

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Schedule 1 – serious drug offences

2.2 Part 1 of Schedule 1 of the Bill seeks to insert a range of serious drug offences into a new Part 9.1 in Chapter 9 of the Criminal Code.¹ Division 307 of the Bill sets out import and export offences, which are based on existing offences in the Customs Act. Most of the other proposed offences are based on Chapter 6 of the Model Criminal Code, which was developed in 1998 by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC).² As the Explanatory Memorandum (EM) states:

Updating and moving existing serious drugs offences into the Criminal Code is part of an ongoing process of placing all the Commonwealth's serious offences in the Criminal Code.³

2.3 However, the EM notes that Chapter 6 of the Model Criminal Code has been 'modified in some respects to take into account developments since 1998.'⁴ In particular, the Bill contains new offences targeting those who manufacture or possess drugs and chemical substances used to make drugs ('precursors'). Further, the Bill includes additional offences targeting those who endanger children during the drug manufacturing process.⁵

2.4 Proposed section 300.2 sets out definitions of a number of terms used in the proposed Part 9.1 of the Criminal Code, including, for example, 'controlled drug', 'commercial quantity', 'controlled plant', 'controlled precursor', and 'marketable quantity'.

1 Part 2 of Schedule 1 of the Bill makes a number of consequential amendments to the *Crimes Act 1914* and the *Customs Act 1901*.

2 See further: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 6 Serious Drug Offences Report*, October 1998 (MCCOC report).

3 *Explanatory Memorandum*, p. 6.

4 *Explanatory Memorandum*, p. 1.

5 *Explanatory Memorandum*, p. 1; see also Attorney-General's Department, *Committee Hansard*, 3 August 2005, p. 13; and *Submission 13*, pp 7-9. The possession offences in proposed sections 308.1 and 308.2 of the Bill also have no corresponding offences in the Model Criminal Code: see *Submission 13*, p. 8.

Impact on state and territory laws

2.5 Proposed section 300.4 of the Bill provides for concurrent operation of state and territory laws. The EM states:

Overlapping State and Territory drug offences will also continue to operate alongside the offences in Part 9.1 of the Criminal Code. This approach is consistent with the approach taken in other areas of criminal law, such as terrorism, fraud, computer crime, money laundering and sexual servitude. It is intended that drug offences will continue to be investigated in accordance with the established division of responsibility between federal and State and Territory law enforcement agencies. The Bill preserves the existing powers of law enforcement officers, including Customs officials and the Australian Federal Police, in relation to serious drugs offences.⁶

2.6 The EM also notes that it will be a defence to the offences in the Bill if the relevant conduct is justified or excused under a law of the Commonwealth or a state or territory.⁷ Further, the EM explains that subsection 4C(2) of the *Crimes Act 1914* protects defendants from double jeopardy by preventing multiple penalties being imposed for substantially the same conduct.⁸

Division 301 - listing additional drugs, plants and precursors

2.7 Most drugs and related substances covered by the proposed offences are set out in proposed Division 314 of the Bill, along with their threshold quantities. However, proposed Division 301 of the Bill also provides for additional substances and threshold quantities to be prescribed by either interim regulations (with a 12 month lifespan) or emergency ministerial determinations (with a 28 day lifespan). Such regulations and determinations can only be made if certain conditions are met, as set out in proposed Division 301 of the Bill. Emergency determinations will be legislative instruments for the purposes of the *Legislative Instruments Act 2003*.⁹

Division 302 – trafficking in controlled drugs

2.8 Proposed Division 302 sets out offences for trafficking controlled drugs.¹⁰ Division 302 sets out three grades of trafficking offence, based on the quantity of controlled drug involved:

- commercial quantity (attracting a maximum penalty of life imprisonment);

6 *Explanatory Memorandum*, p. 2.

7 *Explanatory Memorandum*, p. 1.

8 *Explanatory Memorandum*, p. 13.

9 *Explanatory Memorandum*, pp 13-16.

10 The term 'traffics' is defined broadly in proposed section 302.1 to include conduct extending beyond sale to the ancillary activities of transport and delivery, as well as preparatory conduct such as preparation for supply, packaging, and possession with the intention of selling a drug.

- marketable quantity (attracting a maximum penalty of 25 years imprisonment); and
- the general trafficking offence which has no minimum quantity (attracting a maximum penalty of 10 years).

2.9 For the first two most serious trafficking offences, absolute liability attaches to the circumstance of quantity of controlled drug. This means that the prosecution does not need to prove that the defendant either knew, or was reckless as to whether, the quantity involved was a commercial or marketable quantity.¹¹

2.10 However, a qualified defence of mistake is available to a defendant who can prove, on the balance of probabilities, that at the time of the alleged offence he or she mistakenly believed that the quantity of the drug involved was less than the relevant threshold quantity. In those circumstances, the defendant may be found guilty of a lesser offence, depending on the quantity of drug the defendant mistakenly believed was involved. In order for the qualified defence to operate, it is not necessary for the defendant to prove that his or her belief as to quantity was a reasonable belief.¹²

2.11 The EM states that:

Applying absolute liability to the element of quantity and applying a qualified defence of mistake as to quantity will markedly improve the enforceability of these offences. This approach was recommended by MCCOC in 2003 as a modification to the model offences originally proposed in its 1998 report, and was also endorsed by the Standing Committee of Attorneys-General.¹³

2.12 Proposed subsection 302.5 further provides that where the prosecution can show that a 'trafficable quantity'¹⁴ is involved in the offence, the relevant commercial element of the offence need not be proven, but is presumed.¹⁵ That is, the person involved in the offence will be taken to have had the necessary intention or belief concerning the sale of the substance for a commercial purpose. The EM states that it is intended that a trafficable quantity will be set at an amount less than a marketable quantity.¹⁶

11 *Explanatory Memorandum*, p. 20.

12 *Explanatory Memorandum*, p. 21.

13 *Explanatory Memorandum*, p. 21; see also Attorney-General's Department, *Committee Hansard*, 3 August 2005, p. 23.

14 'Trafficable quantity' is defined in section 300.2 and is prescribed in relation to a range of controlled drugs and plants in proposed Division 314.

15 Note that similar presumptions relating to 'trafficable quantity' are contained in other offences in the Bill: see, for example, proposed sections 303.7; 305.6 and 309.5.

16 *Explanatory Memorandum*, p. 24.

Division 303 – commercial cultivation of controlled plants

2.13 Proposed Division 303 sets out offences for cultivation of controlled plants for commercial purposes. As with the trafficking offences in Division 302, there will be three grades of cultivation offence, based on the quantity of controlled plants involved:

- commercial quantity (attracting a maximum penalty of life imprisonment);
- marketable quantity (attracting a maximum penalty of 25 years imprisonment); and
- no minimum quantity (attracting a maximum penalty of 10 years).

2.14 Again, for the two most serious cultivation offences, absolute liability attaches to the circumstance of quantity of controlled plant, with a qualified defence of mistake as to quantity.

Division 304 – selling controlled plants

2.15 Proposed Division 304 sets out offences for the sale of controlled plants. Two situations are targeted by these proposed offences:

- sale of seedlings for cultivation (for example, where a person sells seedlings to growers who will each cultivate a small number of plants); and
- sale of growing plants for harvest (including where land is sold with its crop, as well as where a crop alone is sold for harvest).¹⁷

2.16 The EM also notes that a purchaser who cultivates, as well as harvests, the plants will be caught by both the cultivation and sale offences — because harvest is included in the meaning of cultivation.¹⁸

2.17 As with offences in other divisions, three grades of offence are proposed based on the quantity of controlled plants involved: commercial quantity (with a maximum penalty of life imprisonment); marketable quantity (with a maximum penalty of 25 years imprisonment); and no minimum quantity (maximum penalty of 10 years). Again, for the two most serious offences, absolute liability attaches to the circumstance of quantity of controlled plant, with a qualified defence of mistake as to quantity.

Division 305 – commercial manufacture of controlled drugs

2.18 Proposed Division 305 sets out offences for the illicit commercial manufacture¹⁹ of controlled drugs. The EM states that:

17 *Explanatory Memorandum*, p. 30.

18 *Explanatory Memorandum*, pp 29-30.

19 'Manufacture' and associated terms are defined in proposed sections 305.1 and 305.2.

Although occasional instances of the manufacture of heroin and other narcotics are reported, the majority of offences falling under this proposed Division will involve synthetic drugs, such as amphetamines, which can be manufactured from chemicals and substances which have legitimate uses in industry.²⁰

2.19 As with the previous Divisions, three grades of drug manufacturing offence (with similar penalties) are proposed, based on the quantity of drug involved. For the two most serious offences, absolute liability attaches to the circumstance of quantity of controlled drug, with a qualified defence of mistake as to quantity.

Division 306 – pre-trafficking controlled precursors

2.20 Division 306 creates new federal offences targeting illicit dealings in precursor chemicals for the purpose of manufacturing controlled drugs. The EM states that:

Precursors are chemical substances that are used in the manufacture of controlled drugs, particularly amphetamines. Most, if not all, precursors also have legitimate uses, and are subject to regulatory controls to limit their diversion to the illicit manufacture of amphetamines and other controlled drugs.²¹

2.21 Proposed section 306.1 defines the term 'pre-traffics' to cover a range of conduct involving precursors. In particular, the definition of pre-trafficking covers the sale, commercially-motivated manufacture or possession, of a substance, where there is an intention to use the substance to manufacture a controlled drug or a belief that another person intends to use the substance for that purpose.²²

2.22 As the EM notes, the pre-trafficking offences have slightly lower penalties than the trafficking offences to reflect the fact that the conduct involved is preparatory to illicit drug manufacturing.²³ Once again, three tiers of pre-trafficking offences are proposed, depending on the quantity of controlled precursor involved: a commercial quantity pre-trafficking offence (maximum penalty of 25 years imprisonment); a marketable quantity offence (maximum penalty of 15 years imprisonment); and a base offence with no minimum quantity attracting a maximum penalty of 7 years.

Division 307 – import-export offences

2.23 The import and export offences in proposed Division 307 will bring existing drug offences, primarily in section 233B of the Customs Act, into the Criminal

20 *Explanatory Memorandum*, p. 32.

21 *Explanatory Memorandum*, p. 37.

22 *Explanatory Memorandum*, p. 37.

23 *Explanatory Memorandum*, p. 37.

Code.²⁴ The EM states that the proposed offences 'have been designed to accord as closely as possible to the offences they are replacing in the Customs Act'.²⁵

2.24 However, there are some differences between the proposed offences and the existing offences in the Customs Act. For example, some maximum penalties will be increased under the proposed offences, as recommended by the MCCOC Report. The penalties for the offence of importing or exporting a middle-tier quantity of cannabis will be increased from a maximum of 10 years imprisonment to a maximum of 25 years imprisonment. The EM states that this will 'bring the treatment of cannabis into line with the treatment of other illicit drugs'.²⁶ Further, an additional penalty tier of 10 years imprisonment is proposed where relatively small quantities of drugs are imported or exported but the prosecution can prove the offence was commercially motivated. Currently, under the Customs Act, the maximum penalty for all illicit imports or exports involving less than a trafficable quantity is 2 years imprisonment.²⁷

2.25 Proposed Division 307 also creates new offences of importing and exporting border controlled precursors, as recommended in the MCCOC Report.²⁸

2.26 In addition, under Division 307, the issue of quantity of drug would be placed before the arbiter of fact (judge or jury). According to the EM, 'this will remedy existing legal vulnerabilities with the structure of the offences in the Customs Act that have previously been the subject of legal challenge'.²⁹

2.27 The categories of offences in Division 307 are:

- importing and exporting border controlled drugs or border controlled plants (subdivision A);
- possessing unlawfully imported border controlled drugs or border controlled plants (subdivision B);
- possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported (subdivision C); and
- importing and exporting border controlled precursors (subdivision D).

2.28 Consistent with offences in the rest of the Bill, there are three tiers of offences for each of these categories, and absolute liability attaches to the circumstance of quantity of border controlled drug for offences in this proposed division. However, unlike the other offences in the Bill, the alternative verdict provisions do not apply to

24 Proposed Part 3 of Schedule 1 of the Bill repeals existing offences in the Customs Act.

25 *Explanatory Memorandum*, p. 46; also Attorney-General's Department, *Submission 13*, pp 4-5.

26 *Explanatory Memorandum*, p. 45.

27 *Explanatory Memorandum*, pp 45-46.

28 *Explanatory Memorandum*, p. 46.

29 *Explanatory Memorandum*, p. 45.

offences under Division 307 and the qualified defence of mistake as to quantity is not available.³⁰ The EM states that this is consistent with the current offences in the Customs Act, and will ensure that the offences in proposed Division 307 are no more difficult to prove than the existing offences in the Customs Act.³¹

Division 308 – possession offences

2.29 Proposed division 308 sets out four categories of possession offences:

- possessing controlled drugs (with up to two years imprisonment);
- possessing controlled precursors (with up to two years imprisonment);
- possessing plant material, equipment or instructions for commercial cultivation of controlled plants (with up to seven years imprisonment); and
- possessing substance, equipment or instructions for commercial manufacture of controlled drugs (with up to seven years imprisonment).

Division 309 – drug offences involving children

2.30 Proposed Division 309 creates a regime of offences directed against adults who exploit children³² for commercial gain in the illicit drug industry. The offences included in this proposed division extend to persons who supply controlled drugs to children or who use children to facilitate trafficking controlled drugs. This proposed division also includes offences against persons who procure children to sell, prepare for supply, transport, guard or conceal a controlled drug or procure children to sell, manufacture or possess a controlled precursor. Under this division, the penalties available for the offences of importing and exporting border controlled drugs, plants or precursors will also be increased where those offences involve the exploitation of children.³³

2.31 Strict liability attaches to the age of the child for all of the offences in this proposed division. This means that the prosecution does not have to prove that the defendant knew that the individual to whom they supplied the controlled drug was in fact a child. However, subsection 6.1(2) of the Criminal Code makes available to the defendant the defence of mistake of fact. The EM suggests that:

Strict liability is appropriate in this context given the serious harm caused to children when they are supplied with controlled drugs or procured to engage in other unlawful activities involving controlled drugs, plants and precursors.³⁴

30 *Explanatory Memorandum*, pp 45 and 57.

31 *Explanatory Memorandum*, pp 45 and 57.

32 A child is defined as an individual under 18 years of age: proposed section 300.2.

33 *Explanatory Memorandum*, p. 63.

34 *Explanatory Memorandum*, p. 64.

2.32 Further, as with other offences in the Bill, absolute liability applies as to the quantity of controlled drug involved under proposed Division 309, although a qualified defence of mistake is available.

Division 310 – harm and danger to children

2.33 Proposed Division 310 creates offences directed against adults who endanger children under 14 years of age by exposing them to the manufacture of controlled drugs or controlled precursors. First, stand-alone offences are created for:

- engaging in conduct that gives rise to a danger of serious harm to a child under 14 by exposing the child to the manufacture of a controlled drug or controlled precursor (proposed section 310.2); and
- causing actual harm to a child under 14 by exposing the child to the manufacture of a controlled drug or controlled precursor (proposed section 310.3).

2.34 Proposed section 310.4 then sets out circumstances of aggravation for the manufacturing of controlled drugs offences included in proposed sections 305.4 and 305.5, and the pre-trafficking controlled precursor offences included in proposed sections 306.2, 306.3 and 306.4. These offences target persons who have been found guilty of manufacturing a controlled drug or pre-trafficking a controlled precursor where the commission of that offence gives rise to a danger of harm to a child under 14.³⁵

2.35 As with proposed Division 309, strict liability attaches to the age of the child for all of the offences in this proposed division. The EM notes that:

The MCCOC model endangerment offences are aggravated when committed against children under 10 years of age, but this age threshold is considered too low in the drug endangerment context. On the other hand, persons who are 14 years or older are largely capable of looking after themselves. A 14 year age threshold represents a good balance.³⁶

Division 311 – combining quantities of drugs, plants or precursors

2.36 The aggregation provisions in proposed Division 311 allow prosecutions for offences based on combined amounts of drugs, plants or precursors. The EM states that this division will allow prosecutions to be based on:

...evidence of a course of action which amounts, in its totality, to major drug criminality. This is available even though individual instances of dealing, manufacture or cultivation may involve relatively small quantities.³⁷

35 *Explanatory Memorandum*, p. 77.

36 *Explanatory Memorandum*, p. 77.

37 *Explanatory Memorandum*, p. 83.

2.37 Three types of aggregation are available to the prosecution for the proposed Part 9.1 offences:

- combining different parcels on the same occasion (subdivision A);
- combining parcels from organised commercial activities (subdivision B); and
- combining parcels from multiple offences occurring within a certain period (subdivision C).

Division 312 – working out quantities of drugs, plants or precursors

2.38 Proposed Division 312 contains provisions for determining the quantities of controlled substances, particularly when different kinds of controlled substances are involved, or where dilute quantities of substances are used.

Division 313 – defences and alternative verdicts

2.39 Proposed Division 313 sets out defences that apply to the offences in proposed Part 9.1. There are two complete defences that relate to conduct that is justified or excused by or under state or territory law (proposed section 313.1) and where there is a reasonable belief that conduct is justified or excused by or under a law (proposed section 313.2).

2.40 Three alternative verdict provisions operate as qualified defences (proposed sections 313.3 to 313.5). For example, section 313.4 applies where there is a mistake as to the quantity of drug involved. Under this provision, a defendant does not completely escape criminal liability but may be found guilty of an offence with the same or lesser penalty.³⁸

Division 314 – drugs, plants, precursors and quantities

2.41 Proposed Division 314 contains two sets of interim lists of controlled substances and threshold quantities. The first set applies to the import-export offences – that is, lists of 'border controlled drugs', 'border controlled plants', 'border controlled precursors'. The EM notes that these lists have been based on the lists that apply to the current import-export offences under the Customs Act.³⁹ The second set of lists are lists of 'controlled drugs', 'controlled plants', 'controlled precursors', which apply to the other offences under the Bill.

2.42 In setting out these lists in the legislation, the Bill departs from the MCCOC recommendation that the lists of controlled substances and threshold quantities be contained in interim regulations. The rationale for the MCCOC recommendation was

38 *Explanatory Memorandum*, p. 99.

39 *Explanatory Memorandum*, p. 104. Note that there are some minor technical differences between the lists prescribed under the Customs Act and the lists in the Bill. These differences were explained by the Attorney-General's Department: see *Submission 13*, pp 3-6.

so that the lists could be 'updated quickly and therefore be responsive to changes in the illicit drug market.' However, the EM states that:

...given the serious nature of the offences in proposed Part 9.1 (with some offences carrying the highest penalty available in Australia — life imprisonment), and the fact that the lists of controlled substances, border controlled substances and threshold quantities define the scope of those offences, it was considered that those lists should be contained in the parent Act and subject to full Parliamentary scrutiny.⁴⁰

2.43 The EM further notes that the Bill retains the capacity to respond to rapid changes in the illicit drug market through proposed Division 301. As discussed earlier, Division 301 allows new substances and quantities to be added on a temporary basis through interim regulations and emergency determinations.⁴¹

2.44 The EM refers to the lists in the Bill as 'interim lists', to be revised by a Working Party established by the Ministerial Council on Drug Strategy. According to the EM, this Working Party is developing a uniform schedule of illicit substances and threshold quantities to be adopted by all Australian jurisdictions, which is not due to be released before late 2005. The EM explains that:

As the Bill includes important new child protection offences and precursor offences, the proposal is not to delay the Bill waiting for the Working Party recommendations, but instead to include interim lists of drugs and quantities to be revised when the Working Party makes its recommendations.⁴²

2.45 The EM further notes that:

Pending the availability of the model lists being developed by the Working Party, a minimal approach has been adopted with the domestic lists limited to a relatively small number of common illicit drugs and plants and precursor chemicals that can be used to manufacture those drugs and plants. On an interim basis, the threshold quantities for those substances have been set at a level that is consistent with the quantities prescribed by other jurisdictions that have introduced the model drug offences.⁴³

Other schedules

2.46 The Bill also makes minor amendments to other legislation. These are outlined below.⁴⁴

40 *Explanatory Memorandum*, p. 104.

41 *Explanatory Memorandum*, p. 104.

42 *Explanatory Memorandum*, p. 103.

43 *Explanatory Memorandum*, p. 104; see also Attorney-General's Department, *Submission 13*, pp 1-2.

44 This section draws on pp 3-4 and pp 117-124 of the *Explanatory Memorandum*.

2.47 Schedule 2 gives effect to an obligation under the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (the Optional Protocol). The Optional Protocol requires parties to take all measures necessary to criminalise the recruitment or use in hostilities of persons under the age of 18 years by armed groups not part of the State. The Bill will comply with this obligation by amending the Criminal Code to provide that these activities constitute federal offences, punishable by imprisonment for up to 17 years.

2.48 Schedule 3 amends the *Proceeds of Crime Act 2002* to enable a court to make a restraining order over a bankrupt's property where the property has vested in a trustee under the *Bankruptcy Act 1996*. According to the EM, this will 'give effect to existing policy intentions of the *Proceeds of Crime Act 2002*.'⁴⁵

2.49 Schedule 4 amends the *Australian Federal Police Act 1979* (the AFP Act) to clarify that the functions of the Australian Federal Police (AFP) extend to:

- providing assistance to, and cooperating with, Australian and foreign law enforcement agencies, intelligence or security agencies and government regulatory agencies; and
- establishing, developing and monitoring peace, stability and security in other countries.

2.50 This schedule will also create an exception to the secrecy provision in the AFP Act to clarify that the AFP can disclose personal information about a person with that person's consent.

2.51 Schedule 5 amends the *Mutual Assistance in Business Regulation Act 1992* to facilitate transfer of responsibility from the Attorney-General to the Treasurer for consideration of requests received from foreign regulators for information, documents or evidence.

2.52 Schedule 6 inserts an explanatory example after subsection 20A(1) of the *Financial Transaction Reports Act 1988* to clarify that cash dealers are not required to obtain multiple identification references from a person who is a signatory to different accounts with the cash dealer. The EM states that this is intended to clarify subsection 20A(1) 'especially for the benefit of solicitors administering deceased estates'.⁴⁶

2.53 Schedule 7 repeals the *Defence (Transitional Provisions) Act 1950* which no longer has any legal effect.

2.54 Schedule 8 makes a technical amendment to a power in the Customs Act which allows Customs officers to detain people who are on bail and are caught trying to leave Australia in breach of their bail conditions. The EM states that:

45 *Explanatory Memorandum*, p. 117.

46 *Explanatory Memorandum*, p. 122.

This amendment will put beyond doubt that the detention power applies where the relevant bail condition is worded to prohibit the person 'from approaching an international departure point'.⁴⁷

2.55 Schedule 9 exempts the Australian Transaction Reports and Analysis Centre from the operation of the *Freedom of Information Act 1982* in relation to documents concerning information communicated to it under section 16 of the *Financial Transaction Reports Act 1988*.⁴⁸

47 *Explanatory Memorandum*, p. 3.

48 See further *Explanatory Memorandum*, pp 123-124.