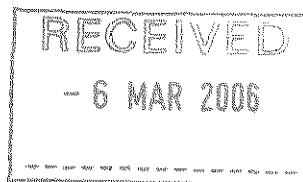




DPP



Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA05101680/1

3 March 2006

Mr Jonathan Curtis
Committee Secretary
Parliamentary Joint Committee
on the Australian Crime Commission
Parliament House
CANBERRA ACT 2600

PARLIAMENTARY JOINT COMMITTEE ON
THE AUSTRALIAN CRIME COMMISSION

REC'D: DPP 6 March 2006

FROM: DPP

AUTHORISED FOR PUBLICATION:

SECRETARY:

Dear Mr Curtis

Inquiry into amphetamines and other synthetic drugs

I refer to your letter of 8 December 2005 to the Commonwealth Director of Public Prosecutions, inviting a submission to the Committee's Inquiry into amphetamines and other synthetic drugs.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the review. I am the author of the submission and my contact details are:

Mr James Edwin Carter
A/g Senior Assistant Director
PO Box 3104
CANBERRA ACT 2601

Telephone: 02 6206 5621

Thank you for inviting the Commonwealth DPP to make a submission.

Yours sincerely

James Carter
A/g Assistant Director



Commonwealth Director of Public Prosecutions

Submission to the Parliamentary Joint Committee on the Australian Crime Commission

Inquiry into amphetamines and other synthetic drugs

Introduction

The Office of the Commonwealth Director of Public Prosecutions is responsible for the prosecution of offences against the laws of the Commonwealth. The CDPP is an independent prosecuting authority and conducts prosecutions for Commonwealth offences in accordance with the Prosecution Policy of the Commonwealth. The CDPP also takes action to confiscate the proceeds of Commonwealth crime.

The CDPP is not an investigative agency and does not have any function pursuant to the Director of Public Prosecutions Act 1983 to investigate possible offences. The CDPP can only prosecute, or take confiscation action, when there has been an investigation by an investigative agency, such as the Australian Crime Commission or the Australian Federal Police. However the CDPP is available to provide legal advice and assistance to investigators during the course of investigations.

Offences relating to the importation and possession of drugs, including amphetamines and other synthetic drugs, are amongst the most serious Commonwealth offences. The CDPP submits in the courts that substantial and deterrent sentences are required in order to protect the community. The seriousness of this offending is reflected in the courts imposing very substantial prison sentences, including the most severe penalty, life imprisonment, in the most grave cases. Intercepting drugs before they enter the community and are distributed has always been regarded as vital.

The Parliamentary Joint Committee's inquiry follows the recent commencement, on 6 December 2005, of the serious drug offences contained in Part 9.1 of the *Criminal Code*. Part 9.1 contains offences relating to the importation and trafficking of amphetamines and other synthetic drugs. As well as updating and moving offences relating to the importation and possession of serious drugs from the *Customs Act 1901* to the *Criminal Code*, the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* introduced a number of offences targeting those who import or export, manufacture or possess chemical substances used to make manufactured drugs, namely precursors.

The criminal offences in Part 9.1 extend to the illicit commercial manufacture of drugs within Australia. These new Commonwealth offences provide for penalties up to life imprisonment recognising the seriousness of this conduct.

Part 9.1 contains new offences where adults use children for the purposes of the drug trade. The gravity of this conduct is recognised in the penalties available. In relation to the manufacture of drugs, the courts are able to impose higher penalties where children are exposed to the manufacture of drugs.

Commonwealth serious drugs legislation – Part 9.1 of the *Criminal Code*

The new offences can be seen as being in two separate streams. The first stream relates to the import and export of drugs and precursors and is dealt with in *Division 307 of the Criminal Code*. The explanatory memorandum states that the drug import/export offences in *Division 307* are based on the existing offences in the *Customs Act* and are designed to accord as closely as possible to the offences they are replacing.

The second stream of offences relate to domestic activity involving drugs and precursors such as trafficking and manufacture. These are dealt with separately from the import/export offences.

The offences in each stream are tiered based on the quantity of serious drug involved, with greater penalties being available where a marketable or commercial quantity is involved.

The new domestic offences in Part 9.1 significantly extend the coverage of Commonwealth drug laws. Part 9.1 provides that the new offences have concurrent operation with State and Territory drug laws.

The Import/Export of border controlled drugs

Division 307 of the Criminal Code provides for offences relating to the import and export of “border controlled drugs”. Section 314.4 lists border controlled drugs and sets out quantities relevant to the various offences. This list includes amphetamines and other synthetic drugs.

Sections 307.1 - 307.4 relate to importing and exporting border controlled drugs. The applicable penalty where a commercial quantity is involved is imprisonment for life or 7,500 penalty units (i.e. \$825,000), or both. Where a marketable quantity is involved the applicable penalty is 25 years imprisonment or 5,000 penalty units (i.e. \$550,000), or both. There is a new tier of offence applying to any quantity with a penalty of 10 years or 2,000 penalty units (i.e. \$220,000), or both, provided there is a commercial purpose. In addition, there is an offence that applies to any amount with penalty of 2 years or 400 penalty units (i.e. \$44,000), or both.

Under the new provisions, the marketable quantity and the new tier offences are subject to a defence of ‘lack of commercial intention’. This requires the defendant to prove on the balance of probabilities that he or she neither intended to sell any of the drugs, nor believed that another person intended to sell any of the drugs. However, where this defence is raised, and accepted by a jury, *Division 307* makes provision for an alternative verdict and the defendant may be convicted of an offence with a 2 year penalty or 400 penalty units (i.e. \$44,000), or both.

Sections 307.5 - 307.10 provide for offences relating to the possession of border controlled drugs that have been unlawfully imported or are reasonably suspected of having been unlawfully imported.

Import/Export of border controlled precursors

Division 307 introduces new offences for the importation or exportation of border controlled precursors with the intention of manufacturing a controlled drug. Section 314.6 lists border controlled precursors and sets out quantities relevant to the various offences. Fourteen precursor chemicals are currently listed. The Ministerial Council on Drug Strategy Working Party is currently examining what additional precursors should be added to the list in the *Criminal Code* and what amounts should be specified.

The applicable penalty where a commercial quantity is involved is 25 years imprisonment or 5,000 penalty units (i.e. \$550,000), or both. Where a marketable quantity is involved the applicable penalty is 15 years or 3,000 penalty units (i.e. \$330,000), or both. There is a further offence where any quantity is involved and this carries a penalty of 7 years or 1,400 penalty units (i.e. \$154,000), or both. The quantities for a commercial and a marketable quantity have been based on the amount of precursor necessary to manufacture the corresponding amount of border controlled drug.

A person commits an offence where the person imports or exports a border controlled precursor and either or both of the following apply, the person intends to use any of the substance to manufacture a controlled drug, or the person believes that another person intends to use any of the substance to manufacture a controlled drug.

These offences carry a defence of lack of commercial intention. The defence has two limbs. First, even if the defendant intended to manufacture a controlled drug, it is a defence if the defendant proves that he or she did not intend to sell any of the drugs so manufactured and did not believe that another person intended to sell any of it. Secondly, even if the defendant believes that another person intended to manufacture a controlled drug, it is a defence if the defendant proves that he or she did not intend to sell any of the precursor to that person.

If the defendant makes out the lack of commercial intention defence, they may still be liable to be convicted of an offence of possessing a precursor with an intention to manufacture a controlled drug – carrying a penalty of imprisonment for 2 years or 400 penalty units (i.e. \$44,000), or both.

Part 9.1 contains presumptions in relation to these offences in section 307.14. Where a Commonwealth law requires the import or export to be authorised and if it was not so authorised, the person is taken to have imported or exported the substance with the intention of using some or all of the substance to manufacture a controlled drug and a belief that another intended to manufacture a controlled drug. These presumptions do not apply however if the person proves on the balance of probabilities that he or she did not have that intention or belief.

To establish a precursor importation offence, the defendant must have intended to use the precursor to manufacture a controlled drug and/or believed that another person intended to use the precursor to manufacture a controlled drug.

The existing regulatory offence, namely section 233BAA of the *Customs Act* of importing Tier 1 goods (which include precursor chemicals), has been retained with a penalty of 1,000 penalty units (i.e. \$110,000) or imprisonment for 5 years, or both.

Domestic offences – trafficking in controlled drugs

Division 302 provides for offences relating to trafficking in controlled drugs. Section 314.1 lists controlled drugs and sets out quantities relevant to the various offences. This list includes amphetamines and other manufactured drugs.

Section 302.1 provides that a person traffics in a controlled drug if the person:

- sells the drug;
- prepares the drug for supply with the intention of selling any of it or believing that another person intends to sell any of it;
- transports the drug with the intention of selling any of it or believing that another person intends to sell any of it; or
- guards or conceals the drug with the intention of selling any of it or assisting another person to sell any of it; or
- possesses the drug with the intention of selling any of it.

The applicable penalty where a commercial quantity is involved is imprisonment for life or 7,500 penalty units (i.e. \$825,000), or both. Where a marketable quantity is involved the applicable penalty is 25 years imprisonment or 5,000 penalty units (i.e. \$550,000), or both. There is a lowest tier offence applying to any quantity with a penalty of 10 years or 2,000 penalty units (i.e. \$220,000), or both.

Part 9.1 contains presumptions in relation to these offences in section 302.5. If not less than a trafficable quantity is involved, it is presumed that the defendant had the necessary commercial intention. The Explanatory Memorandum states that the “trafficable quantity threshold ... reflect[s] the strong likelihood that an offence involving larger amounts will be commercially motivated”. This presumption does not apply if the defendant proves on the balance of probabilities that he or she neither intended to sell any of the drugs nor believed that another intended to sell any of the drugs.

Domestic offences – pre-trafficking in controlled precursors

“Pre-trafficking” is the label given to various illicit dealings in precursor chemicals and is covered in Division 306. Section 314.3 lists controlled precursors and sets out quantities relevant to the various offences.

Pre-trafficking covers four types of conduct. Section 306.1 provides that a person pre-traffics in a precursor if:

- they sell the precursor believing that the buyer or another person will use it to manufacture a controlled drug; or
- they manufacture that precursor with the intention of using any of it to manufacture a controlled drug and with the intention of selling any of the drug so manufactured or believing that another person intends to do so; or
- they manufacture that precursor with the intention of selling it to another person and believing that the other person intends to use any of it to manufacture a controlled drug; or,

- if they possess the precursor with the intention of using any of it to manufacture a controlled drug and with the intention of selling any of the drug so manufactured.

Division 306 sets out new domestic offences of pre-trafficking in controlled precursors. The offences have the same 3 tier structure with the same penalties as importing precursors – 25 years or 5,000 penalty units (i.e. \$550,000), or both for a commercial quantity; 15 years or 3,000 penalty units (i.e. \$330,000), or both for a marketable quantity and 7 years or 1,400 penalty units (i.e. \$154,000), or both, for any quantity. The quantities for a commercial and a marketable quantity have been based on the amount of precursor necessary to manufacture the corresponding amount of border controlled drug.

Part 9.1 contains presumptions in relation to these offences. These are based on whether conduct is required to be authorised and was not authorised and/or whether a marketable quantity is involved. These presumptions do not apply however if the person proves on the balance of probabilities that he or she did not have that intention or belief. The presumptions apply to the bottom tier offence with a penalty of 7 years or 1,400 penalty units (i.e. \$154,000), or both.

Commercial manufacture of drugs

Division 305 addresses the commercial manufacture of controlled drugs. “Manufacture” is defined in section 305.1 to mean any process by which a substance is produced and includes the process of extracting or refining a substance and the process of transforming a substance into another substance. A person manufactures a substance when the person is engaged in its manufacture, exercises control or direction over its manufacture, or provides finance for its manufacture.

The commercial dimension of this activity is reflected in the requirement that a person manufactures the substance with the intention of selling any of it or believing that another person intends to sell any of it.

Division 305 provides for 3 tiers of offences based on quantity. The penalties are the same as for the trafficking offences - imprisonment for life or 7,500 penalty units (i.e. \$825,000), or both, for manufacturing a commercial quantity of controlled drugs; imprisonment for 25 years or 5,000 penalty units (i.e. \$550,000), or both, for manufacturing a marketable quantity; and imprisonment for 10 years or 2,000 penalty units (i.e. \$220,000), or both, for manufacturing any quantity of drugs.

Other domestic precursor offences

There are two other domestic precursor offences. There is a base “possession of precursors with intention to manufacture a controlled drug” offence in section 308.2. This offence carries a penalty of imprisonment for 2 years or 400 penalty units (i.e. \$44,000), or both. If a Commonwealth or State or Territory law required the possession to be authorised and it was not authorised, the defendant is presumed to have possessed the precursor with the intention of using it to manufacture a controlled drug. This does not apply however if the defendant proves that he or she did not have that intention.

There is also an offence of possessing a substance, equipment or instructions for the commercial manufacture of controlled drugs in section 308.4. This offence carries a penalty of 7 years or 1,400 penalty units (i.e. \$ 154,000) or both. There is special provision for a presumption of an intention to use a tablet press to manufacture a controlled drug if a Commonwealth or State or Territory law requires possession of the tablet press to be authorised and it is not so authorised. In this circumstance the defendant is presumed to have possessed it with the intention of using it to manufacture a controlled drug. This does not apply however if the defendant proves that he or she did not have that intention.

Drug offences involving children

There are offences in Division 309 which are directed at adults who involve children under 18 years of age in the drug trade.

There is an offence of supplying a marketable quantity of controlled drugs to children for trafficking in section 309.3 which carries a penalty of imprisonment for life or 7500 penalty units (i.e. \$825,000), or both. Where a child is supplied with any quantity for trafficking, section 309.4 provides for a penalty of 25 years imprisonment or 5,000 penalty units (i.e. \$550,000), or both.

To establish these offences, it must be proved that the person supplied the drug believing that the child intends to sell any of it. There is a presumption that the defendant has this belief where not less than a trafficable quantity is involved.

There is also an offence relating to supplying a child with any quantity in section 309.2 and this offence has a penalty of 15 years or 3,000 penalty units (i.e. \$330,000), or both.

There are offences of procuring an individual to traffic in drugs where the individual is a child under 18 years of age. Strict liability applies to the age of the individual so that a defendant can only escape liability for this element if they can show that they mistakenly believed that the individual was 18 or over and that belief was reasonable.

There are also offences in sections 309.7 - 309.15 relating to procuring a child to pre-traffic in precursors, or import controlled drugs or border controlled precursors.

Harm and danger to children under 14 years of age

Division 310 provides for an offence in section 310.2 where the defendant exposes an individual under 14 years of age to a danger of serious harm from the manufacture of a controlled drug or controlled precursor.

Division 310 also provides for an offence in section 310.3 where the defendant causes harm to an individual under 14 years of age and the harm is caused from exposure to the manufacture of a controlled drug or controlled precursor.

The same penalty applies to each offence, that is, imprisonment for 9 years or 1,800 penalty units (i.e. \$198,000), or both.

Aggravated offences – manufacturing controlled drugs and controlled precursors

Division 310 provides for aggravated offences in relation to manufacturing controlled drugs and controlled precursors. An offence is an aggravated offence if the commission of the offence exposes an individual who is under 14 years of age to the manufacture of a controlled drug. However, the offence is not an aggravated one if the defendant can produce evidence that suggests a reasonable possibility that the offence did not give rise to a danger of harm to the individual.

This is defined to mean that if the commission of the offence is ordinarily capable of creating a real, and not merely a theoretical, danger of harm. If the commission of an offence exposes a person to the risk of catching a disease that may give rise to a danger of harm to that person, the commission of the offence is taken to give rise to a danger of harm to the person.

The offence of manufacturing a marketable quantity of controlled drugs with a commercial purpose carries a penalty of 25 years or 5,000 penalty units (i.e. \$550,000), or both. However, the penalty increases to 28 years or 5,600 penalty units (i.e. \$616,000), or both, for an aggravated offence. Similarly, the penalty for commercial manufacture of any quantity of controlled drugs is 10 years or 3,000 penalty units (\$330,000), or both, but the penalty increases to 12 years or 2,400 penalty units (i.e. \$264,000), or both for an aggravated offence.

Offences relating to pre-trafficking in controlled precursors can also be aggravated. As noted above, the penalty for pre-trafficking in a commercial quantity of controlled precursors is 25 years or 5,000 penalty units (i.e. \$550,000), or both, but the penalty increases to 28 years or 5,600 penalty units (i.e. \$616,000) for an aggravated offence. The penalty for pre-trafficking in a marketable quantity of precursors is 15 years or 3,000 penalty units (i.e. \$330,000), or both, but increases to 17 years or 3,400 penalty units (i.e. \$374,000), or both, for an aggravated offence. The penalty for pre-trafficking in any quantity of precursors is 7 years or 1,400 penalty units (i.e. \$154,000), but increases to 9 years or 1,800 penalty units (i.e. \$198,000), or both, for an aggravated offence.

Combining quantities of drugs or precursors

Division 311 enables charges to be brought on the basis of combined quantities of drugs or combined amounts of precursors in certain situations. Separate trafficking transactions on the same occasion may be charged together. Quantities of drugs imported or trafficked or quantities of precursors that are pre-trafficked, on different occasions, can be charged together where it can be shown that the person is carrying on a business. Quantities of drugs or quantities of precursors can also be charged together when there are frequent offences involving smaller quantities.

The provisions contain restrictions as to what may be combined in a charge. Selling (i.e. trafficking) smaller parcels of drugs requires each transaction to be within 7 days of another, and where several importations are involved they must be within 30 days of each other. The prosecution is required to make clear that it intends to rely on these provisions and a description of the conduct alleged must be set out in the charge or provided to the accused within a reasonable time before the proceedings.

There are also provisions for combining different types of drugs. For example, a defendant who sells half a commercial quantity of heroin and half a commercial quantity of cocaine can be prosecuted for trafficking a commercial quantity of controlled drugs.

Defences

Division 313 provides for total or partial defences to charges against Part 9.1. A person is not criminally responsible for an offence against the Part if at the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory, and had the conduct been so justified or excused the conduct would not have constituted the offence.

In relation to domestic activity if the person engages in conduct in a State or Territory and the conduct is justified or excused by or under a law of that State or Territory Part 9.1 does not apply in relation to that conduct.

These defences are in addition to the general offences contained in the Criminal Code.

The commencement of Part 9.1

The CDPP has provided comprehensive training and materials to its prosecutors on these offences and their operation. In addition, the CDPP has provided training to the ACC, the AFP and the Australian Customs Service. Training has been provided to the ACC in Brisbane, Sydney, Melbourne, and Perth and is scheduled to be conducted in Adelaide in March.

National Working Group on the Prevention of the Diversion of Precursor Chemicals into Illicit Drug Manufacture

The CDPP accepted an invitation to join the National Working Group on the Prevention of the Diversion of Precursor Chemicals into Illicit Drug Manufacture last year. The working group was established by the Minister for Justice and Customs in 2002 and brings together representatives from law enforcement, health and industry, including the ACC, and is focussed on the diversion of pseudoephedrine and other precursors from both legitimate and illegitimate sources.

At the working group meeting on 8 December 2005, the CDPP gave a presentation on the new Commonwealth serious drug offences in Part 9.1 of the Criminal Code.