General for approval.

Senator LUDWIG—In respect of the assistance that is provided up to charging, do you log that or do you keep a mechanism to ensure that assistance has been given in a reasonable way that will not cause you any embarrassment?

Federal Agent Phelan—I do not know if it would cause us any embarrassment, but certainly any information that we hand over to foreign law enforcement agencies is recorded on our internal systems and there is a very strict audit trail.

Senator LUDWIG—Is it an internal policy document that governs what you will provide on a police to police basis?

Federal Agent Phelan—It depends what is requested. Some things that are requested by foreign law enforcement agencies we simply cannot provide. For example, sometimes they ask for things that we require coercive powers to obtain here in Australia, either under a search warrant or under some other form of compulsion in legislation that exists here, and we cannot provide that information.

Senator LUDWIG—The MAA would apply in that instance.

Federal Agent Phelan—Exactly.

Senator LUDWIG—I am more interested in those areas where the MAA would not apply—in other words, where the use of coercive powers was not a requirement.

Federal Agent Phelan—That is right.

Senator LUDWIG—So there is only the internal policy guideline rather than that guideline which would apply prior to charging?

Federal Agent Phelan—That is right. The guideline that you have before you is the only guideline that exists in relation to that matter.

Senator LUDWIG—How does that interact with the minister or the Attorney-General? Are they aware of the documents that you provide prior to a charge in the circumstances I have outlined?

Federal Agent Phelan—Prior to the decision by the AFP to provide the information?

Senator LUDWIG—Yes.

Federal Agent Phelan—No, not as a matter of course.

Senator LUDWIG—So these are within operational matters of the AFP?

Federal Agent Phelan—Absolutely.

Senator LUDWIG—If the minister requests to know what you are doing, do you provide a brief, or is that still within operational matters? You work under a statute so I guess there are limits to what you can say and what you can provide, even to the minister, I suspect.

Federal Agent Phelan—That is right. We do not keep the minister in the dark.

Senator LUDWIG—I am not suggesting that either.

Federal Agent Phelan—There are times when we regularly brief the minister on operational matters. But prior to taking the operational decision, that rests with the AFP and is made by the AFP.

Senator LUDWIG—Customs are not here to be able to answer this question, but the Attorney-General's might be able to shed light on this for Customs or seek to gain assistance from them in respect of it. There seems to be a detention power that is available to Customs. A technical amendment to section 219ZJC—you will need to renumber this one day—subsection (1)(c)(ii) of the Customs Act is proposed in schedule 8 of the bill to ensure that, however the condition is expressed, in effect it would prevent the person from leaving Australia and then Customs would have the power to detain them. Is that a new power or is that a clarification of an existing power?

Mr Gray—It is my understanding that it is a new power. No, my understanding has changed: it is a clarification of an existing power.

Senator LUDWIG—How does that work if there is a variety of ways in which bail conditions can be expressed? What I am concerned about is if you ended up detaining people unlawfully or without due reason, or that proper process was not undertaken.

Mr Gray—There are some representatives here from the Australian Customs Service.

Senator LUDWIG—They can take it on notice—or if they can answer it in short form then I would be happy to hear that.

Mr Hill—In relation to schedule 8, section 219ZJC(1)(c)(ii), we already have a clause that enables a person on bail to be detained at the port of entry. All this does is to clarify the

situation where we have a range of different ways in which the condition might be expressed. It ensures that, however it is expressed, we can still detain someone.

Senator LUDWIG—What exactly is the extension then—the mischief you are trying to clarify or the issue you are trying to deal with?

Mr Hill—Basically, it is the reference there to ‘subject to a bail condition however expressed’, which is very minor.

Senator LUDWIG—What was happening before? Couldn’t you detain people who were subject to certain bail conditions?

Mr Hill—It is simply that bail conditions were expressed in different ways, and you could take the view that at times the effect of the wording was to prevent a person leaving the country. But on a strict reading, it did not actually say that. What we were after was an amendment that ensured that, however the condition was expressed, we could still take the action.

Senator LUDWIG—Does that mean that if the bail condition is not clear as to whether or not they can leave the country you can detain?

Mr Hill—Yes.

Senator LUDWIG—So the benefit of the doubt is not provided to them, nor do you need to return to the court to clarify what the bail condition is?

Mr Hill—Strictly speaking, yes.

Senator LUDWIG—That is an extension of your existing power.

Mr Hill—Providing that the provision appeared to be reasonably clear that the effect was to prevent the person leaving then this provision would apply. If in fact on the reading it could not have that effect then it does not change.

Senator LUDWIG—But who reads it that way?

Mr Hill—Customs.

Senator LUDWIG—And then Customs detain. If the person then objects and says, ‘No, I think you have read it wrongly,’ what happens next? If you clearly detain them and they miss their flight to the US and they miss their business opportunity—or whatever it might be—what happens next?

Mr Hill—I guess it depends on what the order actually says. If the order is expressed in such a way that its effect would be that the person would be prevented from leaving the country then, on a plain reading of it as far as we understand it, we would detain the person.

Senator LUDWIG—Yes, but how would the person, having been detained, then object to your reading? What if they say whilst in detention—this is if we play devil’s advocate—‘Manifestly your reading is wrong, and in fact I can leave. You have detained me unlawfully’?

Mr Hill—Normally if an objection is raised the matter would be dealt with at the airport, being referred ordinarily to the senior officer who had made that decision. It would not necessarily be a person at the barrier who makes the complete decision.

Senator LUDWIG—So if the senior Customs official has detained them and they still object, what happens then?

Mr Hill—If it is still considered that the bail condition applies to prevent the person leaving Australia then the person would be prevented from leaving.

Senator LUDWIG—How do they then go and resolve it? Do they have to go back to the court and reopen the bail condition?

Mr Hill—Essentially, yes. You have got to be aware that once a person has arrived at the airport ready to leave—

Senator LUDWIG—They are going to be agitated if you have read it wrong.

Mr Hill—That is exactly right. If it is a situation where the person is ready to leave and we are advised of this bail condition then we must act in relation to that. We cannot simply ignore it. We certainly would not act to prevent the person leaving unless there were good grounds for that belief.

Senator LUDWIG—I will not dwell on it any longer. There is no similar power anywhere else in Customs for that, is there?

Mr Hill—No.

Senator LUDWIG—That is a new power in the sense that you have the right to be able to read into a bail condition.

Mr Hill—The amendment ensures to some extent that we do not have to read anything into it, providing that the effect is reasonably clear.

Senator LUDWIG—People can argue about that for a long time, I suspect. I refer to the other matters that were raised by the Law Council of Australia, particularly the issue of interim regulations. The usual requirement, they say, seems—and it does seem to be this—to be a necessary impost. What is the justification for that? Is that the Attorney-General's response to that? Why can't you deal with it in the normal regulation-making power? Why do you need the power of a two-stage process: firstly, an interim regulation and, secondly, a determination to be made urgently? I think you might have been in the room when we discussed with Mr North the possibility of a regulation not being subsequently made or an interim order not being made into a regulation or lapsing where a person might have already been charged and incarcerated.

Mr Gray—The final question is something we have not given a great deal of thought to. We have given a great deal of thought to the first questions. The concept is of course to make this legislation responsive, flexible and able to be effective. There have been situations where drugs have been on the way to Australia or a new drug has been manufactured. The provision for emergency determinations is meant to cover those situations. It can take time to get regulations, even interim regulations, enacted.

Senator MASON—So that is the mischief, Mr Gray—a new drug either has been invented or is being imported but is not in the current schedule—

Mr Gray—That is right.

Senator MASON—and you have to add that drug to it quickly?

Mr Gray—Yes. There have been situations where information has come to police or Customs that a boat is on the sea with a container load of drugs. What do you do when it arrives? This gives you a capacity. If you look at the bill, particularly at the provisions dealing with emergency determinations, you see it does have some qualifications on the minister's capacity. The minister has to be satisfied that taking the drug 'would create a substantial risk of death or serious harm' or 'would have a physical or mental effect substantially similar to that caused by taking' another illicit drug and there is a substantial risk that the drug will be 'taken without appropriate medical supervision'.

This is meant to, and I think it does, constrain the ability to enact emergency determinations. It is for the situation where people do manufacture drugs. The reason why the schedules of drugs are so lengthy is that people keep coming up with new variations on the chemicals and manufacture new drugs. The complaints by the Law Council also went to the concept of interim regulations and suggested that it should be left to amendments to the act. We all know that it takes considerable time in many cases to get legislation changed. The provision for interim regulations gives a 12-month opportunity to get the legislation amended.

To answer your last question, throughout the drafting of this the presumption has been that, if a drug is particularly serious and the minister is satisfied on those matters that I have just specified, the drug gets into an emergency determination. The test is going to be the same or possibly lower to put it into the schedule. There is an assumption that, if the drug is seen to be a serious enough risk by the responsible minister to make its way into an emergency determination, eventually it will make its way into the schedule. It is possible theoretically that parliament might decide not to pass an act or an amendment to the schedule, but by that stage parliament would have passed up the opportunity to disallow the emergency determination and the interim regulations. It is not as though it will come as an amendment before the parliament for the first time. I put that in the realm of theoretical possibility rather than in a major way.

Senator LUDWIG—So your defence is that it will not happen?

Mr Gray—You would have to be very brave to make that prediction, but anything is possible.

Senator MASON—Can I just jump in for a second?

Senator LUDWIG—Yes.

Senator MASON—What were the fetters on the ministerial discretion again?

Mr Gray—I can take you to the section, which is 301.6 to 306.12. The reason why there is a number of those is that controlled drugs, controlled plants, controlled precursors, border controlled drugs and border controlled precursors are all dealt with in separate sections. Reading from 301.6, it says:

The Minister must not make a determination under subsection (1) unless he or she is satisfied:

(a) that taking the substance or plant concerned—

and this is controlled drugs and controlled plants—

(i) would create a substantial risk of death or serious harm; or

(ii) would have a physical or mental effect substantially similar to that caused by taking a substance or plant already listed or described in section 314.1 or 314.2. 2.

Senator MASON—But a physical or mental effect that is caused by cannabis would satisfy that criterion, would it not? Would that not be serious enough to warrant an emergency determination?

Mr Gray—It would have to satisfy 301.6(2)(a)(ii). I think that would have to be right: if cannabis is listed and a drug had a substantially similar physical or mental effect to cannabis then yes.

Senator MASON—And that would justify an emergency determination?

Mr Gray—Provided that the minister was also satisfied that taking the substance or plant would create a substantial risk of death or serious harm.

Senator MASON—Or ‘would have a physical or mental effect substantially similar’.

Mr Gray—Yes, ‘or’.

Senator MASON—That is not a high-bar test, is it?

Mr Gray—It is to equate to the drugs which are on the list.

Senator MASON—For something as serious as cannabis, you make an emergency determination. As the Law Council says, without putting it through legislative scrutiny, there is a ministerial determination. We will have to think about this.

Mr Gray—It is obviously meant to cover, as I said, the situation where a new drug is manufactured—

Senator MASON—I understand that.

Mr Gray—which is similar to an existing drug. To apply it to a naturally occurring product, the answer is yes. You are right: there is power to make the determination, which is of course a legislative instrument.

Senator LUDWIG—So you would take exception to a caffeine derivative plant.

ACTING CHAIR—In that sense, when Families and Friends for Drug Law Reform say that perhaps the bill goes too far, is that an example?

Mr Gray—I do not think I could comment on whether the bill goes too far.

Ms Vale—The argument would be that, if parliament has seen fit to list substances such as cannabis, and there is a new substance on the market that has a similar effect, that should be reason enough to include it in a list.

Senator MASON—Ms Vale, the problem is that this is an executive decision, not a legislative one. And that is a big difference.

Ms Vale—That is correct, although it is subject to parliamentary disallowance.

Senator MASON—Yes.

ACTING CHAIR—You sat there and listened before to witnesses—I am sorry we are jumping around—who put to us quite succinctly that this just goes too far. To refer to their submission, it can pick up a kid who might be playing around with this stuff or a person who

might just be growing one or two plants at home. What can you tell me that will reassure me that those people will not be subject to the severe penalties in this bill?

Mr Gray—Is that in relation to the emergency determinations or in relation to cannabis?

ACTING CHAIR—Are they not linked, perhaps, in some way? There might be someone dabbling in a new drug, or young kids experimenting.

Senator MASON—The issue before us is this: we have, as the chair says, Families and Friends for Drug Law Reform saying there is a radical extension of Commonwealth legislative authority; we have heard the Law Council say, in effect, that this is potentially trashing ancient common law rights; and in your oral submission you are saying that this is not an extension of Commonwealth legislative power at all, or at least it is very minor.

Mr Gray—I do not think I am saying—

Senator MASON—I do not mean to misquote you.

Mr Gray—I think it is a substantial and significant extension of Commonwealth power.

Senator MASON—I must have misheard you. Okay.

ACTING CHAIR—If that is the case, what can you tell me on record that would perhaps contradict the submission put to us by the Families and Friends for Drug Law Reform, who put to us quite succinctly in their submission, as I said a minute ago, that this in fact has ‘potential application to every drug user in the country’ and that it will pick up drug users who are moderate, genuine home cultivators and consumers of it for pleasure.

Mr Gray—A number of questions are being put to me. I might take them in no particular order. In the answers to the questions that were put to the people who appeared before us, their initial evidence seemed to be based on an assumption that none of this is unlawful at the moment. In fact, there are laws. There is nothing in this act which is going to criminalise something that is not already criminal at state level. This is the concept of consistency with state law that I talked about. One of the reasons—I am not sure it is the only reason—for including that provision is to have a scheme which is consistent with state law. There can be differences with penalties, expiation notices and diversion schemes. If you go to specific state laws you may very well find that in some states a person who is prosecuted under one of these provisions would be dealt with in a different way. And that is something we decry. Basically what we want to see at the Commonwealth level is consistent drug laws. The MCCOC recommendations were made seven years ago. It has taken this long for the Commonwealth to enact model laws. We see this as very much a trigger or a basis for the Commonwealth to now go to the states, which have not all enacted MCCOC model laws, and say, ‘Please do so. Let us have some consistent laws.’

ACTING CHAIR—In the minister’s speech when the bill was tabled in parliament he said that the new offences will also apply to drug dealings within Australia. You are saying that it actually protects the impact of state and territory legislation.

Mr Gray—It does.

ACTING CHAIR—Therefore, if someone is picked up with one cannabis plant they will not be subject to 25 years in prison? Are you reassuring me that in fact the penalties do fit the crime in this bill?

Mr Gray—That is a question of opinion.

Senator LUDWIG—Use the example of the ACT, which permits expiation, and the situation where the person has two relatively large cannabis plants. Then look at the end product. In the ACT currently they get, if we take the evidence of the submitters, a \$100 fine. They are not arguing that it is not an offence. They are not arguing that it should be permitted. They recognise that. Under the legislation that the Attorney-General is proposing, what would the offence be and what would the penalty be?

Mr Gray—Firstly, I thought that they were in fact proposing that it be decriminalised. The second thing I have to say is that it is not Attorney-General's Department legislation; it is a government bill. Subject to those comments, item 308.3 will make it an offence under this bill for a person to possess a plant with the intention of growing it and selling the product. The maximum penalty is imprisonment for seven years or 1,400 penalty units or both. The mental element is that 'the person intends to sell, or believes that another person intends to sell, any of the plant so cultivated or any of its products'. So a person is exposed. Possession of a plant for personal use is not caught by these provisions.

The point of course has been made that if the weight of the plant exceeds a trafficable amount there is then a rebuttable presumption. All we can say in relation to rebuttable presumptions is that there is nothing new about those in drug law. There is nothing new about reversing the onus of proof in relation to various elements. It is in the Customs Act. It is in state laws. I think if you speak to any law enforcement community agencies you get the same answer: they find those essential to the proper prosecution of the offences. The reason is quite simple. Because it is very difficult to know what is going on in the mind of a person, you have to look at the surrounding circumstances. Basically—and I think the point was made by the Law Council—it is based on commonsense. If you find somebody with a warehouse full of drugs, you can assume they intend to sell it.

What this legislation tries to do, through this mechanism of the rebuttable presumption, is to introduce an element of fairness and consistency and to say at what point the presumption will cut in. So you do not have one court saying about the warehouse of drugs, 'We will assume you intended to sell,' and another court saying, 'Half a warehouse is not enough to raise the presumption.' It is meant to bring a measure of objectivity into this very difficult and complex area. The trafficable level for cannabis plants I think is 10 plants.

Ms Vale—It is either 10 plants or 250 grams.

Mr Gray—We figure that if somebody has 10 plants or more than 10 plants growing in their garden then it is reasonable to draw a rebuttable presumption that they are intending to harvest and sell the product. The 250 grams is the alternative. What happens if somebody only has one or two plants but they are massive? At some point it becomes fairly reasonable to assume that they are growing it for more than personal use. One can argue about whether 250 grams is the right figure or not. I can tell you where that figure came from. As I said before, these are interim schedules. When we looked at the schedule for import and export, the

template for that was the Customs Act. For the other ones, we have looked at state laws. Consistency is what we are aiming for. To the extent that we can, we have run those past people who know these things. We may find that that figure will change when the scheduling committee presents its report. But the best that we can do at the moment is to say, 'That's the figure which is generally perceived to be an appropriate figure for drawing these presumptions,' and pick that up and put it into the schedule. So that is where that comes from. As far as the weight goes, there has been a bit of debate about that. Our view of how this provision should be interpreted is that it is the weight of the plant at the time it is seized. So, yes, you shake off the dirt.

Senator MASON—It could be wet, or not dried.

Mr Gray—Not dried, yes. It has been a dewy morning; it has been raining—the plant is heavier than it was on the previous afternoon. That will affect the weight of it. But we do not think any other test is workable. What are you going to do—take a plant and dry it, so it has to go through some chemical process? What if there is a paddock full of plants? It is hard enough to count them, harder to weigh them, virtually impossible to dry them all in some scientific way and weigh the dry product. So we are looking at that figure as being the actual weight of the plant. As I say, different people can take different views about whether that 250 grams is an appropriate threshold for the presumption to cut in.

Senator LUDWIG—Have the states and territories been consulted? Is the ACT government, say, aware of or understand that there is a border aspect? I do not think we are arguing about whether there is half a warehouse or a full warehouse. We are arguing as to right at the place where it will actually operate. That is at the point where there is a cross-over between state and federal legislation if this bill is passed and how that interaction will play out as to what charges the policing authorities, whether it be the state or federal policing authorities, lay depending on the circumstances. In one instance you could have in the ACT a person who was charged by the community policing arm of the AFP over two big plants but they, for whatever reason, had decided that it be an expiration notice and a \$100 fine. But the other side of the AFP—the drug enforcement arm, section or function—comes along to the neighbour and says, 'Two big plants—we think you're trafficking,' and they take them down that course. There are two distinct, different ways. Of course a rebuttable assumption will apply to the latter, but in fairness you would have to say that they are being treated distinctly differently under the law. There are different requirements, a different defence, different outcomes and even different costs.

Mr Gray—In terms of consistency, it really depends on what you look at. In that situation you are looking at two offenders in the ACT being dealt with under a different regime. There are currently inconsistencies in the way that offenders are dealt with in different states. A person in Queanbeyan who has a set number of plants or a certain amount of drugs may end up being dealt with very differently from a person in Canberra. At least this bill has the benefit that people across Australia who are dealt with under Commonwealth law will be dealt with in a consistent manner.

As for the point you have made about how a person may be dealt with more harshly or more leniently in the ACT, part of the response to that is that ultimately the discretion on what penalty to apply rests with the court. You have got three agencies in between this bill and the

person walking out the end of the process. You have got the police to decide which offence they should investigate and what charge they should lay, you have got the DPP deciding whether they are going to prosecute it—and it is always open to the DPP to say, ‘You’ve got the wrong charge: we think this should be referred to the state agency because it really is a state matter,’ and then you have got the courts—who are the ultimate protector, under our system, of the rights of the individual—who will look at it and say, ‘Yes, you are facing an offence which has got two years imprisonment’—or seven years imprisonment or whatever it might be—‘but if you had been prosecuted under local law you would have got a \$500 fine. That will be taken into account at sentence.’ It is inevitable that it will be. So I do not think the position is quite as stark as the example would suggest.

Senator LUDWIG—In relation to consultation with the ACT government on these issues, how will this particular bill affect state and territory law, its operation and the choice by the policing authority of the jurisdiction under which to charge people?

Mr Gray—We had no consultation with the states and territories before the bill was introduced. Obviously they were involved in the MCCOC exercise and some of them—three jurisdictions I think—have introduced MCCOC laws but there was no specific consultation with them. Obviously they are now aware that a bill has been introduced. Some of the state agencies have made representations and I think we can assume that there will be discussion in this ongoing context. It is not as though the state and Commonwealth do not talk on drug matters.

Senator LUDWIG—You just told me they did not talk.

Mr Gray—I told you there was no formal consultation before this bill was introduced, but they talk a lot and they talk very closely. The working group that I referred to is a really positive and very good example of the cooperation which goes on at state and Commonwealth level. I would not want to leave you with the impression that there is no talking between the states and Commonwealth on drug cases.

Senator LUDWIG—I think you are using your best endeavours to do that. Would one of you take on notice whether or not you can provide the submissions from the various states or territories in respect of this particular bill, what they have said about the bill since they have become aware of it, whether you have got submissions from all of the states and territories and whether or not a task force will be established?

Ms Cockshutt—Yes. The states have not contacted us at all. They know that the bill has been introduced, but no-one has contacted us to give their opinions either way.

Senator LUDWIG—Have you contacted them and asked for their opinion?

Ms Cockshutt—The minister told the Australasian Police Ministers Council in July that the serious drug offences bill had been introduced. I think he also told the ministers at the Ministerial Council on Drug Strategy that the bill had been introduced.

Senator LUDWIG—Perhaps you could confirm that and get back to us on that.

Ms Cockshutt—I can do that.

Senator LUDWIG—Also, could you advise whether or not copies of that were made available during those processes?

Mr Gray—We can do that.

Senator LUDWIG—My next question is on the guidelines for the offences which in this instance will introduce no fault. The guidelines are produced by the Commonwealth, and there is a test that you have to meet when you use those types of offences. Could you take me to where you have satisfied those tests that are required under those guidelines in the EM or in the second reading speech? Are you familiar with what I am talking about? Are you familiar with the prosecution guidelines?

Ms Vale—Yes, I am familiar with the prosecution guidelines.

Senator LUDWIG—They are about two inches or four centimetres thick. That requires you in introducing no fault provisions to argue effectively why you are doing it and for the justification for it. Have you done that?

Ms Vale—Yes. The explanatory memorandum sets out in detail why absolute liability and presumptions have been used in the bill.

Senator LUDWIG—Whereabouts is that?

Ms Vale—One example of where these issues are outlined is in proposed division 304. The heading, which is on page 29 of my copy of the explanatory memorandum, is ‘Selling controlled plants’. Under that heading, another heading reads ‘Absolute liability as to quantity’, and it sets out the rationale for absolute liability being used in that circumstance. There are similar descriptions in other divisions where absolute liability is used.

Senator LUDWIG—It sets out what absolute liability is, but where is the justification for using it? It only describes what absolute liability is.

Ms Vale—In the second paragraph, it also goes on to explain:

The qualified defence of mistake as to quantity ... operates to protect a defendant who mistakenly believed that a lesser quantity of plant was involved.

It is saying that, while on the one hand there is absolute liability as to the quantity that was involved, so the prosecution does not have to prove that the person knew or was reckless that that quantity was involved—

Senator LUDWIG—I understand what it says—it says the effect of it. I am missing the justification for the application of it or why you need it.

Ms Vale—Part of the justification is that the qualified defence of mistake as to quantity also applies to ameliorate the effect of the absolute liability provision.

Senator LUDWIG—Are you saying that that then requires you to use absolute liability? Is that your argument?

Ms Vale—That was the rationale for applying absolute liability: it could be ameliorated by that defence.

Senator LUDWIG—And the reason is to improve the enforceability of these offences, as in the last paragraph? Is that your catch-all to justify this?

Ms Vale—That is right.

Mr Gray—It also notes:

This approach was recommended by MCCOC in 2003 ... and was also endorsed by the Standing Committee of Attorneys-General.

I think that should be taken as an endorsement by reference to the material which MCCOC produced in 2003.

Senator MASON—I think my question is to the AFP and DPP. Has the investigation or indeed the prosecution of any serious drug offences been prejudiced by the lack of these powers? Can you point to any specific cases where by the lack of these powers you have not been able to either investigate or prosecute?

Mr Phelan—Rather than talk about any prosecution that may have been jeopardised, I will say that it is a matter of process for the AFP. The way it works at the moment is that we have a lot of joint agency investigations with state police on a number of matters that relate to syndicates that may be involved in importation/trafficking. At the moment the state police end up charging the offenders with the trafficking side and the AFP end up charging them with the importation offences. Importation offences are prosecuted by the Commonwealth and trafficking offences are prosecuted by the states.

Senator MASON—So the proposed change is more administrative?

Mr Phelan—It is. But it would streamline the process significantly. We would be able to properly work within a joint investigation arrangement and be able to share briefs of evidence and share interviews—to have one seamless brief of evidence.

Senator MASON—Mr Carter, have any of your famous or infamous drug prosecutions been prejudiced by the lack of this legislation?

Mr Carter—The important point to make is that these provisions are replicating the Customs Act situation. But, of course, they are in Criminal Code language, if I can put it that way, in terms of the division between the physical elements and the fault elements. It is misleading to suggest that the offences—the import-export offences, for example—are not offences of intention. There must be intention in relation to the physical element of importing the substance, but ‘recklessness’ then attaches to the nature of the substance itself. In our submission we referred to some of the practical situations that arise in prosecuting and the difficulty in proving the nature of the quantity and the identity. You can see some references on page 4 of our submission to comments made by the High Court in relation to that.

Senator MASON—You touched on ‘recklessness’ as the fault element, so you have addressed the Law Council’s concerns there. I do not think we have discussed the issue of alternative verdicts. Why shouldn’t you specify in the indictment all potential alternative verdicts against a defendant?

Mr Carter—One reason is that in some situations the alternative verdict might arise because of a defence that is raised by the defendant, taking the matter down to a lower level or to the base possession charge. In that circumstance the prosecution would not be in a position to know what the alternative verdict might be.

Senator MASON—Let’s cut to the chase: is this a change from the usual approach with respect to alternative verdicts? Is not having to specify alternative verdicts an unusual approach?

Mr Carter—It appears in several places in—

Senator MASON—It does appear in other places?

Mr Carter—Yes. For example, in the Criminal Code there is a similar provision in relation to money laundering. Importantly, it does refer to the defendant being accorded procedural fairness—

Senator MASON—Yes, I know.

Mr Carter—Which means that the availability of the alternative verdict to be considered by a jury is ultimately in the hands of the court, considering the fairness to the accused.

Senator MASON—This committee is worried about incrementalism, Mr Carter, as you know.

Senator LUDWIG—In terms of Customs, your offences are now going to be transferred to the crimes area. It is troubling me as to whether or not there is any extension of your current powers. The EM seems to say there is not. But is there any tweaking when those powers go across? In other words, is there a cleanup of the language or of the expression? The bail one comes to mind, where to my mind there is an extension in truth, although you might argue that it is a clarification of existing power. Is there a diagram or a flow chart which shows how your powers have moved across and which ones have been altered or changed to accord with what you might consider to be a clarification of the existing law?

Mr Hill—No, we do not have a flow chart or diagram. Our points were largely made in our submission to emphasise the fact that, according to our belief, there is not any substantial change in our powers at all. What is occurring is a simple transfer. Where there are changes in relation to particular provisions, there is simply a reference to division 307 instead of 233B via the Customs Act.

Senator LUDWIG—In terms of then being able to utilise any other provisions under the crimes legislation that is not available now, there has been no extension of your Customs powers or authority? That is right in terms of this legislation, isn't it?

Mr Hill—Yes, as I understand it.

Mr Gray—Although the drug offence provisions and the importation stuff is in the Customs Act, that is really a technicality. Those provisions are investigated by the AFP, not by Customs officers, and prosecuted by the DPP. Moving them to the Criminal Code is purely mechanical.

Senator LUDWIG—Yes, I appreciate that point. There are controlled operations, and Customs do get involved with the AFP in those operations on occasion, but my understanding is that it is ostensibly an AFP operation.

Mr Gray—Yes. There is absolutely no reason why the powers of Customs and the AFP should change. Schedule 8 is going to a totally different matter unrelated to the drug offences.

Mr Pedley—Could I make a brief comment addressing Senator Ludwig's query about absolute liability in relation to quantity. The only point I would like to make is that currently quantity is a matter of aggravation; it is not an element to the offences. So the effect of having absolute liability attaching to quantity in essence replicates the current position.

Senator LUDWIG—But it does not get around the problem of forum shopping if the person decides to prosecute in the ACT, by the AFP community policing for an expiration order and a \$100 fine or, alternatively, if the other arm of the AFP decides that they might try their luck at using these current powers.

Mr Pedley—I guess I would say what Mr Gray said: there are a number of steps and the DPP does play a significant role in choice of charges, in deciding whether cases should proceed and, through the course of prosecutions, whether they should be kept under review as they progress.

Senator LUDWIG—On that point, do you have a policy that you can then refer to that says, ‘Perhaps it should have been dealt with under the state offences; we recommend accordingly’?

Mr Pedley—The prosecution policy does have regard to alternatives, and they are things that the DPP must have regard to.

Senator LUDWIG—Does that include state offences—that alternative?

Mr Pedley—It is not specified in that way.

Senator LUDWIG—My understanding is that it would be more of a matter that you would view in isolation—forgive me if I use those words—in terms of the Commonwealth offences, the Commonwealth DPP and your role. Are there instances of where you would then go back and look at it in a more holistic way in terms of what the current state law is and then refer it accordingly?

Mr Pedley—Yes.

Senator LUDWIG—So you do that?

Mr Pedley—Yes. We have regard to what the state provisions are where there is an overlap.

Senator LUDWIG—Are there instances recently that you are able to mention where you have done that? I am happy for you to take that on notice if you are able to. Some you may not be able to say, obviously.

Mr Carter—Without reference to a particular example, it is not uncommon for matters to come to our office and for an assessment to be made that they do involve breaches of state law. They are then referred to state authorities.

Senator LUDWIG—This is slightly different to that.

Mr Carter—Yes. In relation to the choice of charges, the prosecution policy of the Commonwealth does require us to consider the appropriate charges and those that adequately reflect the nature and extent of the criminal conduct. So you really are looking at the conduct and then looking at the appropriate charge.

Senator LUDWIG—And you think that also includes jurisdiction?

Mr Carter—Yes. I would also make the comment that, as the explanatory memorandum points out, it is not intended that this bill, as we understand it, will affect the general division of responsibility between investigative agencies in relation to the prosecution of matters.

Senator LUDWIG—No, but we can all be aware of unintended consequence, though, can't we.

ACTING CHAIR—I thank the witnesses who have given evidence before the committee today.

Committee adjourned at 4.39 pm