Submissions filed on behalf of the Tasmanian DPP in relation to the referral of the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* to the Senate Legal and Constitutional Affairs Legislation Committee

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On 17 July 2014 the Senate referred the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014* (the Bill) to the Senate Legal and Constitutional Affairs Legislation Committee (The Committee), for enquiry and report by 2 September 2014. The Bill contains a range of measures to, inter alia, ban the importation of psychoactive substances that are not otherwise regulated or banned, create new international firearms trafficking offences, streamline the international transfer of prisoners regime within Australia, and amend certain slavery offences to clarify they have universal jurisdiction.

The Committee has invited submissions that may be of relevance. The Tasmanian DPP has elected to provide detailed submissions in relation to the proposed amendments in the Bill concerning psychoactive substances, cross border trafficking in firearm parts and the proposed mandatory minimum sentences for the firearms offences. The Tasmanian DPP supports the balance of the amendments in the Bill, Schedules 3 – 5 - but does not seek to comment at length on those amendments. The Tasmanian DPP does not seek to make any comment in relation to Schedule 6.

Schedule 1 – Psychoactive Substances

Schedule 1 of the Bill amends the Commonwealth *Criminal Code 1995* and the *Customs Act 1901* to ban the importation of substances:

1. which mimic the psychoactive effects of illicit drugs but whose chemical structures fall outside existing controls (also known as new psychoactive substances' or NPS); and
2. the presentation of which includes an express or implied representation that the substance is an alternative to an illicit drug. i.e. substances that are expressly or by implication represented as "legal highs".

The Tasmanian DPP supports the proposed legislative amendments as set out in Schedule 1.

The proposed amendments are not inconsistent with, but rather complement provisions under the Tasmanian *Misuse of Drugs Act 2001*. The Tasmanian *Misuse of Drugs Act 2001* does not contain comparable psychoactive or serious drug alternative provisions. Part 1 of Schedule 1 of the *Misuse of Drugs* Act

2001 expands the meaning of controlled substances to include a homologue, a derivative, analogue, chemical derivative of, or a substance that is substantially similar in chemical structure to, the relevant substance.[1]

In recent years Tasmania has seen a surge in the importation, primarily from China, of substances such as 4 - methylmethcathinone and 3, 4 methyldioxymethcathinone. The substance is purchased over the Internet, packaged, imported by post and identified on the declaration form as an innocuous substance. Parcels containing bulk quantities of these powdered substances that make it through customs to the purchaser are prepared and sold in pill form, on the street.

The issue of whether a substance was a derivative of a controlled substance arose in Tasmania in the decision of *Daley v Tasmania [2012] TASCCA 4* (30 March 2012). At the time of the case 4 - methylmethcathinone was not listed as a controlled substance in Schedule 1 of the *Misuse of Drugs Act 2001*. It now is.[2] In *Daley v Tasmania* the defence argued, on a voir dire, prior to the commencement of the trial, that 4 - methylmethcathinone was not a derivative of methcathinone (a controlled substance under Schedule 1) and was therefore not a controlled substance. Evans J, who heard the pre trial argument, ruled that it was a derivative pursuant to Part 1, Interpretation of Schedule 1 of the *Misuse of Drugs Act 2001.*

On appeal, the Court of Criminal Appeal agreed with Evans J, and Crawford CJ (as he then was), the trial judge that 4 - methylmethcathinone was a derivative of methcathinone. In the joint judgment of Blow J (as he then was), Porter J and Wood J, the Court of Criminal Appeal held that for the purposes of Schedule 1 Part 1, Interpretation of the *Misuse of Drugs Act 2001,* the word derivative meant:

> *When used in relation to chemicals encompasses both the concept of a substance made from another and the concept of a substance that is structurally related to another. A derivative means a substance or compound that can readily be made from another substance or compound, as well as a substance or compound that is closely related structurally to another substance or compound.*

The Court of Criminal Appeal went on to conclude:

> *The word derivative is still used by a significant number of chemists not only to refer to a compound made from another compound but also to refer to an analogue.*
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> *... the wide old fashioned construction adopted by Evans J and Crawford CJ does promote the purpose or object of the Act ... As Evans J pointed out ... the narrow construction could result in the*

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[1] *Misuse of Drugs Act 2001*. Schedule 1 – Controlled substances and trafficable quantities. Part 1 – Interpretation. S1 © (vi).
Misuse of Drugs Act 2001 - Schedule 1 - Item 180A

> *legislation being circumvented by the manufacture of analogues of prohibited drugs that have similar properties but are not prohibited. ... it follows that a wide interpretation of the word " derivative" would promote the purpose or object of the Act*

In the case of *Director of Public Prosecutions v Williamson [2013] TASCCA 6 (4 July 2013)* the filing of the indictment in that matter was delayed pending the outcome of the Court of Criminal Appeal decision in *Tasmanian v Daley*. In the case of *DPP v Norton Williamson* the appellant was intercepted disembarking from The Spirit of Tasmania in a vehicle which was subsequently searched and found to contain a variety of controlled drugs and 3 capsules of 3, 4 methylenedioxymethcathinone. At the time of this prosecution, 3, 4 methylenedioxymethcathinone was also not listed as a controlled substance. It now is. [3] A warrant was obtained to search the accused's home and his next door neighbour's home. Underneath the neighbour's home police located a number of drug related items, including 2,248 capsules containing 3, 4 methylenedioxymethcathinone all of which were able to be connected to the accused. It was the Crown case that 3, 4 was methylenedioxymethcathinone was a derivative of MDMA. The Court of Criminal Appeal decision in *Tasmanian v Daley* allowed the Crown to indict the accused for trafficking in the 3, 4 methylenedioxymethcathinone, on the basis that it was a derivative of MDMA.

The proposed amendments in the Bill would fill a gap in the law and complement the Tasmanian legislation in circumstances where a substance mimics the psychoactive effects of a controlled drug but cannot be described as a homologue, analogue, a chemical derivative, or is substantially similar in chemical structure; i.e. it has an unrelated or dissimilar chemical structure and/or in circumstances where the presentation of a substance either expressly or by implication is represented as a lawful alternative to an illicit drug – i.e. a "legal high".

Pursuant to the interpretation section of the *Misuse of Drugs Act 2001,* Trafficking is defined to include the importation of a substance into Tasmania with the intention of selling it or in the belief that another person intends to sell it. [4] As such, although the Commonwealth *Criminal Code 1995* contains its own provisions for trafficking in commercial and marketable quantities of controlled substances, the majority, if not all drug related crime in Tasmania, including trafficking offences, are investigated by the Tasmanian Police and prosecuted by the Tasmanian DPP.

Pursuant to s31(1B) of the Commonwealth *Director of Public Prosecutions Act 1983* and by arrangement and instrument with the Commonwealth DPP the Tasmanian DPP has the power to include State and Commonwealth offences on State indictments and vice versa. The proposed amendments would be of value and assistance in the prosecution of State and Commonwealth drug

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[3] *Misuse of Drugs Act 2001*- Schedule 1- Item 178B
[4] *Misuse of Drugs Act 2001*- s3(1) Interpretation – *Traffic* para (f)

offences; in that the Tasmanian DPP would have the authority and ability to prosecute a person on an indictment for trafficking in a controlled substance under the *Misuse of Drugs Act 2001* and importing psychoactive substances or substances represented to be serious drug alternatives under the *Commonwealth Criminal Code 1995,* if the facts of a particular case warranted such a course and the matter met the criteria in the joint memorandum between the Commonwealth DPP and the Tasmanian DPP.

Factors relevant to the decision of whether the Tasmanian DPP should have the conduct of a joint prosecution include, inter alia:

- Whether there is a preponderance of offences under the law of one jurisdiction;
- The relative seriousness of the offences against the law of one jurisdiction vis-a-vis the offences against the law of the other;
- Which jurisdiction investigated the offences

The conferral of authority for the Tasmanian DPP to sign an indictment containing Commonwealth and State offences extends to situations where:

(a) The defendant was examined but not committed for trial,
(b) The defendant was committed for trial, in respect of an offence founded on facts or evidence disclosed in the course of the committal proceedings;
(c) The defendant consents, in respect of an offence for which the defendant was not examined or committed for trial.

The conferral of authority to sign such an indictment does not include authority to sign an indictment in respect of an offence for which the defendant has not been examined or committed for trial in circumstances not covered by paragraphs 2 (a) -(c). However, the DPP for the receiving jurisdiction is authorised to conduct a trial on such an indictment signed by the Director of the conferring jurisdiction.[5]

It would be preferable that Tasmania Police charged an offender with the relevant Commonwealth offence at the time of arrest. However, that may not always be possible, due to the fact that many controlled substances or psychoactive substances or substances represented to be serious drug alternatives are in powder form and require analysis. The Tasmanian DPP has previously experienced situations where the identification of the drug cannot be included on the indictment until the certificate of analysis has been completed. In such circumstances, the Tasmanian DPP has, in the past, included the substance – if it is a controlled substance – pursuant to Schedule 1 of the *Misuse of Drugs Act 2001* on an ex officio indictment.

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[5] Arrangements for the Conduct of Tasmanian prosecutions by the Commonwealth Director of Public Prosecutions, and for the conduct of Commonwealth prosecutions by the Tasmanian Director of Public Prosecutions.

A similar situation could arise if the circumstances of a case resulted in a need to include one or both of the charges that are the subject of the Bill on a State indictment; unless the certificate of analysis was completed and served prior to committal, in which case a further complaint could be laid and the matters could be joined up for committal to the Supreme Court.

The Tasmanian DPP agrees that it is in the public interest that the proposed amendments as set out in Schedule 1 pass, for the reasons set in the House of Representatives Explanatory Memorandum to the Bill, circulated by authority of the Minister for Justice, The Hon Michael Keenan MP; in particular at page 8 and 9:

> *... The ban will strengthen the current border controls on NPS by preventing importers from tweaking the chemical structure of illicit drugs to evade those controls. NPS have been connected to a number of serious health incidents and deaths across Australia. They are made more dangerous in that they are unknown chemical compounds which are marketed as 'legal highs'or legal analogues of illicit drugs. This marketing can encourage individuals to believe that these substances have been assessed as being safe for consumption or are less harmful than other drugs when, in fact, they are untested and their short and long term health effects are unknown.*
>
> ...
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> *Further, the internet plays a significant role in the marketing and supply of NPS. Internet sales involve limited visibility over the identity and age of the person conducting the transaction, resulting in a heightened possibility that NPS may fall into the hands of children who purchase these substances online.*

And at page 10, in relation to the proposed offence of importing psychoactive substances:

> *This subsection is important as importers, sellers and users of NPS frequently do not know their precise chemical structure and their exact effects. The ingredients in NPS are frequently misdescribed and can produce effects not anticipated by suppliers or users.*

And at page 11 in relation to the proposed offence of importing substances represented to be serious drug alternatives:

> *These paragraphs are necessary to effect the aim of the offence, which is to prevent the importation of substances presented as alternatives, lawful or otherwise, to listed illicit drugs. The representation of psychoactive substances in this manner is not appropriate. Representing a substance as a 'legal' alternative to illicit drugs may encourage a person to use these drugs on the assumption that they have been tested and assessed as safe when*

> *compared to more established illicit drugs. This is incorrect – these substances are typically untested, of varying concentration and toxicity and carry unknown or unpredictable side effects.*

These submissions were reaffirmed in the 2nd reading speech delivered by Michael Keenan MP on 17 July 2014 when he stated:

> *New psychoactive substances have been a growing problem for governments in Australia and overseas in recent years. Governments progressively ban these substances as evidence about their use and harm becomes available, yet manufacturers can alter the composition of these substances to avoid the law. The large number of potential new psychoactive substances and their rate of appearance means that we cannot stay ahead of the market.*
>
> *This bill changes the dynamic. From now, the government will be in front. The bill will introduce offences into the Criminal Code to ban the importation of substances based on their psychoactive effect and where they are presented as alternatives to illicit drugs. It will also amend the Customs Act to allow officers of the Australian Customs and Border Protection Service and the Australian Federal Police to stop these drugs, seize them and destroy them before they can be put on the market.*
>
> ...
>
> *Stopping the sale of new psychoactive substances requires a cooperative effort between the Commonwealth, states and territories to ensure that health, law enforcement and education initiatives are all aligned. This bill will complement the national framework for new psychoactive substances that the Law, Crime and Community Safety Council announced on 4 July 2014.*
>
> *The bill will stop people from importing these dangerous chemicals for use as alternatives to illicit drugs and pretending they are legal or safe. In combination with state and territory initiatives under the national framework, we can prevent new psychoactive substances from becoming as great a challenge as other illicit drugs.*

Experts employed with the Forensic Sciences Services of Tasmania (FFST) have been consulted in relation to these submissions and have highlighted some potential difficulties with proving NPS offences. Although FSST can provide a certificate of analysis identifying what the substance is, whether it falls through the gaps and allows for the proposed offences in the Bill to be laid, there is a potential issue with proving that the substance has a psychoactive effect. Whilst an expert such as a toxicologist or pharmacologist can usually provide evidence about the effects of drugs, based on clinical trials, research and published articles, FSST has advised the Tasmanian DPP that the problem with the experimental drugs we are seeing on the market now, is that there is no or little in the way of experimental clinical trials and therefore very little in the way of published research. Unless an offender

makes admissions about the psychoactive effects of a substance, the Crown will be required to prove the substance and that it has a psychoactive effect. This evidence would need to be led from an expert, who is qualified to give such evidence.

If this Bill is passed, the concern of FSST and this office is, if expert evidence is required to prove the offence, whether the available literature will be sufficient to prove the offence. FSST has advised that the current approach is to deal with the matter on a case by case basis. In the absence of clinical trials, evidence about a NPS is obtained from what literature is available – e.g. case reports in relation to people who have taken the drug and/or other available reviews. The amount of available literature on a NPS currently depends on how long the drug has been on the market and who has been using it.

If the Bill is to be passed in its current form, the Tasmanian DPP recommends that a body of scientific research needs to be undertaken to assist law enforcement agencies and prosecution services with proving these offences.

The Tasmanian DPP notes that a different approach to the issue has been taken by the New Zealand government. In New Zealand, the Government acknowledged it was impossible to ban all NPS's as they were being developed and released onto the market far faster than any identification and restriction process could take place. In response, a different way of reducing the harms caused by NPS was considered necessary.

In 2007 the Labour-led Government asked the Law Commission to conduct a review of New Zealand's *Misuse of Drugs Act (1975)*. One of the conclusions from the Law Commission's report, released in 2011, was that a new regime was needed to regulate new substances which were coming to market. Legislation (*Psychoactive Substances Act 2013)* was introduced into the New Zealand Parliament in early 2013 and went to the Health Select Committee in June of the same year.

The *Psychoactive Substances Act 2013* received the Royal Assent on 17 July 2013 and puts responsibility on NPS producers to develop products that are no more than a low risk of harm. Manufacturers must now clinically test products before they can be legally sold. A unit within the Ministry of Health oversees the importation, manufacture and sale of these products under tight regulations that requires approval by a Psychoactive Substances Expert Advisory Committee. The committee must have relevant expertise in pharmacology, toxicology, neuroscience, medicine and any other areas the Authority considers relevant.

The Act also introduced restrictions on where and how NPS's can be sold and they can only be sold to people 18 years and over.

> *The introduction of the Act reduced the number of NPS products available by 75%, and the number of outlets selling psychoactive products by 95% (from 3,000 to 170). Remaining products and retail outlets operated under an 'interim licence' while a testing*

regime was developed, and became subject to active and on-going scrutiny by health professionals and police. Substances identified as causing harm during this period were withdrawn from the market, with five products removed in late 2013 and six in April 2014.

In April 2014 the government announced a decision to bring forward the end of the interim phase of the Psychoactive Substances Act. This decision removed the remaining thirty-six products on sale, effective as of the 8th of May, 2014.

At this time there are no approved psychoactive products legally available for sale in New Zealand. No products will be available until they have been approved under the Regulations. Regulations are scheduled to be released in mid-2014 for manufacture and wholesale, and mid 2015 for retail.

Built into the legislation is a requirement for it to be reviewed by the Parliament by 2018. This means that if certain aspects of the law are not working, they can be fixed and the focus can remain on protecting health and minimising harm.[6]

Schedule 2 – Firearms Trafficking Offences

Schedule 2 of the Bill will:

1. create new international firearms offences of trafficking prohibited firearms and firearm parts into and out of Australia (new Division 361 of the Code) extend the existing offences of cross-border disposal or acquisition of a firearm and taking or sending a firearm across borders within Australia in Division 360 of the Commonwealth *Criminal Code* to include firearm parts as well as firearms, and
2. introduce a mandatory minimum five year term of imprisonment for the new offences in Division 361 and existing offences in Division 360.

The expansion of the existing offences will prevent offenders from evading trafficking offences and penalties by breaking firearms down and trafficking their constituent parts.

The definition of a firearm under the *Tasmanian Firearms Act 1996* does not include a firearm part. Pursuant to s3, the Interpretation section of the *Firearms Act 1996*, "firearm" and "firearm part" are defined as follows:

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[6] http://www.drugfoundation.org.nz/book/export/html/2752 and *Psychoactive Substances Act 2013* (NZ); and *Psychoactive Substances Amendment Act 2014* (NZ); and

Firearm means:

(a) *a gun or other weapon that is capable of propelling anything wholly or partly by means of an explosive; and*

(b) *a blankfire firearm; and*

(c) *an air rifle; and*

(d) *an air pistol; and*

(e) *an imitation firearm, other than a toy; and*

(f) *any other prescribed thing; and*

(g) *any thing that would be a firearm under paragraph (a), (b), (c) or (d) if it did not have something missing from it or a defect or obstruction in it;*

Firearm part *means a barrel, breech, trigger mechanism, operating mechanism or magazine;*

Pursuant to the *Tasmania Firearms Act 1996,* offences in relation to selling and trafficking in firearms only relate to firearms, not firearm parts. Offences relating to firearm parts include mailing firearms, firearms parts or ammunition within the State (s100), mailing firearm parts outside the State (s101) and offences relating to the proper or lawful delivery, transport, conveying of and advertising of a firearm part (s102 - 104 & s106). S107 also makes it an offence to possess a firearm part unless authorised to do so. The maximum penalty for all of these offences is a fine.

The proposed legislation is not inconsistent with Tasmania legislation and will cover gaps in the State legislation. The Tasmanian DPP supports, in principle, the proposed legislative amendments to Division 360 and the introduction of Division 361. The Tasmanian DPP seeks to comment on the cross border provisions only as the proposed amendments in the Bill relating to International Trafficking in Firearms will have little relevance to the work of the Tasmanian DPP. Such offences would be investigated by the Federal Police and prosecuted by the Commonwealth DPP.

The Tasmanian DPP is experiencing cases in which the trafficking in controlled drugs and the presence of firearms are becoming more common. Controlled substances and firearms often make their way into Tasmania from the mainland. The proposed amendments in the Bill, to Division 360, of the Commonwealth *Criminal Code 1995* - Cross Border Firearms Trafficking -are of relevance to Tasmania.

Sections 100 and 101 of the *Firearms Act 1996* are designed to ensure that firearms move within the State and between States in accordance with the law; i.e. via licensed dealers. The offences are different in nature to the

offences set out in Division 360 of the Commonwealth *Criminal Code 1995*. They are also much less serious offences, as evidenced by the maximum penalty of 50 penalty units. The present maximum penalty for offences against Division 360 is 10 years imprisonment or a fine of 2,500 penalty units, or both.

As such the amendments proposed by the Bill are capable of being used to prosecute offenders in Tasmania. The most common case example of this would be the interception of an offender, who is not authorised to possess or deal in firearms, who enters Tasmania in possession of large quantities of controlled substances and/or firearms and/or firearm parts; the circumstances of which can only suggest or provide an inference that the controlled substances and/or the firearms and/or firearm parts are intended to be disposed of and/or sold.

In accordance with the memorandum between the Commonwealth DPP and Tasmanian DPP these offences could be placed on a State indictment in circumstances where State drugs and/or firearms offences and Commonwealth firearms offences have been committed.

The proposed mandatory penalty provisions in relation to Division 360 and 361

Clause 14 of the Bill provides as follows:

> *360.3A Mandatory minimum penalties.*
>
> *(1) The court must impose a sentence of imprisonment of at least 5 years for a person convicted of an offence against this division.*
>
> *(2) Subsection 1 does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.*

Prescribed mandatory minimum sentences of imprisonment for committing certain offences are becoming increasingly common in Australia and have reopened serious debate about their efficacy. Despite resistance from State Bar associations and Law Societies, State Sentencing Advisory Councils and the Law Council of Australia questioning the efficacy of mandatory sentencing laws, their introduction since the 1990's continues in the Commonwealth, other States and the Northern Territory.

Any legislative scheme that introduces mandatory sentencing provisions that completely fetter the sentencing discretionary of the Courts, can lead to unjust results. If it is thought desirable to have some form of mandatory minimum sentencing scheme, then it should be drafted in such a way that allows the court to exercise its discretion and depart from the mandatory minimum sentence, if a particular case calls for it. For example, Parliament can define the types of offences that will attract mandatory minimum penalties but also

provide for judges to depart from the minimum penalty in exceptional circumstances.

The inclusion of provisions that allow judges to depart from mandatory minimum sentences, in particular cases, avoids the potential for unintended consequences, such as:[7]

- The imposition of excessively harsh, absurd or unjust sentences, where no right of appeal lies.

- The infringement of a fundamental sentencing principle that a sentence and retribution should be proportionate to the gravity of the offence, having regard to the circumstances of the case.

- Unjust outcomes, particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished. Mandatory sentencing regimes are applied selectively and often used in response to particular kinds of crime which are disproportionally committed by these groups. In that sense the regimes can operate in a discriminatory way against members of those groups in society who are already most disadvantaged, if exceptions are not provided for.

- Potentially increasing the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime. This reinforces criminal identity and fails to address the underlying causes of crime. This has particular relevance to young offenders.

- Undermining the community's confidence in the judiciary and the criminal justice system as a whole. Research demonstrates that when members of the public are fully informed about the particular circumstances of a case and the offender, 90 per cent view judges' sentences as appropriate.[8]

A not uncommon factual situation in the trafficking of drugs and firearms is the use of a "mule" or a "middle person" to deliver, transfer or dispose of drugs and/or firearms. It is not unusual for these "mules" or "middle offenders" to be young, uneducated, impoverished and/or suffer with their own substance abuse issues. This type of offender can include a young adult, without prior convictions, who is of low intelligence and who has been groomed by a more culpable offender to commit the crime. This person's criminal culpability is often significantly less than the principal offender. The proposed amendments to the Bill would nonetheless capture these offenders

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[7] Summarised from the Law Council of Australia. Policy Position. Mandatory Sentencing. May 2014

[8] "Pubic Judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study" by Kate Warner, Julia Davis, Maggie Walter, Rebecca Bradfield and Rachael Vermey. Australian Institute of Criminology. Trends and issues in crime and criminal justice. No.407 February 2011

and there is a high risk of offenders in this area of criminal activity receiving sentences that are excessively harsh.

If the mandatory sentence provisions remain in the Bill it, is suggested that the proposed amendments include clauses that allow a judge to depart from the mandatory minimum sentence in the following circumstances:

- The offender was under 18 or over 18 but under 21 at the time the offence was committed or at the time of sentencing ; and /or
- The offender suffered with a cognitive impairment; and /or
- The imposition of the mandatory minimum sentence would not be in the public interest; and/or
- Exceptional circumstances exist that would justify a sentencing judge departing from the mandatory minimum sentence.

Schedule 3 – International Transfer of Prisoners (ITP)

Australia's ITP scheme is governed by the *International Transfer of Prisoners Act 1997* (ITP Act). The scheme aims to promote the successful rehabilitation and reintegration into society of a prisoner, while preserving the sentence imposed by the sentencing country as far as possible. This is a voluntary scheme, which requires the formal consent of the prisoner, Australia's Attorney-General, the relevant foreign country, and, where applicable, the relevant Australian state or territory to or from which the prisoner wishes to transfer.

The ITP measures in Schedule 3 of this Bill streamline the existing ITP process and clarify or simplify some legislative requirements that need to be met before a prisoner may be transferred into or out of Australia.

Given that s46 of the *International Transfer of Prisoners Act 1997* provides that a sentence of imprisonment imposed by the transfer country or Tribunal that is to be enforced in Australia is taken, for the purposes of the Act, to be a federal sentence of imprisonment and the prisoner to be a federal prisoner, these amendments will not impact on the work of the Tasmanian DPP. This office, nonetheless, in principle, supports the proposed changes in the Bill and agrees that it is the public interest to simplify procedures associated with the international transfer of prisoners. In particular, this office notes the importance of the following amendments:

- Amendments which clarify that a prisoner who is the subject of a suspended sentence may be transferred under the ITP scheme.
- The introduction in Part 2 of the concept of "*close family member*" into the ITP Act, which "*firstly can be used when establishing a prisoner's community ties with a particular state, territory or transfer country. Secondly it will extend*

the range of people who can consent to the transfer of a prisoner where they are a child or are incapable of consenting for him or herself."[9]

- The discretion to reconsider an application for transfer within 12 months of a previous application for transfer if there are changes to the prisoner's circumstances.

Schedule 4 – Slavery Offences: Jurisdiction

Schedule 4 of the Bill amends the Commonwealth *Criminal Code 1995* in relation to the jurisdiction of slavery offences and clarifies that slavery offences under s270.3 have universal jurisdiction. The amendment will also make explicit that the Attorney-General's permission to prosecute would be required where a slavery offence takes place wholly outside Australian territory.

The Tasmanian DPP supports the proposed amendments to 270.3 of the Commonwealth *Criminal Code 1995*.

> *Under the existing section 270.3, the jurisdiction of the slavery offences is not specified. Where jurisdiction is not explicit in the Code, standard geographical jurisdiction (limited to conduct occurring wholly or partly in Australia) applies under section 14.1 unless a contrary intention appears.*
>
> *The Explanatory Memorandum to the Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999, indicated that the slavery offences apply whether the conduct occurs inside or outside Australia and whether or not the offender is an Australian national', suggesting an intention that the slavery offences have universal jurisdiction.*
>
> *Universal Jurisdiction would be in line with Australia's recognition of universal jurisdiction as a well-established principle of international law, which extends to slavery, alongside piracy, genocide, war crimes, torture and other crimes against humanity.*
>
> *This amendment will empower Australian law enforcement agencies to effectively investigate and prosecute instances of slavery even where the offence was not committed wholly within Australian territory and reflects Australia's recognition of slavery as a heinous crime.*[10]

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[9] The Parliament of the Commonwealth of Australia. House of Representatives. Explanatory Memorandum *Crime Legislation Amendment (Psychoactive Substances and other Measures) Bill 2014,* circulated by authority of the Minister for Justice, the Hon Michael Keenan MP at pg 60,61

[10] The Parliament of the Commonwealth of Australia. House of Representatives. Explanatory Memorandum. *Crime Legislation Amendment (Psychoactive Substances and other Measures) Bill 2014,* circulated by authority of the Minister for Justice, the Hon Michael Keenan MP at pg 79

These amendments are unlikely to impact on the work of the Tasmania DPP. The only circumstances in which the Tasmanian DPP would be involved in slavery offences would be in circumstances where a state crime, being the substantive crime, (for example, murder) was also committed. Offences committed in these circumstances would provide a basis for the State to intervene and prosecute an offender on a State indictment in accordance with the memorandum of understanding between the Commonwealth DPP and the Tasmanian DPP in relation to joint indictments for Commonwealth and State offences.

Schedule 5 – Validating Airport Investigations

Schedule 5 provides that members of the Australian Federal Police (AFP), and special members, had the appropriate range of Commonwealth powers to conduct investigations of applied State offences committed at designated State airports from the 19 March 2014 to 16 May 2014. This covers the period between the repeal of the *Commonwealth Places (Application of Laws) Regulations 1998* (1998 Regulation) and the commencement of the *Commonwealth Places (Application of Laws) Regulation 2014* (2014 Regulation).

The *Commonwealth Places (Application of Laws) Act 1970* (the COPAL Act) has the effect of applying the provisions of the laws of a State as Commonwealth laws in Commonwealth places. Section 3 of the COPAL Act defines *"a designated State airport"* as a Commonwealth place. This includes the Hobart airport.0

> *During the approximately eight week period between the repeal of the 1998 Regulations and the introduction of the 2014 Regulation, AFP members were required to rely exclusively on State powers contained in State legislation to investigate applied State offences. Schedule 5 retrospectively validates the exercise of relevant Commonwealth powers in designated State airports from the repeal of the 1998 Regulations until the introduction of the 2014 Regulation. This will ensure that the AFP members, and special members, had the full range of Commonwealth investigatory powers for applied State offences committed at designated State airports.*[11]

The Tasmanian DPP supports the amendments.

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[11] The Parliament of the Commonwealth of Australia. House of Representatives. Explanatory Memorandum. *Crime Legislation Amendment (Psychoactive Substances and other Measures) Bill 2014,* circulated by authority of the Minister for Justice, the Hon Michael Keenan MP at pg 23

Schedule 6 – Minor Amendments

Schedule 6 makes minor and technical amendments to the *Financial Transaction Reports Act 1988* (FTR Act); to section 301.11 of the *Criminal Code Act 1995* to correct an error in the definition of a minimum marketable quantity in respect of a drug analogue of 1 or more listed border controlled drugs. It also amends Division 312 of the Code to update references to the border controlled drugs list and the controlled drugs list for the purposes of working out commercial, marketable or trafficable quantities of drugs and precursors in mixtures, or where different kinds of drugs, plants or precursors are involved and corrects minor grammatical errors in subsection 205E (2) and paragraphs 205E (2) (a) and (b) of the *Customs Act.*

The minor amendments as set out in Schedule 6 are unlikely to have any impact on the work of the Tasmanian DPP and it therefore declines to comment on those amendments.

Daryl Coates SC
Acting Director of Public Prosecutions
11 August 2014