



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

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Law and Bills Digest Section

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

Date Introduced: 26 May 2005

House: House of Representatives

Portfolio: Justice and Customs

Commencement: The formal provisions commence on Royal Assent. Other commencement provisions are detailed in the Main Provisions section of this Digest.

Purpose

The primary purpose of the Bill is to insert a new part dealing with serious drug offences into the Commonwealth Criminal Code.

Background

The Bill amends a number of Commonwealth statutes. However, its major focus is the creation of new Commonwealth illicit drug offences. Background information about drug laws in Australia is summarised in this Section of the Digest. Where relevant, background information about other amendments can be found in the Main Provisions section of the Digest.

Illicit drug laws in Australia

Illicit drug laws in Australia have traditionally been the province of the States and Territories, with the focus of Commonwealth offences being on the importation and exportation of illicit drugs.

Commonwealth legislation

Commonwealth legislation is based on the trade and commerce power in section 51(i) of the Constitution and on the external affairs power in section 51(xxix). A number of pieces of Commonwealth legislation deal with narcotic drugs:

- the *Customs Act 1901* creates offences of importing and exporting prohibited narcotics and being in possession of prohibited narcotics reasonably suspected of being imported.¹ Severe penalties apply and are graduated according to the quantity of drugs involved. The Customs Act also contains regulatory offences, such as offences of

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importing and exporting prohibited narcotics in breach of licences or permissions. Under the current Bill, regulatory offences will remain in the Customs Act.

- the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* (TINDAPS Act). The purpose of the TINDAPS Act is to extend Australia's extraterritorial jurisdiction relating to drug trafficking in accordance with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the 1988 Convention). For instance, the Act creates jurisdiction over persons outside Australia who engage in conduct with a view to the commission of a drug offence in Australia.² As both the current Bill and the TINDAPS Act are designed to implement the 1988 Convention, the TINDAPS Act will also be repealed—but not by the Bill. The Explanatory Memorandum states that the repeal will be effected 'as soon as the tables of controlled substances and border controlled substances ... [in the Bill] are expanded to cover all substances currently covered by the TINDAPS Act. The TINDAPS Act will then become redundant.'³
- the *Narcotic Drugs Act 1967*. This Act creates a licensing regime for the manufacture of narcotic drugs—in other words, it sets out circumstances in which the manufacture of narcotic drugs will be lawful. It partially implements the Single Convention on Narcotic Drugs, 1961. The Narcotic Drugs Act is not affected by the Bill.
- Customs Regulations. For example, the Customs (Prohibited Imports) Regulations create a system of licensing and permissions for the lawful importation of narcotic drugs—thus, narcotics may be imported by someone holding a licence under the Narcotic Drugs Act or for medical or scientific purposes.⁴

The States and Territories

State and Territory illicit drugs laws contain offences relating to matters such as possession and supply of illicit drugs and are primarily used when criminal activity has no international dimension.⁵

State and Territory legislation contains a diverse range of offences and penalties. Significantly, for example, there is considerable variation between jurisdictions in the area of simple cannabis possession. In the ACT, Northern Territory, South Australia and Western Australia possession of small amounts of cannabis (variously defined) generally attracts an infringement notice rather than a criminal penalty. In Western Australia possession of up to 30 grams of cannabis can result in a fine of \$150;⁶ while possession of up to 50 grams of cannabis attracts a fine of \$200.⁷ However in NSW and Tasmania, the penalties for possession of cannabis are more severe—up to \$2200 fine or 2 years imprisonment in NSW⁸ and up to \$5000 or 2 years imprisonment in Tasmania.⁹

All States and Territories impose heavy penalties for manufacture, supply and trafficking, especially for drugs such as heroin or cocaine. Depending on the offence, the maximum penalties vary from 21 years imprisonment to life imprisonment.

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In recent years, the States and Territories have also developed a range of pre-court and court diversion programs to education or treatment—either by way of administrative arrangement or by statute.¹⁰ For instance, although serious penalties continue to apply in NSW to possession of cannabis, an Adult Cannabis Cautioning Scheme has been operating in that State since 2001 on a trial basis. It applies to adults found with up to 15 grams of cannabis but excludes anyone who has been cautioned twice before and anyone who has prior convictions for drug or sexual assault or offences involving violence. Additionally, Western Australia, Victoria, South Australia, the ACT and Northern Territory have pre-court diversion to education and treatment programs for drugs other than cannabis. Lastly, drug courts operate in NSW, Queensland, South Australia, Victoria and Western Australia with the aim of diverting illicit drug users from custodial sentences to treatment programs.¹¹

The Model Criminal Code Project

The Bill is based on the work of the Model Criminal Code Officers Committee (MCCOC). The Model Criminal Code project was an outcome of a review of Commonwealth criminal law conducted in the late 1980s and early 1990s by former Chief Justice of the High Court, Sir Harry Gibbs. Initially, the Commonwealth decided simply to codify its own laws. However, the Standing Committee of Attorneys-General established MCCOC to work on a model criminal code that could be adopted by the States and Territories and, with appropriate modification by the Commonwealth,¹² so that serious criminal offences could operate uniformly throughout Australia.¹³ For Commonwealth purposes, the Criminal Code project also involves moving serious Commonwealth offences from other statutes (such as the Customs Act) and placing them in the Criminal Code.

MCCOC has completed reports on nine chapters of the model criminal code, together with draft legislation. Chapter 6 of the Model Criminal Code is entitled *Serious Drug Offences*. Its accompanying report was published in 1998.¹⁴ Legislation based on Chapter 6 of the Model Criminal Code has been passed in the ACT¹⁵, Tasmania¹⁶ and Victoria.¹⁷ The amendments to the Criminal Code contained in the Law and Justice Legislation (Serious Drug Offences and Other Measures) Bill 2005 are based on but not identical to the model draft bill. Some of differences include the addition of:

- aggravated offences when trafficking endangers children
- offences relating to the manufacture or possession of precursors for the purpose of manufacturing illicit drugs
- a presumption of commercial purpose when a threshold quantity of illicit drugs is involved¹⁸, and
- simple possession offences.

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Main Provisions

Schedule 1—Serious Drug Offences

Schedule 1 commences 28 days after Royal Assent (**clause 2**).

Item 1 of Schedule 1 amends Chapter 9 of the Criminal Code by inserting **proposed Part 9.1** (Serious drug offences).

Preliminary provisions

Proposed Division 300 of Part 9.1 of the Criminal Code contains a number of preliminary provisions. Important amongst these are:

- *a purpose clause*—this clause says that one of the purposes of the Bill is to give effect to the 1988 Convention. Australia is a party to the Convention. The clause signals that the Commonwealth is relying at least in part on the external affairs power to support the Bill (**proposed section 300.1**)
- *definitions* (**proposed section 300.2**). Important definitions in proposed section 300.2 include ‘controlled drug’, ‘controlled plant’, ‘commercial quantity’, ‘marketable quantity’ and ‘trafficable quantity’
- *a statement of geographical jurisdiction*. Extended geographical jurisdiction—category B applies to the **proposed Part 9.1** offences. This means that the offences apply to Australian citizens, corporations and residents anywhere in the world, subject to a ‘foreign law’ defence¹⁹ (**proposed section 300.3**)
- *a provision preserving the concurrent operation of State and Territory law*, even if different penalties, fault elements or defences apply. This provision recognises that drug offences have traditionally been the province of the States and Territories (**proposed section 300.4**) and allows for the continuing operation of State and Territory law.

Interim regulations and emergency declarations

Proposed Division 314 lists controlled substances such as heroin, cannabis, LSD etc. **Proposed Division 301** enables additional substances and threshold quantities to be added quickly to these lists. In prescribed circumstances, the Minister can make *interim regulations* declaring substances, plants and precursors to be controlled substances and specifying commercial, marketable and trafficable quantities. A substance or plant can be declared if the Minister is satisfied *both* that taking the substance or plant would create a substantial risk of death or serious harm *and* that there is a substantial risk that the substance or plant will be taken without appropriate medical supervision. Interim regulations cannot be in force for more than 12 months (**proposed sections 301.1-301.5**). The Explanatory Memorandum states that the purpose of interim regulations is to enable

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temporary prescription of substances and quantities while expert advice is being obtained by the Minister.²⁰

The Minister is also empowered to make *emergency determinations* (**proposed sections 301.6-301.11**). The Minister must be satisfied *both* that taking the substance would create a substantial risk of death or serious harm *and* that there is an *imminent* and substantial risk that the substance will be taken without medical supervision. Emergency determinations take effect from the time of their registration and cannot be in force for more than 28 days (although this period can be extended once for up to 28 days). Emergency determinations must be publicly announced, published on the Internet and in a newspaper circulating in each State, the ACT and Northern Territory.

Interim regulations and emergency determinations are legislative instruments and so must be tabled in Parliament and are subject to disallowance.

Trafficking in controlled drugs

Proposed Division 302 contains trafficking offences. The expression ‘traffic’ is defined to mean selling a substance, or preparing, transporting, concealing or possessing a substance with the intention of selling it (**proposed section 302.1**).

There are three trafficking offences with graduated maximum penalties depending on the quantity of drugs involved:

- trafficking in commercial quantities of controlled drugs—life imprisonment or 7,500 penalty units or both
- trafficking in marketable quantities of controlled drugs—25 years imprisonment or 5,000 penalty units or both
- trafficking in controlled drugs—10 years imprisonment or 2,000 penalty units, or both.

A penalty unit equals \$110.

A number of features of these and other offences are worth mentioning.

Fault elements

While the prosecution must prove that the defendant intended to traffic in a substance, it need only prove that he or she was reckless that the substance was a controlled drug. In other words the offence is structured so that trafficking in a controlled substance is not simply *conduct* to which a fault element of intention would apply. Rather it is broken up into physical elements of *conduct* (trafficking in a substance) and *circumstance* (the substance is a controlled drug) to which intention and recklessness apply, respectively. Recklessness is easier than intention for the prosecution to prove.

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Absolute liability

Where commercial or marketable quantities are involved, absolute liability applies to those circumstances. In other words, the prosecution need not prove that the defendant put their mind to the issue of whether a commercial or marketable quantity (as defined) was involved. There is a partial defence provided in **proposed section 313.4**.

Presumption where traffickable quantities are involved

If a person has prepared, transported, concealed or possessed a traffickable quantity of a substance, then he or she is deemed to have the necessary commercial intention required for trafficking. The onus of proof is reversed and the defendant must prove that he or she did not have the requisite intention or belief. The burden placed on the defendant is a legal one—meaning that the defendant is put to proof on the balance of probabilities (**proposed section 302.5**). This contrasts with the usual burden placed on a defendant, which is an evidential burden—meaning that the defendant need only raise evidence suggesting a reasonable possibility that something exists or does not exist.²¹

The identity of drugs, plants and precursors

Proposed section 300.5 provides that if it is necessary for the prosecution to prove that the accused knew or was reckless about whether a substance or plant was a controlled substance, plant etc, it is not necessary for the prosecution to prove that the accused knew or was reckless about the particular identity of the controlled drug, plant etc.

Defences

The Bill also provides defences to the offences (see **proposed Division 313**).

Commercial cultivation of controlled plants

Proposed Division 303 contains offences of commercially cultivating controlled plants. ‘Cultivation’ includes engaging in, controlling, directing or financing cultivation [**proposed subsection 303.1(2)**]. A person will be cultivating for commercial purposes if he or she cultivates a plant with the intention of selling it or its products or believing that another person has that intention. The only controlled plant specified in the Bill is cannabis.

As with the other offences contained in the Bill, the maximum penalties available depend on the quantity of the controlled substance:

- cultivating a commercial quantity of a controlled plant for commercial purposes—maximum penalty of life imprisonment or 7,500 penalty units, or both
- cultivating a marketable quantity of a controlled plant for commercial purposes—maximum penalty of 25 years imprisonment or 5,000 penalty units, or both

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- cultivating (any other quantity of) a controlled plant for commercial purposes— maximum penalty of 10 years imprisonment or 2,000 penalty units, or both.

Provisions in relation to fault elements, absolute liability and presumptions applying to the trafficking offences in **proposed Division 302** are replicated in **proposed Division 303**. For defences see **proposed Division 313**.

Selling controlled plants

Proposed Division 304 contains offences of selling controlled plants. It will be an offence to:

- sell a commercial quantity of a controlled plant— maximum penalty of life imprisonment or 7,500 penalty units or both
- sell a marketable quantity of a controlled plant— maximum penalty of 25 years imprisonment or 5,000 penalty units or both
- sell (any other quantity of) a controlled plant— maximum penalty of 10 years imprisonment or 2,000 penalty units or both.

Provisions in relation to fault elements and absolute liability applying to the trafficking offences in **proposed Division 302** are also found in **proposed Division 304**.

Commercial manufacture of controlled drugs

Proposed Division 305 contains offences relating to the commercial manufacture of controlled drugs in commercial, marketable and trafficable quantities. Manufacturing for commercial purposes means manufacturing with the intention of selling the substance or manufacturing believing that another person intends selling the substance (**proposed section 305.2**).

The fault elements and absolute liability provisions mentioned earlier apply to offences of manufacturing commercial and marketable quantities of controlled drugs. There is also a ‘presumption’ provision which reverses the onus of proof in the case of trafficable quantities of a drug (**proposed section 305.6**).

Penalties for manufacturing offences involving marketable or trafficable quantities depend on whether the offence is an aggravated one (ie where the commission of the offence exposes a person under 14 to a controlled drug):

- in the case of an aggravated offence of manufacturing marketable quantities of controlled drugs, the maximum penalty is 28 years imprisonment or 5,600 penalty units or both. For a non-aggravated offence, the maximum penalty is 25 years imprisonment or 5,000 penalty units or both (**proposed section 305.4**)
- in the case of an aggravated offence of manufacturing controlled drugs, the maximum penalty is 12 years imprisonment or 2,400 penalty units or both. For a non-aggravated

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offence, the maximum penalty is 10 years imprisonment or 2,000 penalty units, or both (**proposed section 305.5**).

For further details of the factors that constitute ‘aggravation’, see **proposed subsection 310.4(2)**.

Pre-trafficking in controlled precursors

Precursors are the raw ingredients of controlled drugs. **Proposed Division 306** creates offences of pre-trafficking in controlled precursors. A controlled precursor is a substance prescribed by the proposed Act, an interim regulation or an emergency determination. Precursors prescribed in the Bill include ephedrine (used in the manufacture of methamphetamine) and lysergic acid (used in the manufacture of LSD). Pre-trafficking includes activities like selling a substance in the belief that the buyer will use it to manufacture a controlled drug (**proposed section 306.1**).

The Bill creates aggravated offences of pre-trafficking in controlled precursors where a child under the age of 14 is involved (for further details see **proposed subsection 310.4** below). Relevant penalties and offences are as follows:

- pre-trafficking in a commercial quantity of a controlled precursor—a maximum penalty of 28 years imprisonment or 5,600 penalty units or both in the case of an aggravated offence; 25 years imprisonment or 5,000 penalty units or both in any other case (**proposed section 306.2**)
- pre-trafficking in a marketable quantity of a controlled precursor—17 years imprisonment or 3,400 penalty units or both in the case of an aggravated offence; 15 years imprisonment or 3,000 penalty units or both in any other case (**proposed section 306.3**)
- pre-trafficking (in other quantities) of a controlled precursor—9 years imprisonment or 1,800 penalty units or both in the case of an aggravated offence; 7 years imprisonment or 1,400 penalty units or both in any other case (**proposed section 306.4**).

As with the other offences, there are provisions relating to recklessness and absolute liability. There are also a number of presumptions which reverse the onus of proof (**proposed sections 306.5-306.8**). For example, as a result of the presumptions:

- where a person has sold, manufactured or possesses a substance without the appropriate legal authorisation, it is deemed that the person intended to act unlawfully
- in relation to presumptions relating to manufacture and possession, the person is deemed to have acted with the requisite commercial intention or belief.

The burden placed on the defendant as a result of these presumptions is legal one—ie to prove, on the balance of probabilities, that he or she did not have the requisite intention or belief.

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Import-export offences

Proposed Division 307 deals with serious import-export offences. These offences are currently found in the *Customs Act 1901* but will be repealed and transferred to the proposed Act. Regulatory offences will remain in customs legislation.

The new offences relate to the import, export or possession of a substance that is a ‘border controlled drug or border controlled plant’ or a ‘border controlled precursor’. Such drugs, plants and precursors are those listed in **proposed section 314.5**, prescribed by regulation or specified in an emergency determination. They include substances such as cannabis, cocaine, heroin and LSD that have been imported or exported.

There are three categories of import-export offence:

- importing or exporting border controlled drugs or plants (**proposed sections 307.1-307.4**)
- possessing unlawfully imported border controlled drugs or plants or drugs or plants reasonably suspected of being unlawfully imported (**proposed sections 307.5-307.7**)
- importing or exporting border controlled precursors (**proposed sections 307.11-307.14**).

Within each category there is a hierarchy of offences and penalties depending on whether commercial, marketable or lesser quantities are involved.

In general, provisions relating to recklessness²² and absolute liability applying to other offences, also apply to the import-export offences. Presumptions reversing the onus of proof also apply to offences of importing and exporting border controlled precursors. Legal burdens are also placed on the defendant in certain circumstances.

Possession offences

Proposed Division 308 contains possession offences. It will be an offence to:

- possess a controlled substance—maximum penalty: imprisonment for 2 years or 400 penalty units, or both (**proposed section 308.1**). If such an offence is committed in a State or Territory, the person can be dealt with as though the offence were a State or Territory offence. A note explains that this ‘allows for drug users to be diverted from the criminal justice system to receive the same education, treatment and support that is available under State or Territory laws.’
- possess a controlled precursor, intending to use it to manufacture a controlled drug—maximum penalty: imprisonment for 2 years or 400 penalty units, or both (**proposed section 308.2**). The onus of proof is reversed—if the defendant possessed the substance without the requisite authorisation he or she is presumed to possess the substance intending to manufacture a controlled drug

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- possess plant material, equipment or instructions for the commercial cultivation of controlled plants—maximum penalty: imprisonment for 7 years or 1,400 penalty units, or both (**proposed section 308.3**)
- possess any substance, equipment or instructions for commercially manufacturing controlled drugs—maximum penalty: imprisonment for 7 years or 1,400 penalty units, or both (**proposed section 308.4**). The onus of proof is reversed—if a person possesses an unauthorised tablet press, then he or she is presumed to possess the tablet press with the intention of using it to manufacture a controlled drug.

Drug offences involving children

Proposed Division 309 deals with drug offences that involve children. Children (ie individuals under the age of 18) are not criminally responsible for offences against **proposed Division 309 (proposed section 309.1)**. This is because children are the *victims* of these offences.

A number of offences, all carrying severe penalties (custodial sentences ranging from 25 years to life imprisonment) are created for:

- supplying controlled drugs to children (**proposed section 309.2**)
- supplying marketable quantities of controlled drugs to children for trafficking (**proposed section 309.3**)
- supplying controlled drugs to children for trafficking (**proposed section 309.4**)
- procuring children for trafficking in marketable quantities of controlled drugs (**section 309.7**)
- procuring children for trafficking in controlled drugs (**proposed section 309.8**)
- procuring children for pre-trafficking in marketable quantities of controlled precursors (**proposed section 309.10**)
- procuring children for pre-trafficking in controlled precursors (**proposed section 309.11**)
- procuring children for importing or exporting marketable quantities of border controlled drugs, plants or precursors (**section 309.12**)
- procuring children for importing or exporting border controlled drugs or border controlled plants (**proposed section 309.13**)
- procuring children for importing or exporting marketable quantities of border controlled precursors (**proposed section 309.14**)
- procuring children for importing or exporting border controlled precursors (**proposed section 309.15**).

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Procuring for the purposes of trafficking means procuring a child to sell a substance or, with the intention of selling the substance, procuring the child to prepare a substance for supply or to transport, guard or conceal it (**proposed section 309.6**). Procuring for the purposes of pre-trafficking means procuring a child to sell a substance to a person where the procurer believes that the buyer intends to use the substance to manufacture a controlled drug (**proposed section 309.9**).

Strict liability

In all the **proposed Division 309** offences, strict liability applies to the circumstance that the individual is a child. In other words, the prosecution need not prove that the defendant put their mind to whether the individual was a child. However, the defendant has a defence of mistake of fact.

Absolute liability

When a **proposed Division 309** offence involves a marketable quantity of a controlled substance, the prosecution need not prove that the defendant put their mind to the issue of whether the quantity was a marketable quantity. A defendant may have a partial defence in **proposed section 313.4**.

Fault elements

In all the **proposed Division 309 offences**, the prosecution must prove that the defendant was reckless about the circumstance that the substance was a controlled substance. However, prosecution need not prove that the defendant was reckless about the particular identity of the controlled substance (**proposed section 300.5**).

Presumptions where trafficable quantities are involved

In relation to the offences of supplying controlled drugs to children for trafficking (**proposed sections 309.3 and 309.4**), it is presumed that, if a trafficable quantity is involved, the person believed that the child intended to sell some or all of the controlled drug. The onus of proof is thus reversed and the defendant bears a legal burden of proving that he or she did not have that belief (**proposed section 309.5**)—ie on the balance of probabilities.

Other legal burdens on the defence

A defendant will not be guilty of the offences in **proposed sections 309.13-309.15** if he or she can prove that he or she neither intended nor believed that another person intended to sell the prohibited substance or plant. The burden is a legal one, that is it must be proved on the balance of probabilities.

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Harm and danger to children under 14 from serious drug offences

The following offences are created by **proposed Division 310**. They are:

- creating a danger of harm to a child under the age of 14 by exposing them to the unlawful manufacture of a controlled drug or controlled precursor (**proposed section 310.2**).²³ The maximum penalty is 9 years imprisonment or 1,800 penalty units or both. The risk of harm must be a real, not merely a theoretical risk. Additional features of this offence are that the prosecution need not prove that a person was actually placed in danger of serious harm and that the prosecution need not prove that a particular person unlawfully manufactured the drug or precursor
- causing harm to a child under the age of 14 as a result of exposing them to the unlawful manufacture of a controlled drug or controlled precursor (**proposed section 310.3**). The maximum penalty is 9 years imprisonment or 1,800 penalty units or both. An additional feature of this offence is that the prosecution need not prove that a particular person unlawfully manufactured the drug or precursor

Children are not criminally responsible for these offences because they are the victims of the offences (**proposed section 310.1**).

Strict liability applies to the following circumstances of these offences:

- the child is under the age of 14 years, and
- the manufacture is unlawful.

Strict liability means that the prosecution need not prove that the defendant put their mind to these matters. However, the defendant has a defence of mistake of fact.

Aggravated offences are also created, designed to increase the penalty imposed by a court:

- manufacturing controlled drugs and manufacturing marketable quantities of controlled drugs—if the commission of the offence exposes a person under the age of 14 years to the manufacture of a controlled drug (**proposed subsection 310.4(2)**)
- pre-trafficking in controlled precursors and pre-trafficking in commercial or marketable quantities of controlled precursors— if the commission of the offence exposes a person under the age of 14 years to a controlled precursor intended to be used in manufacture or to the manufacture of a controlled drug (**proposed section 310.4(3)**)

It is a defence to show on the balance of probabilities that the commission of these offences did not give rise to a danger of harm to the child. Harm includes catching a disease. The danger of harm must be real rather than theoretical.²⁴

The penalties for the aggravated offences are set out in proposed **sections 305.4-305.5 and 306.2-306.4**.

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Combining quantities of drugs, plants or precursors

The purpose of **proposed Division 311** is to enable a person to be prosecuted for serious drug offences by aggregating dealings that involve smaller quantities of controlled drugs or controlled precursors. There are three types of aggregation:

- *combining different parcels on the same occasion (proposed section 311.1)*—this provision covers the situation where a person traffics in, sells, manufactures etc different parcels of either the same or different controlled drugs, border controlled drugs, etc. The total quantity of controlled drugs etc will be determined by adding the weights of the individual parcels
- *combining parcels from organised commercial activities*—this type of aggregation can be used where the prosecution can show that the defendant carried on a business involving commercial or marketable quantities of controlled substances or border controlled substances but cannot show individual quantities or transactions. There is no limit on the amount of time over which the activity takes place in order for this type of aggregation to occur.
- *combining parcels from multiple offences*. These provisions are designed to target those who repeatedly traffic in small quantities in a defined time period (either 7 days in the case of controlled substances or border controlled substances or 30 days in the case of import-export offences).

Working out quantities of drugs, plants or precursors

Proposed Division 312 sets out how quantities of drugs, plants or precursors can be determined when those substances are in mixtures and when dilute quantities of substances are involved.

Defences and alternative verdicts

A person has a defence to the offences in Part 9.1 (other than under Division 307 ie import/export offences) if:

- they engage in conduct in a State or Territory and the conduct is excused under the relevant State or Territory law (**proposed section 313.1**)
- their conduct is excused under another Commonwealth law (section 10.5, Criminal Code)
- they reasonably but mistakenly believe that their conduct was not unlawful under a Commonwealth, State or Territory law (**proposed section 313.2**)

Proposed sections 313.3-313.6 enable alternative verdicts to be substituted if:

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- a defendant is found not guilty of an alleged offence but the trier of fact (the judge or jury) is satisfied beyond reasonable doubt that they are guilty of another Part 9.1 offence (**proposed section 313.3**)
- a defendant proves beyond reasonable doubt that they were mistaken about the *quantity* of the controlled substance and that, if their mistaken belief had been correct, they would have been guilty of another offence attracting a lesser penalty (**proposed section 313.4**)
- a defendant proves beyond reasonable doubt that they were mistaken about the *identity* of the controlled substance and that, if their mistaken belief had been correct they would have been guilty of another offence attracting a lesser penalty (**proposed section 313.5**).

Drugs, plants, precursors and quantities

Proposed Division 314 sets out the trafficable, marketable and commercial quantities of a range of controlled drugs, controlled precursors, controlled plants, border controlled precursors and border controlled precursors.

For example, in relation to controlled drugs, a trafficable quantity of heroin is 2 grams, a marketable quantity is 250 grams and a commercial quantity is 1.5 kilograms. A trafficable quantity of cannabis is 250g, a marketable quantity is 25 kilograms and a commercial quantity is 125 kilograms (**proposed subsection 314.1(4)**).

Consequential and transitional provisions

Part 2 of **Schedule 1** contains consequential and transitional amendments.

Crimes Act 1914

The effect of **items 2** and **3** is that controlled operations will be able to be conducted to obtain evidence for the prosecution of controlled substances offences. This is the new terminology introduced by **proposed Part 9.1** (the current terminology in the Crimes Act is ‘illegal drug dealings’).

Section 22 of the Crimes Act currently allows a court to order that a person charged with or convicted of a serious narcotics offence remain in Australia or surrender their passport. **Items 4-11** change the terminology in section 22 of the Crimes Act to reflect proposed Part 9.1.

Customs Act 1901

Amendments to the Customs Act will repeal a number of definitions that will no longer be used because of the enactment of Part 9.1 of the Criminal Code.

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Regulatory offences (as opposed to serious criminal offences) involving controlled substances will remain in the Customs Act.

Additionally, some of the amendments relating to the Customs Act will ensure that any substance or plant that is border controlled ‘will automatically become a “prohibited import” under the Customs Act subject to the exemptions and authorisation processes set out in the *Customs (Prohibited Imports) Regulations 1956*.’²⁵

Surveillance Devices Act 2004

The Surveillance Devices Act enables emergency authorisations for the use of surveillance devices to be obtained in certain circumstances. These circumstances include where the use of a surveillance device is urgently required to prevent the loss of evidence in an investigation into an offence under section 233B of the Customs Act (ie involving the importation or exportation of narcotic goods). **Item 68** repeals the reference to section 233B because that section is being repealed (**item 61**). **Item 69** inserts a reference to offences under **proposed Part 9.1**.

Telecommunications (Interception) Act 1979

Warrants to intercept telecommunications can be obtained by certain law enforcement agencies to investigate what are called ‘class 1’ and ‘class 2’ offences. The judge or AAT member issuing a warrant must be satisfied of different things depending on whether the warrant applied for relates to a ‘class 1’ or ‘class 2’ offence.

‘Class 1’ offences are particularly serious offences that include murder and terrorism offences. **Item 70** removes the reference to ‘narcotics offence’²⁶ in the definition of ‘class 1’ offences and substitutes a reference to the import-export offences in proposed Division 307 so that these offences will become ‘class 1’ offences.

‘Class 2’ offences are also serious offences and include offences punishable by at least 7 years imprisonment involving loss of life, serious personal injury, serious arson etc. **Item 73** makes offences against proposed Part 9.1 (other than Division 307, section 308.1 or 308.2) ‘class 2’ offences. Section 308.1 is a simple possession offence and section 308.2 is an offence of possessing a controlled precursor.²⁷ It would not be appropriate to define these offences as ‘class 2’ offences.

Schedule 2—Involvement of children in armed conflict

Schedule 2 commences on the later of 28 days after Royal Assent or the day on which the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict enters into force for Australia. However, the provisions do not come into effect if the Protocol does not enter into force for Australia (**clause 2**).

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Background

The purpose of **Schedule 2** is to give effect to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. The Protocol is designed to prevent the involvement of children in armed conflict. It sets 18 years as the minimum age for direct involvement in armed hostilities and compulsory recruitment and prescribes that States Parties must raise the minimum age for voluntary recruitment beyond the current minimum age of 15 years (the age set down in the Convention on the Rights of the Child). It is estimated that 300,000 persons under the age of 18 years are involved in 30 conflicts worldwide.²⁸

Australia signed the Optional Protocol in December 2002 but has not yet ratified it. In line with the Government's policy on entering into treaties, the Optional Protocol was referred to the Joint Standing Committee on Treaties in 2004 for inquiry and report. During the Committee's inquiry, a number of issues were raised by HREOC:

- a suggestion for a new offence (rather than amendments to existing Criminal Code offences) which followed the language of article 4 of the Protocol more closely. HREOC suggested that a new offence should use the term 'hostilities' and 'pick up the notion of armed groups as distinct from the armed forces of a state.'²⁹
- amending the *Defence Act 1903* rather than issuing new Defence Instructions to give effect to the Optional Protocol (Defence Instructions (General) PERS 33-4 states that the minimum voluntary recruitment age is 17 years).

The Committee reported in December 2004 and recommended that Australia take binding treaty action in respect of the Protocol.³⁰ The Committee did not adopt the suggestion that the Defence Act be amended but did recommend that the relevant Defence Instructions be readily available (for example on the Department's website) and that they be amended to reflect Article 3(3) of the Optional Protocol.³¹

The amendments in Schedule 2

The provisions in **Schedule 2** amend sections 268.68 and 268.88 of the Criminal Code to:

- create new offences of using, conscripting or enlisting a person under the age of 18 years into 'an armed force or group other than the national armed forces (in the context of an international armed conflict). The maximum penalties are imprisonment for 17 years, 15 years and 10 years, respectively (**item 3**)
- create new offences of using, conscripting or enlisting a person under the age of 18 years into 'an armed force or group other than the national armed forces (in the context of an armed conflict that is not an international armed conflict). The maximum penalties are imprisonment for 17 years, 15 years and 10 years, respectively (**item 11**).

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Schedule 4—Australian Federal Police Act 1979

Schedule 4 commences on Royal Assent (**clause 2**).

The amendments in Schedule 4 amend the Australian Federal Police Act (AFP Act) to add to the functions of the AFP and amend the secrecy provisions of the Act.

Overseas deployments

The AFP's functions are set out in section 8 of the AFP Act. They include:

- providing police services for the Australian Capital Territory and the Jervis Bay Territory
- providing police services in relation to Commonwealth laws and property and to safeguard Commonwealth interests
- anything incidental or conducive to the performance of the functions that are specified in section 8.

The AFP has been deployed overseas for the purposes of 'international peace and stability operations [and] ... multilateral and bilateral law enforcement building capacity.'³² Recent and current international deployments include East Timor, Papua New Guinea, Nauru and Solomon Islands.³³ The Explanatory Memorandum states that such deployments are covered by section 8 because they are incidental to the AFP's provision of police services in relation to the laws of the Commonwealth and safeguarding Commonwealth interests. It adds that the AFP's ability to deploy overseas should be spelled out in the legislation. **Item 8** amends section 8 of the AFP Act to provide that the AFP's functions include:

- providing police services and police support services to assist Australian or foreign law enforcement, intelligence or security or government regulatory agencies
- providing police services and police support services relating to peace, stability and security in foreign countries.

Secrecy provisions

Items 6-9 of **Schedule 4** amend section 60A of the AFP Act. Section 60A prohibits serving and former AFP personnel from recording or communicating prescribed information³⁴ with certain exceptions. These exceptions are communications relating to the Witness Protection Program which are authorised by the AFP Commissioner. Or recordings or communications for the purposes of, or in accordance with duties under the AFP Act, the *Witness Protection Act 1994* (Cwlth) or regulations made under those statutes.

The amendments will enable the AFP Commissioner to authorise the disclosure of 'personal information' where the individual consents to or requests that this be done. The

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Explanatory Memorandum gives as examples character and criminal history checks for pre-employment security assessments.³⁵ The definition of ‘personal information’ in the *Privacy Act 1988* (Cwlth) is used.

Concluding Comments

Simple possession offences

Proposed section 308.1 of the Criminal Code creates an offence of possessing a controlled drug. Such drugs include cannabis and heroin. The maximum penalty for this offence is 2 years imprisonment or a fine of 400 penalty units, or both. The section provides that if such an offence is committed in a State or Territory, the person can be dealt with under the relevant State or Territory law, thus allowing for diversion from the criminal justice system.

There is probably little doubt that the Commonwealth’s ratification of international treaties such as the Single Convention on Narcotic Drugs, 1961 and the 1988 Convention gives it wide scope to legislate in the area of illicit drugs and, indeed, to cover the field should it wish to do so. However, in looking at the simple possession offence Parliament may wish to consider the following matters:

- is the offence a ‘serious’ offence suitable for inclusion in the Criminal Code? MCOCC’s 1998 report on *Serious Drug Offences* did not contain a simple possession offence. MCOCC’s draft offences were ‘intended to concentrate on the impact of prohibitions and penalties on individuals engaged in organised commercial trade in recreational drugs.’³⁶
- while **proposed sections 308.1 and 300.4** allow for the continued operation of State and Territory laws, it would not appear that there is any guarantee that a person who commits an offence of say, simple cannabis possession, in a jurisdiction that allows for the offence to be expiated on payment of a fine will not be proceeded against under Commonwealth law³⁷
- while the continued operation of State and Territory laws is provided for, some jurisdictions are operating pre-court or court diversion programs that are administratively rather than legislatively based. What happens in these circumstances?

Presumptions of innocence and other matters

The presumption of innocence has been described as the golden thread of the criminal law. It means that the prosecution must prove the defendant’s guilt. However, many inroads have been made to the presumption—including in drug trafficking offences where the burden of proof is reversed, presumptions (of guilt) may be applied and strict and absolute liability may affect elements of the offence.³⁸

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In some of the offences created by the Bill, there is a presumption that possession of a commercial or marketable quantity of a controlled substance means that the person possessed it for commercial purposes. A legal burden is then placed on the defendant to prove (on the balance of probabilities) that he or she did not have this intention. This provision reverses the onus of proof that normally applies in criminal proceedings.

In its 1998 Final Report on *Serious Drug Offences*, the Model Criminal Code Officers Committee recommended placing an evidential not a legal burden on the accused. An evidential burden, the usual burden placed on an accused, merely requires the defendant to point to evidence suggesting a reasonable possibility that something exists or does not exist. The report commented:

The overwhelming majority of offenders who appear before the courts in a charge of trafficking arising from possession are not caught with kilo quantities. If they are dealers at all, they are small dealers. At this level there is considerable risk that legal rules which deem an accused to be a dealer, on proof of possession of a trafficable quantity, will catch a significant proportion of mere users, who have no commercial involvement in trafficking. The existing commitment to harm minimisation as a central object of drug law enforcement requires laws which discriminate, so far as it is possible to do so, between those who are traffickers and those who are not.³⁹

Subsequently, however, the Standing Committee of Attorneys-General decided that a legal rather than an evidential burden should be placed on the accused. This agreement is reflected in Tasmanian and ACT legislation.

Parliament may wish to consider whether placing a legal burden on the accused, together with other provisions which make some inroads into the presumption of innocence, strikes an appropriate balance.

Endnotes

- 1 Section 233B, Customs Act.
- 2 Minister for Defence Science and Personnel, Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989, Second Reading Speech, House of Representatives, *Hansard*, 2 November 1989, p. 2395.
- 3 *Explanatory Memorandum*, p. 6.
- 4 Regulation 5, Customs (Prohibited Imports) Regulations.
- 5 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law*, LawBook Co., 2005.
- 6 *Cannabis Control Act 2003* (WA).
- 7 *Misuse of Drugs Act 1990* (NT).

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- 8 *Drug Misuse and Trafficking Act 1985* (NSW).
- 9 *Misuse of Drugs Act 2001* (Tas).
- 10 See: <http://www.aic.gov.au/research/drugs/responses/diversion.html> and http://www.aic.gov.au/research/drugs/responses/drug_courts.html, for information about Australian pre-court diversion programs and drug court initiatives.
- 11 There are differences between the drugs courts in each jurisdiction—for example, in relation to eligibility criteria, whether they have a legislative basis and whether there are limits on the number of participants.
- 12 For constitutional reasons.
- 13 See: Ian Leader-Elliott, ‘Elements of liability in the Commonwealth Criminal Code’, Paper presented to the AIJA Magistrates’ Conference, Melbourne, 20-21 July 2001.
- 14 [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/\(0AFA115E182148C186311CED66C0728D\)~modelcode_ch6_drug_offences_report.pdf/\\$file/modelcode_ch6_drug_offences_report.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentPersonal/(0AFA115E182148C186311CED66C0728D)~modelcode_ch6_drug_offences_report.pdf/$file/modelcode_ch6_drug_offences_report.pdf)
- 15 *Criminal Code (Serious Drug Offences) Amendment Act 2004* (ACT).
- 16 *Misuse of Drugs Act 2001* (Tas).
- 17 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) as amended by the *Drugs, Poisons and Controlled Substances (Amendment) Act 200?*
- 18 Explanatory Memorandum, p. 1.
- 19 That is, there must be a corresponding foreign offence where the alleged offence by an Australian occurs overseas.
- 20 Explanatory Memorandum, p. 13.
- 21 See sections 13.3-13.5, Criminal Code.
- 22 Section 233B of the Customs Act was recently amended to separate out the physical elements of conduct and circumstance in the offence so that the prosecution does not have to prove an intention to import a prohibited substance.
- 23 This includes exposing a child to the risk of catching a disease that may result in serious harm to them [**proposed subsection 310.2(3)**].
- 24 **Proposed subsections 310.4(6)-(8)**.
- 25 Explanatory Memorandum, p. 110.
- 26 This term is defined in section 5 of the Telecommunications (Interception) Act as ‘an offence punishable as provided by section 235 of the *Customs Act 1901*’. **Item 71** repeals this definition as section 235 of the Customs Act is repealed by **item 64**.
- 27 Attracting maximum penalties of 2 years imprisonment or 400 penalty units, or both.
- 28 Joint Standing Committee on Treaties, *Review of treaties tabled on 7 December 2004 (Previously tabled in May and June 2004)*, December 2004.

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- 29 *ibid.*, quoted on p. 104.
- 30 *ibid.*
- 31 See recommendations 6 and 7 of the Committee's report.
- 32 Explanatory Memorandum, p. 119. See also the AFP's website at: <http://www.afp.gov.au/afp/page/International/InternationalDeployment/home.htm>.
- 33 For a table of AFP overseas missions see: <http://www.afp.gov.au/afp/page/International/InternationalDeployment/TableofAllMissions.htm>.
- 34 Prescribed information is information obtained in the course of performing duties under the AFP Act, the Witness Protection Act or regulations made under those statutes (section 60A(3)).
- 35 Explanatory Memorandum, p. 121.
- 36 Model Criminal Code Officers Committee, *Model Criminal Code. Chapter 6. Serious Drug Offences. Report*, October 1998, p. 8.
- 37 In the ACT, for instance, section 171A of the *Drugs of Dependence Act 1989* (ACT) enables a police officer to serve an offence notice on a person believed to have committed a simple cannabis offence (eg possessing not more than 25 grams of cannabis). The value of a penalty notice is \$100. Alternatively, the person could be charged, in which case the fine cannot exceed 1 penalty unit (paragraph 171(1)(a)). A penalty unit is \$100.
- 38 Bronitt and McSherry, *op. cit.*
- 39 MCOCC, *op. cit.*, p. 87.

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