

Chapter 5

The national law enforcement environment: agencies, strategies and legislative initiatives

Introduction

5.1 The previous chapter discussed the strategic aspects of demand and harm reduction and, in particular, the need to draw together all aspects of meeting the challenge presented by AOSDs. This chapter focuses on the law enforcement environment. It outlines the key Commonwealth agencies that deal with the policing of AOSD internationally, at the border, and across Australian law enforcement jurisdictions, and the notable strategies these agencies use in their task of supply reduction. The chapter then discusses recent legislative initiatives that will assist law enforcement agencies (LEAs) in this goal.

Commonwealth law enforcement agencies

5.2 Primary responsibility for supply reduction rests with the LEAs. As a result of Australia's federal system of government, the management of this process is both difficult and complex:

It is difficult to describe the management of Australia's Drug Law Enforcement (DLE) in a simple way, as the relationship between DLE agencies is complex; largely a product of the independent development of law enforcement within Australia's federated system of government...However, what can be said is that DLE occurs at many levels in Australia, from general duty policing to drug unit and command levels, through to state and federal levels, as well as across jurisdictions. Each level and jurisdiction differs in terms of whether there is a dedicated or generalist organisational structure, and whether this is primarily centralised or regionalised in nature. They also differ according to preferred operational approaches, the number of specialised personnel employed, legislation, agency resources and the character of the different markets for illicit drugs themselves.¹

5.3 Across the many law enforcement bodies that gave submissions and evidence to the Committee, a consensus view appears to be that the dynamic nature of the AOSD industry, in terms of its ability to rapidly develop new drugs, markets and means of production, presents a 'considerable challenge for Australian law enforcement'.²

1 National Drug Law Enforcement Research Fund, *Developing and implementing a performance measurement framework for drug law enforcement in Australia, Monograph Series No. 18*, 2006, p. 9.

2 Australian Customs Service, *Submission 5*, p. 3.

...it is important to note that the AOSD market is a dynamic one, and the potential for new AOSD to emerge and gain popularity is an ongoing threat that law enforcement must continue to monitor and address.³

5.4 Enforcement of Commonwealth drug legislation, and hence of the spectrum of offences that relate to AOSD, is undertaken principally by the Australian Crime Commission (ACC), the Australian Federal Police (AFP), and the Australian Customs Service (ACS). In brief, the roles of these agencies are as follows:

The Australian Crime Commission

The role of the ACC

5.5 The ACC is a Commonwealth statutory body working nationally with other federal, state and territory agencies to counter serious and organised crime. It aims to bring together all arms of intelligence gathering and law enforcement to unify the effort against serious and organised criminal activity.

5.6 The ACC performs a number of functions, including:

- criminal intelligence collection and analysis;
- providing advice to the ACC Board on National Criminal Intelligence Priorities; and
- investigating federally relevant criminal activity, and undertaking taskforces as approved by the ACC Board.⁴

5.7 The ACC is engaged in a number of activities that contribute to supply-reduction strategies under the National Drug Strategy and which, inter alia, focus on reducing the AOSD market in Australia. In its submission, the ACC emphasises that its role is one of investigation and intelligence gathering 'to enhance national intelligence on the importation, manufacture and distribution of AOSD, precursor chemicals and associated equipment.'⁵

5.8 Mr Alastair Milroy, Chief Executive Officer of the ACC, emphasised that the ACC is a 'criminal intelligence and investigative agency with a mandate to counter federally relevant activity,'⁶ and whose role is inherently strategic. The ACC aims, according to Mr Milroy:

3 *Submission 5*, p. 2.

4 ACC website, http://www.crimecommission.gov.au/content/about/ACC_PROFILE.pdf, viewed 18 November 2006.

5 ACC, *Submission 18*, p. 9.

6 *Committee Hansard*, 5 June 2006, p. 85.

...to bring together all arms of intelligence gathering and law enforcement to unify the fight against serious and organised criminal activity.⁷

The ACC Special Intelligence Operation determination on AOSD

5.9 The ACC Board of Management referred an AOSD Special Intelligence Determination to the ACC in 2003. The determination authorises the ACC to 'develop intelligence on the importation, production and trafficking in AOSD and precursor chemicals in Australia.'⁸ Crucially, the making of the determination allows the ACC to use its coercive powers.⁹ The issuing of the AOSD determination acknowledged that 'traditional law enforcement methods were not as effective in this particular area as a result of the growth of...[the AOSD] market.'¹⁰ In its strategic investigative and intelligence function, the ACC has sought to 'deliver informed and timely advice to drive an effective national response' to the AOSD problem.¹¹

5.10 Mr Milroy described the ACC's approach under the AOSD determination as intended to establish 'strong collaboration arrangements with key stakeholders, including jurisdictional and Commonwealth partner agencies and industry groups, and to highlight the issue as a national priority for both the ACC and the broader law enforcement community.'¹²

5.11 Similarly, Mr Michael Outram, Director of National Operations for the ACC, characterised the ACC's approach under the AOSD determination as collaborative, broad based and holistic:

That determination has worked very closely with industry and academia, looking for the causes, the problems, and to get various views from across the whole spectrum of people who have a stake in this as to why there might be a problem and how it can be fixed.¹³

Coercive powers

5.12 Under section 7C of the *Australian Crime Commission Act 2002*, the board of the ACC can authorise in writing a special investigation or determination. Once the authorisation is made, the ACC is able to use its coercive powers, allowing it to compel a person to attend a hearing before an ACC Examiner, to produce documents and to answer questions. Under sections 22 and 23 of the ACC Act, authorised persons within the ACC are allowed to apply for search warrants, with provision for

7 ACC, *Australian Crime Commission Annual Report 2004-05*, p. 10.

8 *Submission 18*, p. 10.

9 *Submission 18*, p. 8.

10 *Committee Hansard*, 5 June 2006, p. 86.

11 *Committee Hansard*, 5 June 2006, p. 86.

12 *Committee Hansard*, 5 June 2006, p. 85.

13 *Committee Hansard*, 5 June 2006, p. 87.

applications by telephone. The AOSD determination has been authorised by the ACC Board and the coercive powers are available to be used in the ACC's investigations.

5.13 A number of submitters highlighted the significance of the coercive powers for the intelligence and investigative role that the ACC plays in the control of AOSD. The NSW Police submission states:

The ACC has made excellent use of its coercive powers to identify rogue pharmacists and equipment suppliers. They have also arranged the surrender of suspicious pill presses. A monitoring role on the internet eBay site produced evidence of suspicious purchases of scientific glassware that led the arrest and charge for an individual in Parkes for manufacturing prohibited drugs. The ACC disseminates intelligence to NSW police pursuant to its charter.¹⁴

5.14 The ACC submission notes that, in undertaking the AOSD determination, the ACC has 'directed its efforts and resources to areas not already specifically targeted by other jurisdictions and to those where the ACC's special intelligence operations tools could be most effective'.¹⁵ Furthermore:

The Determination has established a 'niche' area in national law enforcement for the timely collection of strategic and tactical intelligence which has proven successful in the disruption and deterrence of nationally significant criminal activity.¹⁶

5.15 However, there have been some challenges to these powers since the inception of the ACC Act, particularly to the abrogation of the privilege against self-incrimination for Commonwealth, state and foreign offences, and the abrogation of legal professional privilege.

5.16 In evidence to the Committee's review of the ACC Act in 2005, Mr John Hannaford, an ACC Examiner, told the Committee that the coercive powers are exercised only after deliberation within the ACC. Mr Hannaford noted that submissions are made to the examiners regarding the use of the powers and that authorisation is not automatic.¹⁷

The Amphetamine-Type Stimulant National Action Plan

5.17 In May 2005, in furtherance of the ACC's work under the AOSD determination and in recognition of the myriad issues relevant to developing an effective response, the ACC Board requested the preliminary development of an AOSD national action plan—since renamed the Amphetamine-Type Stimulants

14 New South Wales Police, *Submission 9B*, p. 7.

15 ACC, *Submission 18*, p. 11.

16 *Submission 18*, p. 9.

17 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, p. 20.

National Action Plan—to outline current and potential further responses to the problem.¹⁸ The plan, according to Mr Milroy:

...identified a lot of areas of responsibility, a lot broader than just law enforcement. It addressed issues to do with health, education, research, academia and so on which indicates that there is a considerable amount of work that might need to be considered...¹⁹

5.18 The draft plan covered the following eight elements:

- policy debate and implementation;
- government legislative or regulatory responses;
- industry self-regulation;
- enhanced education;
- the role of the criminal justice system;
- strategic partnerships;
- research and development; and
- environmental concerns.

5.19 Recognising the intrinsically linked nature of the above elements, and thus of any responses designed to solve the AOSD problem, in July 2005 the ACC Board presented a draft of the national action plan to the Intergovernmental Committee on Drugs (IGCD) to be reviewed and reported on. The ACC Board had agreed:

...that the broad nature of the consultation required to ensure inclusion of all relevant sectors, and the wide ranging nature of current and potential strategies and activities, were beyond the scope of the responsibilities and partnership relationships that are appropriate to the role of the ACC.²⁰

5.20 The ACC submission indicates that, with the IGCD, the ATS National Action Plan is being progressed, and that consideration is being given to using the draft plan as the basis for the development of a national ATS strategy.²¹

5.21 The ACC's constitutional focus is on law enforcement and intelligence agencies. The Committee observes that the intelligence-gathering and strategic-planning aspects around its investigations into nationally significant crime at times require the ACC to consider an issue across a range of agencies and stakeholders. The Committee commends the role of the ACC in developing a broad ATS National Action Plan and in advancing it appropriately through established forums.

18 ACC, *Submission 18*, p. 5.

19 *Committee Hansard*, 5 June 2006, p. 87.

20 ACC, *Submission 18*, p. 6.

21 *Submission 18*, p. 7.

The Australian Federal Police

5.22 The functions of the AFP in drug matters are split between federal policing and ACT policing. The ACT Police indicated that MDMA use in the ACT is increasing in line with the national trend. Recent ACT legislation supports police in investigations related to precursor chemicals and equipment used in the manufacture of AOSD.²²

5.23 At the federal level, the AFP's role is 'to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas'.²³ Section 37(2) of the *Australian Federal Police Act 1979* provides for a ministerial direction setting out the government's priorities for the AFP. The current ministerial direction, signed on 31 August 2004, directs the AFP to give special emphasis to a number of activities. They include:

- crime prevention;
- illicit drug trafficking;
- providing an effective contribution to the implementation of the government's Tough on Drugs strategy;
- ensuring that the AFP's strategic directions in relation to these and other activities appropriately complement priorities set at board level for the ACC, particularly in the area of national criminal intelligence; and
- contributing to the government's international law enforcement interests.²⁴

The Australian Customs Service

5.24 The Australian Customs Service (ACS) is a national organisation employing over 5,000 people around Australia and overseas. The agency's principal role in relation to AOSD is border protection. The ACS has a fleet of eight ocean-going patrol vessels and, 'using a combination of contracted aircraft, Australian Defence Force patrol boats and aircraft, and sea-going vessels of the Customs National Marine Unit,' operates Coastwatch, a civil maritime surveillance and response service for a range of government agencies, including the Australian Quarantine and Inspection Service and the ACS itself.²⁵

5.25 The interception of AOSD and their precursors is a high priority for the ACS, with a variety of techniques used to target high-risk aircraft, vessels, cargo, postal items and travellers. These techniques include the application of intelligence and computer-based analysis methods to risk assess the large volume of movements of

22 Australian Federal Police, *Submission 2*, p. 2.

23 *Submission 6*, p. 1.

24 *Submission 6*, pp 1-2.

25 Australian Customs Service website, <http://www.customs.gov.au/site/page.cfm?u=4238>, viewed 15 November 2006.

passengers and goods across the Australian border. These approaches are complemented by the use of detector dogs, container X-ray and various other detection technologies.²⁶

5.26 The ACS investigates and prosecutes serious customs offences, including those relating to AOSD and their precursors, under the *Customs Act 1901* and the *Criminal Code*. The ACS also conducts financial investigations in accordance with the *Proceeds of Crime Act 2002* for recovery of assets gained through the commission of criminal offences.

5.27 The Commonwealth law enforcement agencies, in conjunction with the state and territory police, undertake a range of approaches to the reduction of supply of illicit drugs in Australia. Their approach to this task is collaborative. The Committee heard that a number of mechanisms exist to enhance the efforts of these agencies. Following is a discussion of the notable strategies through which LEAs and the ACC pursue supply reduction.

Information sharing

5.28 The efforts to reduce the supply of AOSD in Australia are pursued through and enhanced by information-sharing arrangements between the ACC, AFP, ACS and a range of international and domestic LEAs.

5.29 The AFP submission states that the AFP monitors and responds to global trends in trafficking of precursor chemicals and 'the manufacture of...[AOSD], the movement of specialist chemists, and the diversification of global production centres'.²⁷

5.30 International information sharing around AOSD is enhanced through the Australian Illicit Drug Intelligence Program (AIDIP). In 2002, the National Illicit Drug Strategy (NIDS), which was established to address issues surrounding heroin, provided further funding to expand AIDIP to encompass AOSD. The Joint Drug Intelligence Team, which is a strategic level partnership between the AFP and the National Measurement Institute, administers this expanded program. AIDIP provides physical and chemical analyses of illicit drugs. The results allow the identification of regions of origin, manufacturing trends and the nature and composition of drugs within specific markets, against which new drug seizures may be searched. The information obtained assists the AFP and ACS to allocate resources and to gain insights into particular illicit drug markets.²⁸

26 Australian Customs Service, *Submission 5*, p. 2.

27 Australian Federal Police, *Submission 6*, p. 5.

28 Australian Federal Police website, http://www.afp.gov.au/national/drug_trafficking/drug_intelligence, viewed 20 November 2006.

5.31 The effectiveness of the ACS in the control of AOSD at the border is underpinned by, and directly related to, the quality of intelligence. Coastwatch, for example, places the highest value on accurate and timely intelligence. The ACS website states:

Coastwatch's effectiveness is directly related to the quality of available information sources and intelligence assessments that flow from these sources.²⁹

5.32 The NSW Crime Commission acknowledged the valuable role played by the ACS in the identification of international trends, which assists local law enforcement agencies in detecting shipments and locating possible clandestine laboratory sites.³⁰

Training and education

5.33 The AFP administers the Law Enforcement Cooperation Program (LECP), which provides training programs, strategic law enforcement seminars and workshops, equipment and short-term attachment and/or exchange of law enforcement personnel. The AFP submission states, for example, that 'LECP funding has enabled specific programs to be delivered in the region on identification of precursor chemicals and clandestine laboratories'.³¹

5.34 Both international and domestic knowledge on AOSD is enhanced through the National Chemical Diversion Congress (NCDC). This annual event is sponsored by the ACC and the Attorney-General's Department, and brings together law enforcement, health care, legal, and pharmaceutical industry representatives to discuss issues relating to the diversion of chemicals into the manufacture of AOSD, particularly amphetamines. The 10th Annual Congress was held on the Gold Coast in October 2006, and included keynote speakers from the US, Germany and India. The 9th Annual Congress was held in Darwin in October 2005, and included representatives from Australia, New Zealand, China, Hong Kong, the Philippines, Thailand, Samoa, Fiji, Papua New Guinea, Germany, Japan, the Netherlands, Belgium, Canada and the USA.

5.35 The Queensland Crime and Misconduct Commission noted the value of this forum:

The ACC's commitment to national forums such as the annual National Chemical Diversion Conference and National Criminal and Intelligence Operations Forum (NCIOF) enhances the ability of all LEAs in Australia to

29 Australian Customs Service website, <http://www.customs.gov.au/site/page.cfm?u=4238>, viewed 15 November 2006.

30 New South Wales Crime Commission, *Submission 9A*, p .4.

31 Australian Federal Police, *Submission 6*, p. 5.

become aware of emerging issues and to proactively target participants in the AOSD market.³²

Joint operations

5.36 The Committee heard that there is currently a high level of collaborative and joint operations between the various LEAs. Mr John Valastro, ACS National Manager, Law Enforcement Strategy and Security Branch, told the Committee:

Customs does not work in isolation with respect to this issue. Amphetamines and other synthetic drugs present an ongoing challenge to Australian law enforcement and we are committed to meeting this challenge. Key respects of how we are doing this include, with regard to risk assessment, our results being based on intelligence-driven risk assessment philosophy. We recognise that the majority of international movements are legitimate and target resources at areas that are high risk for illegal activity. The ACC is an important partner in helping us do this effectively.³³

5.37 Internationally, the AFP liaises with other agencies in the region and provides assistance to establish regional transnational crime centres. Although such centres are intended to assist investigations into all crime, the AFP's submission describes these centres as:

...[a] fulcrum for effective drug investigations, allowing proper coordination with intelligence and related crime such as money laundering.³⁴

5.38 Between 1998 and 2005, the AFP's international representation has increased from maintaining a presence in 14 countries to having 88 officers in 26 countries.³⁵ In addition, the AFP has signed a number of MOUs with key international law enforcement partners, particularly those from within the Asia Pacific region; the MOUs encompass measures to target illicit drug trafficking. The Committee were informed that other agreements are being considered and progressed as appropriate.³⁶

5.39 The ACC is a leading agency in the planning and administration of domestic joint operations. A key feature of this role is a nationally focused effort, involving cooperation between state, territory and Commonwealth law enforcement and relevant partner agencies. The ACC shapes strategic and operational decisions and activities

32 New South Wales Crime Commission, *Submission 9A* p. 4.

33 *Committee Hansard*, 5 June 2006, p. 9.

34 Australian Federal Police, *Submission 6*, p. 6.

35 *Submission 6*, p. 6; *Committee Hansard*, 5 June 2006, p. 74.

36 *Submission 6*, p. 6.

through appropriate intelligence products and services, as well as by providing advice on law and other regulatory reforms.³⁷

5.40 The AFP routinely undertakes collaborative operations with state law enforcement agencies. Additionally, the ACS notes that Customs maintains strong relationships with domestic law enforcement agencies, regulatory agencies and the law enforcement intelligence and research communities. The ACS submission states:

These relationships encompass active participation in joint agency groups and taskforces, intelligence exchange, and collaboration on research products. Much of this work either encompasses, or is specifically focused on AOSD matters.³⁸

5.41 Mr Valastro outlined the ACS's involvement with state agencies:

[The ACS works]...pretty closely with state law enforcement as well, and that is every single state because we have a presence there. Essentially we work with the AFP primarily in relation to these types of offences but, where there are opportunities for other agencies to be involved, we certainly bring them on board as well.³⁹

5.42 The Committee acknowledges that LEAs employ a range of mechanisms to address the issue of AOSD at both an international and domestic level. The development of partnerships and relationships between various LEAs at both the federal and state levels is at the centre of a successful law enforcement response. The Committee encourages all relevant agencies to continue to pursue and develop these collaborative arrangements.

Legislative initiatives

5.43 The effectiveness of the Commonwealth drug law enforcement response to AOSD has been enhanced by the recent enactment of legislation that has consolidated all federal drug offences into the *Criminal Code Act 1995* and increased the uniformity of drug offences in Australia.

Commonwealth law

5.44 Commonwealth drug law is broadly concerned with the import and export of illicit drugs. Until 2005, Commonwealth drug offences were contained in the *Customs Act 1901* and the *Crimes (Trafficking in Narcotic Drugs and Psychotropic Substances) Act 1990*.⁴⁰ Section 233B(1) of the *Customs Act 1901* contained the two most important offences: importing prohibited imports and possessing prohibited

37 ACC, *Australian Crime Commission Annual Report 2004-05*, p. 36.

38 Australian Customs Service, *Submission 5*, p. 7.

39 *Committee Hansard*, 5 June 2006, p. 9.

40 Dr Andreas Schloenhardt, University of Queensland, *Submission 21*, p. 10.

imports. By definition, narcotics were 'prohibited imports': subsections 233B(2) and (4).⁴¹

5.45 On 5 December 2005, the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005* (the SDO Act) commenced. The SDO Act moved previous import and export offences from the *Customs Act 1901*, together with a number of new drug offences, into the *Criminal Code Act 1995*.

5.46 In restructuring the *Criminal Code* drug offences, the SDO Act introduced offences for the import, export, manufacture or possession of precursors—chemical substances used in the manufacture of drugs.⁴² The amendments also include offences for the possession of equipment for manufacturing illicit drugs, and aggravated offences where trafficking or manufacture involves children.

5.47 These amendments correspond to Australia's obligations under the United Nations Convention against Illegal Trade in Narcotic Drugs and Psychotropic Substances.⁴³

5.48 The development of the SDO Act was a collaborative effort involving the relevant government agencies. As Customs outlined in its submission:

Customs was closely involved in the development of the SDO Act, which consolidated all federal drug offences into the *Criminal Code Act 1995* and increased the uniformity of drug offences in Australia. Of particular note in relation to AOSD, the SDO Act includes provision for newly emerged AOSD to be emergency scheduled, enabling rapid legislative response to emerging threats. Also, a number of new offences and increased penalties in relation to AOSD precursors were significant enhancements introduced through the SDO Act.⁴⁴

5.49 The explanatory memorandum to the SDO Bill states that section 300.4 of the bill (now the SDO Act) allows overlapping state and territory drug offences to operate alongside the offences in part 9.1 of the *Criminal Code*. This is similar to jurisdictional arrangements in other areas of the criminal law, such as terrorism, fraud, computer crime, money laundering and sexual servitude. The explanatory memorandum concludes:

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.⁴⁵

41 *Submission 21*, p. 10.

42 Commonwealth Director of Public Prosecutions, *Submission 11*, p. 1.

43 Australian Federal Police, *Submission 6*, pp 7-8.

44 Australian Customs Service, *Submission 5*, p. 10.

45 Explanatory memorandum, *Law and Justice Legislation (Serious Drug Offences and Other Measures) Amendment Bill 2005 (Cth)*, p. 2.

5.50 The new section 300.3 of the *Criminal Code* includes a statement of geographical jurisdiction such that the offences apply to all Australian citizens, corporations and residents anywhere in the world, although with some qualification.

5.51 The basis of the SDO Act amendments was the Model Criminal Code developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, which consists of Commonwealth and state officers. The intention behind the amendments was to develop criminal legislation that could be adopted by all Australian jurisdictions. The ACT, Tasmania and Victoria have passed legislation based upon the Model Criminal Code, with some variations.⁴⁶

5.52 The Committee considers that the effectiveness of the SDO Act amendments to the *Criminal Code* could be lessened if the states do not enact similar provisions, particularly in relation to precursor offences.

Offences and penalties: section 300.2 of the Criminal Code

5.53 Section 300.2 of the *Criminal Code* defines the key concepts of 'controlled drug' and 'controlled precursor'. 'Controlled drug' is defined to mean a substance, other than a growing plant:

- listed or described as a controlled drug in section 314.1; or
- prescribed by regulations under paragraph 301.1(1)(a); or
- specified in a determination under paragraph 301.6(1)(a).

5.54 A similarly constructed definition exists for 'controlled precursors'.

5.55 Division 301 of the *Criminal Code* allows a swift response to the entry of new precursors and drugs to the illicit drug market through proscription of controlled substances by regulation or specification under determination, rather than through legislation. In particular, the emergency determination procedures allow the Minister for Justice and Customs to make a determination by legislative instrument that a substance is a controlled drug, a controlled precursor or a border controlled drug or precursor.

5.56 The offences and penalties are arranged in a hierarchy according to the quantity of drugs involved and in which the greatest maximum penalties—7,500 penalty units or life imprisonment—are incurred for a commercial quantity.⁴⁷ A marketable quantity incurs a penalty of 25 years or 5,000 penalty units or both, and a simple possession offence where no specific quantity is involved attracts a penalty of 10 years or 2,000 penalty units or both. What is classed as a commercial or marketable quantity varies according to the substance involved.

46 Australian Federal Police, *Submission 6*, p. 8.

47 A penalty unit is presently \$110.00.

Import/export of border controlled drugs

5.57 The Commonwealth Director of Public Prosecutions (CDPP) submitted that 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.

5.58 Sections 307.1 to 307.4 of the *Criminal Code* relate to importing and exporting border controlled drugs. The penalty where a commercial quantity is involved is imprisonment for life or 7,500 penalty units (\$825,000), or both. Where a marketable quantity is involved, the penalty is 25 years imprisonment or 5,000 penalty units (\$550,000), or both. There is a new tier of offence that applies to any quantity, which carries a penalty of 10 years or 2,000 penalty units (\$220,000), or both, provided there is a commercial purpose. In addition, there is an offence that applies to any quantity, which carries a penalty of two years or 400 penalty units (\$44,000), or both.⁴⁸

Import/export of border controlled precursors

5.59 Division 307 of the *Criminal Code* introduces new offences for the importation or exportation of border controlled precursors with the intention of manufacturing a controlled drug. Section 314.6 of the *Criminal Code* lists border controlled precursors and sets out quantities relevant to the various offences. Fourteen precursor chemicals are currently listed. A Ministerial Council on Drug Strategy working party is examining the question of whether any additional precursors should be added to the section 314.6 list, and, if so, what quantities of those precursors should relate to each tier of the offence.

5.60 The penalty where a commercial quantity is involved is 25 years imprisonment or 5,000 penalty units (\$550,000), or both. Where a marketable quantity is involved the applicable penalty is 15 years or 3,000 penalty units (\$330,000), or both. In addition, there is an offence that applies to any quantity, which carries a penalty of seven years or 1,400 penalty units (\$154,000), or both.⁴⁹ The set quantities for commercial and marketable offences are based on the amount of precursor necessary to manufacture the corresponding amount of a border controlled drug.⁵⁰

Domestic offences: trafficking in controlled drugs

5.61 Division 302 of the *Criminal Code* provides for offences relating to trafficking in controlled drugs. Section 314.1 lists controlled drugs and sets out

48 Commonwealth Director of Public Prosecutions, *Submission 11*, p. 2.

49 *Submission 11*, p. 3.

50 *Submission 11*, pp 2-3.

quantities relevant to the various offences. This list includes amphetamines and other manufactured drugs.

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

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

5.63 The applicable penalty where a commercial quantity is involved is imprisonment for life or 7,500 penalty units (\$825,000), or both. Where a marketable quantity is involved the applicable penalty is 25 years imprisonment or 5,000 penalty units (\$550,000), or both. There is a lowest-tier offence applying to any quantity, which carries a penalty of 10 years or 2,000 penalty units (\$220,000), or both.⁵¹

Domestic offences: pre-trafficking in controlled precursors

5.64 'Pre-trafficking' is the label given to various illicit dealings in precursor chemicals; this range of offences is covered in division 306 of the *Criminal Code*.

5.65 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-trafficks 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
- 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.

51 *Submission 11*, p. 3.

5.66 Division 306 of the *Criminal Code* sets out new domestic offences of pre-trafficking in controlled precursors. The offences have the same three-tier structure and penalties as the offences for importing precursors: 25 years or 5,000 penalty units (\$550,000), or both, for a commercial quantity; 15 years or 3,000 penalty units (\$330,000), or both, for a marketable quantity; and seven years or 1,400 penalty units (\$154,000), or both, for any quantity. The quantities for commercial and marketable quantities are based on the amount of precursor necessary to manufacture the corresponding amount of border controlled drug.⁵²

Commercial manufacture of drugs

5.67 Division 305 of the *Criminal Code* addresses the commercial manufacture of controlled drugs. 'Manufacture' is defined in section 305.1 to mean any process by which a substance is produced. This 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 offence is reflected in the requirement contained in section 305.2 that to be guilty of a section 305.1 offence a person must manufacture the substance with the intention of selling any of it or believing that another person intends to sell any of it.

5.68 Division 305 of the *Criminal Code* also provides for three tiers of offences based on quantity. The penalties are the same as for the trafficking offences: imprisonment for life or 7,500 penalty units (\$825,000), or both, for manufacturing a commercial quantity of controlled drugs; imprisonment for 25 years or 5,000 penalty units (\$550,000), or both, for manufacturing a marketable quantity; and imprisonment for 10 years or 2,000 penalty units (\$220,000), or both, for manufacturing any quantity of drugs.⁵³

Drug offences involving children

5.69 Division 309 of the *Criminal Code* contains offences directed at adults who involve children under 18 years of age in the drug trade. Section 309.3 lists the offence of supplying a marketable quantity of controlled drugs to children for trafficking, which carries a penalty of imprisonment for life or 7,500 penalty units (\$825,000), or both. Where a child is supplied with any quantity of controlled drugs for trafficking, section 309.4 provides for a penalty of 25 years imprisonment or 5,000 penalty units (\$550,000), or both.⁵⁴

52 *Submission 11*, pp 4-5; Attorney-General's Department, *Submission 15*, p. 5.

53 *Submission 11*, p. 5.

54 *Submission 11*, p. 6.

Adequacy of the legislation

5.70 Comparing the old and new legislation, Dr Andreas Schloenhardt, from the University of Queensland, observed that the new legislation covers precursors more adequately than did the offences contained in the *Customs Act 1901*. The new division 306 specifically provides penalties for offences involving precursors.⁵⁵

5.71 The Australian Federal Police (AFP) submission to the inquiry indicates that the amendments to the *Criminal Code* have had 'significant implications for Commonwealth law enforcement.'⁵⁶ In particular, the submission notes that the tiering provisions have improved the AFP's ability to focus on importation and trafficking of large amounts of illegal drugs and precursors. The submission states that the scope of operation of the legislation is expanded through section 300.3, which establishes jurisdiction over Australians operating overseas. This is achieved through the application of division 15 of the *Criminal Code*, which allows some criminal activities engaged in by Australian citizens or residents when abroad to be subject to Australian criminal law.

5.72 The addition of Commonwealth offences for selling, manufacturing or possessing precursors has filled gaps in the previous legislative regime. In evidence, Ms Melinda Cockshutt, from the Commonwealth Attorney-General's Department, observed that, in particular, the creation of parallel domestic offences enabled the AFP to pursue convictions for drug offences where the offences might not have involved the import or export of the controlled precursor.⁵⁷

5.73 Evidence from several witnesses suggest that, at a Commonwealth level, the scope and intent of the amendments introduced by the SDO Act are currently adequate to combat AOSD importation, manufacturing and trafficking effectively.⁵⁸ The Attorney-General's Department submitted:

The SDO Act represents a significant step forward in the fight against ATS [AOSD] and drugs in general. It has created a range of offences to inhibit the supply of ATS to the Australian community through decreasing ATS manufacture and trafficking. It also aims to protect children from the harms associated with ATS. The Commonwealth continues to encourage all States and Territories to include similar offences in their individual drug legislation.⁵⁹

5.74 Similarly, the ACC endorsed the effectiveness of the new precursor offences and regulatory measures:

55 University of Queensland, *Submission 21*, pp 10-11

56 Australian Federal Police, *Submission 6*, p.8.

57 *Committee Hansard*, 19 June 2006, p. 17.

58 Australian Federal Police, *Submission 6*, p. 7.

59 Attorney-General's Department, *Submission 15*, p. 6.

The enactment of the Law and Justice Amendment (Serious Drug Offences and Other Measures) Bill 2005, coupled with the actions of rescheduling by the National Drugs and Poisons Schedule Committee, will significantly decrease the risk of diversion of precursor chemicals (particularly pseudoephedrine) in Australia.⁶⁰

5.75 Dr Schloenhardt identified significant improvements in the application, construction and substantive operation of the new legislative regime, saying that it removed potential ambiguity of judicial interpretation and was easier to use:

The legislation does remove many of the difficulties and uncertainties of former s 233B Customs Act 1901 (Cth). The principles under Chapter 2 of the Criminal Code (Cth) now apply more consistently to federal drug offences and there is less room for judicial interpretation of the elements of federal drug offences. The new legislation is significantly easier to use (and understand).⁶¹

5.76 The Committee has recommended elsewhere that the legislation dealing with illicit drugs be evaluated. However, the Committee also considers that the effectiveness of the provisions of SDO Act should be evaluated within two years of commencement, and that it be reviewed every two years after that to ensure that it is achieving the objectives set for it.

Recommendation 8

5.77 The Committee recommends that a review of the provisions of the *Law and Justice Legislation Amendment (Serious Drug and Other Offences) Act 2005* be undertaken not later than December 2007, and that it be amended to provide for regular reviews of the effectiveness of the provisions at two-year intervals after the initial review.

The deterrent potential of penalties

The prohibition model

5.78 The penalties under the Model Criminal Code are intended to act as a substantial deterrent to AOSD and precursor importation, manufacture and distribution. The Commonwealth Director of Public Prosecutions submission states:

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.⁶²

60 ACC, *Submission 18*, p. 10.

61 University of Queensland, *Submission 21*, p. 13.

62 Commonwealth Director of Public Prosecutions, *Submission 11*, p. 1.

5.79 However, a number of witnesses questioned the deterrent value of penalties for drug offences:

Harsher penalties for users will do nothing to deter them, and will only exacerbate the us and them dynamic.⁶³

5.80 In his submission, Andrew Macintosh, the Deputy Director of the Australia Institute, argued that '[p]eople with a propensity to use drugs are generally not deterred by legal sanctions'.⁶⁴ A prohibition approach—in which 'the manufacture, import, supply, possession and use of these drugs are crimes carrying harsh penalties'—is based on the deterrence theory, which assumes that increasing the costs of supplying and using drugs will reduce the market size and thus the harms that flow from it.⁶⁵ Mr Macintosh argued that this reasoning was flawed, as decisions regarding drugs were rarely made rationally:

This theory assumes that people's decisions are a product of rational processes whereby the costs and benefits of a proposed course of action are meticulously weighed before an action is taken.⁶⁶

5.81 Dr Schloenhardt also raised concerns about the deterrent value of penalties. He expressed doubt that the new offences and the slightly higher penalties contained in the *Criminal Code* 'will deter large-scale operators in a growing illicit market'.⁶⁷ Dr Schloenhardt explained that the deterrent value of penalties may affect the consumers rather than the producers of AOSD:

People can be deterred by penalties and not use drugs. I do not think any serious drug trafficker can really be deterred by our penalties. He has other ways to keep himself immune from investigation.⁶⁸

Consistency

5.82 The Committee considers that another factor with the potential to undermine the deterrent value of the new penalties is the national inconsistency of AOSD-related laws.

5.83 The Committee is concerned that inconsistency between jurisdictions in the severity of sentences imposed for the same category of AOSD-related crime will have the potential to undermine the deterrent effect of those penalties in two ways. First, where the principles underlying the calculation and application of penalties are unclear, those penalties are unlikely to act as a specific or known deterrent. Second,

63 Name withheld, *Submission 25*, p. 2.

64 Australia Institute, *Submission 24*, p. 9.

65 *Committee Hansard*, 5 June, 2006, p. 18.

66 *Committee Hansard*, 5 June, 2006, p. 17.

67 University of Queensland, *Submission 21*, p. 13.

68 *Committee Hansard*, 15 May 2006, p. 21.

where state systems are producing disparate penalty or sentencing outcomes, the deterrent effect of the federal laws could, at best, be undermined and, at worst, be consciously avoided by organised criminals selecting certain jurisdictions in which to undertake their activities.

5.84 Accordingly, the Committee supports the adoption of offences and penalty regimes based on the SDO Act by those states that have not yet done so.

5.85 The Committee is of the opinion that the effectiveness of the SDO Act amendments to the *Criminal Code* would be strengthened by greater national consistency in the offence and penalty regimes in place to combat AOSD-related crime.

Recommendation 9

5.86 The Committee recommends that the states and territories consider adopting drug offence regimes based on the *Law and Justice Legislation Amendment (Serious Drug and Other Offences) Act 2005* with the aim, as far as is practically possible, of establishing greater national consistency in the offences and penalties that apply to crimes related to amphetamines and other synthetic drugs (AOSD).

State legislation

5.87 Drug offences under state legislation have traditionally focused on use, possession and trafficking, and have had no international aspect, which is the province of federal laws. Inevitably, no two states are exactly alike in their offence and penalties legislation, although some states have at least partially adopted the regime set out in the Model Criminal Code. In its submission, the ACC noted:

...there remains some lack of uniformity of drug offences throughout Australia...The lists of controlled substances and quantities covered by State and Territory drug legislation also vary by jurisdiction.⁶⁹

5.88 The *Bills Digest* to the SDO Act notes, for example, that 'there is considerable variation between jurisdictions in the area of simple cannabis possession.'⁷⁰ In the ACT, Northern Territory, South Australia and Western Australia, possession of small amounts of cannabis—an amount that is 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, while possession of up to 50 grams attracts a fine of \$200. However, in NSW and Tasmania, the penalties for possession of cannabis are more severe: a fine of up to \$2,200 or two years

69 ACC, *Submission 18*, p. 12.

70 Jennifer Norberry, *Bills Digest for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth)*, pp 3-4.

imprisonment in NSW and a fine of up to \$5,000 or two years imprisonment in Tasmania.⁷¹

5.89 The problems in operating across these disparate legislative regimes were highlighted in evidence by the Detective Inspector Frederick Scupham, Assistant Divisional Officer, Organised Crime Division, Western Australia Police, who told the Committee that the constraints imposed by state borders militate against effective policing—principally because the criminals are not similarly constrained. He continued:

A recent operation between the WA Police, the Australian Crime Commission and New South Wales Police was Operation Schumacher...it was very evident that the criminal element were in fact working on a national basis...It was really only...the facility under the ACC Act that enabled us to [police them nationally] without having restrictions or borders.⁷²

5.90 Detective Inspector Scupham indicated that variations in drug legislation from state to state add to the limitations on special projects, irrespective of how closely the state agencies work.

5.91 Detective Chief Superintendent Denis Edmonds, Officer in Charge, Strategy and Support Branch, Crime Service, South Australia Police, reinforced the need for uniformity in drug laws across the states. He told the Committee that, while there is movement towards national consistency for the more serious offences such as drug manufacture and trafficking, and some consistency on the code of conduct for reporting the sale of precursor chemicals, jurisdictional differences remain for possession of precursor chemicals or clandestine laboratory equipment.⁷³

5.92 Dr Andreas Schloenhardt, from University of Queensland, also noted the potential for the fragmented state regimes to favour organised crime. He observed that the 'modern and sophisticated' Commonwealth laws widen the gap between the federal and state drug offence regimes.⁷⁴ Dr Schloenhardt told the Committee:

...if you look at the present-day drug offences that exist in Queensland compared to those of the Commonwealth, the gap could not be wider. There is no precursor offence in Queensland. It is a sophistication in detail that our drug misuse act does not have.⁷⁵

71 *Bills Digest for the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth)*, pp 3-4.

72 *Committee Hansard*, 4 May 2006, p. 4.

73 *Committee Hansard*, 3 May 2006, p. 5.

74 *Committee Hansard*, 15 May 2006, p. 20.

75 *Committee Hansard*, 15 May 2006, p. 20.

5.93 The Committee notes that the Queensland parliament passed amendments to the *Drugs Misuse Act 1986* earlier this year which go some way towards criminalising the possession of certain items and substances that are precursors for the manufacture of dangerous drugs.

5.94 Like Queensland, New South Wales has not adopted the model drug legislation, although there have been amendments to the *Drug Misuse and Trafficking Act 1985* that prohibit possession of precursors as well as possession of equipment such as the glass pipes used to smoke ice.

5.95 In his submission, Dr Schloenhardt observed that the diversity of and discrepancies in the drug laws of the Commonwealth, the states and the territories remain a significant obstacle in criminalising AOSD-related activities.⁷⁶ Dr Schloenhardt expressed the view that the work of investigators and prosecutors would be made easier by a more uniform approach:

In the long-term, it may be desirable to consolidate jurisdiction over drug offences (along with other aspects of criminal law and criminal justice) in a single, federal jurisdiction, thus avoiding administrative obstacles as well as discrepancies between legislation.⁷⁷

5.96 Similarly, the Queensland Alcohol and Drug Research and Education Centre argued:

The current legislative and regulatory powers available to criminal justice agencies in Australia for the control of illegal drug markets are largely adequate. Greater consistency in laws and regulation between state jurisdictions may improve regulatory effectiveness.⁷⁸

5.97 The Committee notes that there has not been adequate time since the SDO legislation commenced to collect data on prosecutions under the new legislation. In evidence, the Committee was advised that there are several bodies that could monitor the success of the new legislation, as it appears that the Model Criminal Code Officers Committee no longer performs that function.⁷⁹

5.98 The Committee considers that it is crucial to measure the effectiveness of the current legislation as part of considering the longer-term possibility of developing a national drug law that encompasses federal and state jurisdictions as well as standardised penalties and systems for administering international and domestic offences.

76 University of Queensland, *Submission 21*, p. 13.

77 University of Queensland, *Submission 21*, p. 13.

78 Queensland Alcohol and Drug Research and Education Centre, *Submission 12*, p. 7.

79 Mr Craig Anthony Harris, Assistant Secretary, National Law Enforcement Policy Branch, Criminal Justice Division, Attorney-General's Department, *Committee Hansard*, 19 June 2006, p.16.

Recommendation 10

5.99 The Committee recommends that the Commonwealth government undertake regular reviews of the effectiveness and interaction of Commonwealth and state drug legislation.

Recommendation 11

5.100 The Committee recommends that the Commonwealth government continue to work with the state and territory governments to encourage national consistency of offences relating to amphetamines and other synthetic drugs (AOSD) and precursor chemicals.

International treaties and obligations

5.101 The principal conventions on drugs that govern Australia's international obligations are:

- the United Nations Single Convention on Narcotic Drugs of 1961, as amended by the 1972 protocol;
- the United Nations Convention on Psychotropic Substances of 1971; and
- the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

5.102 During the course of the inquiry, and as discussed in chapter 2, the issue of international involvement in the supply of AOSD and precursors was raised. In particular, the Committee heard that there is growing evidence of trafficking of AOSD to and through the South Pacific islands. Anecdotal evidence supports concerns in Australia and the international community about growing levels of AOSD abuse in some Pacific island nations.⁸⁰ Many South Pacific countries do not have adequate laws and penal codes to criminalise the activities associated with AOSD manufacture, trafficking and sale. Further, only five of the 15 South Pacific nations have ratified relevant international instruments and the three key UN drug conventions listed above. Dr Schloenhardt argued:

The lack of comprehensive drug laws along with weaknesses in the regulation of the financial markets in many countries make the Pacific islands particularly vulnerable to AOSD and other drug trafficking and to the laundering of proceeds of AOSD and other drug-related crime.⁸¹

5.103 The need to strengthen regional approaches to the control of AOSD was identified in a number of submissions. The AFP emphasised the importance of strong international law enforcement cooperation in AFP operations. Examples include:

80 Dr Andreas Schloenhardt, University of Queensland, *Submission 21*, p. 5.

81 *Submission 21*, p. 6.

- the AFP's international network, which provides a conduit for intelligence obtained and for coordination of overseas operations affecting Australia's interests. The AFP submission states that '[a]pproximately 84 per cent of all high-impact work undertaken by the AFP in 2003-04 involved the international network',⁸²
- the establishment of transnational crime centres for drug investigations and related crime; and
- the signing of memoranda of understanding (MOUs) with key international law enforcement agencies. The AFP states that the MOUs focus on combating transnational crime and developing police cooperation, and encompass measures to target illicit drug trafficking.⁸³

5.104 In evidence, Federal Agent Michael Phelan, National Manager, Border Intelligence Network, Australian Federal Police, told the Committee that the AFP posts in Western Europe are '100 per cent devoted to AOSD intelligence gathering, as are posts in the Philippines, Malaysia, Indonesia and Bangkok'.⁸⁴

5.105 The AFP submission also notes that amendments to the *Criminal Code* 'broadened the scope of law enforcement operations to include greater geographical jurisdiction over Australians operating overseas'.⁸⁵ This is a reference to section 8(1)(bf) of the *Australian Federal Police Act 1979*, a provision that, according to the explanatory memorandum to the SDO Act, specifically allows 'police services and police support services to assist and cooperate with law enforcement agencies, intelligence or security agencies and government regulatory agencies, both in Australia and overseas'.⁸⁶ The explanatory memorandum continues:

This will ensure that the AFP can undertake activities that do not have an immediate, apparent nexus to traditional "police services". For example, educational activities such as instructing the police force of another country in the techniques of forensic investigation to build that country's expertise in that area.⁸⁷

5.106 The Committee considers that the AFP's activities in interrupting internationally-sourced supplies of AOSD and their precursors and efforts in providing education and support for neighbouring nations will contribute significantly to the strategy of supply reduction.

82 Australian Federal Police, *Submission 6*, p. 6.

83 *Submission 6*, p. 6.

84 *Committee Hansard*, 5 June 2006, p. 73.

85 Australian Federal Police, *Submission 6*, p. 8.

86 Explanatory memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences And Other Measures) Bill 2005*, p. 120.

87 Explanatory memorandum, *Law and Justice Legislation Amendment (Serious Drug Offences And Other Measures) Bill 2005*, p. 120.

Conclusion

5.107 The Committee considers that the SDO Act amendments to the *Criminal Code* are clearly a significant step forward in creating a legislative framework that recognises the particular issues surrounding the importation, trafficking and possession of AOSD precursor chemicals. The adoption of the code across state jurisdictions, coupled with uniform sentencing practices, would assist in achieving greater consistency between states and the Commonwealth in prosecuting precursor drug offences, and enhance the deterrent effect of the new division 309 penalties.

5.108 Commonwealth agencies in collaboration with each other and state law enforcement agencies have developed, and are continuing to develop, a range of strategies and administrative arrangements that deal with AOSD importation, manufacture and distribution. The Committee is confident that law enforcement agencies currently have sound and evolving legislative and administrative frameworks to assist them in their collaborative efforts against AOSD in Australia. The Committee concurs with the following view expressed by the Australian Customs Service:

AOSD will continue to pose a considerable challenge for Australian law enforcement agencies in the coming years. It is only by fostering expertise and capability within law enforcement and through law enforcement agencies continuing to work closely together—including with their regulatory, health and research partners—that the excellent outcomes that have been achieved in recent years in reducing the supply of these drugs to the Australian community will continue to be surpassed.⁸⁸

5.109 The following chapter examines the specific law enforcement approaches to reducing the supply of AOSD in Australia, and critiques the adequacy of that response.