CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues and concerns raised in submissions, and in particular:

- the Bill's interaction with state and territory legislation;
- fault elements and burdens of proof in the Bill's drug offence provisions;
- other specific aspects of the drug offence provisions;
- policy aspects of the drug offence provisions; and
- other schedules of the Bill.

3.2 Most submissions received by the committee were focussed on the drug offence provisions in Part 1 of Schedule 1 of the Bill, and this chapter therefore focuses on these provisions.[1]

3.3 In general, the majority of submissions expressed support for the Bill.[2] However, the Families and Friends for Drug Law Reform (FFDLR) expressed serious misgivings about the Bill, and queried whether the Bill would meet some of its objectives.[3] The Law Council of Australia (the Law Council) also raised a number of concerns in relation to the Bill. Some submissions also raised issues in relation to the Bill's interaction with state and/or territory legislation.[4] This is discussed further below.

Interaction with state and territory legislation

3.4 A key objective of the Bill is 'to achieve national consistency in this very significant area of criminal law'.[5] A number of submissions were supportive of this objective, and the Bill as a means of achieving this objective.

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1 Note that unless otherwise stated, references in this report to proposed sections or divisions of the Bill are to those sections or divisions in Part 1 of Schedule 1 of the Bill.

2 See, for example, Australian National Council on Drugs, *Submission 1*; Queensland Police Service, *Submission 2*; Commonwealth Director of Public Prosecutions, *Submission 3*; Dr Gregor Urbas, *Submission 4*; Australian Customs Service, *Submission 9*; Drug Free Australia, *Submission 12*.

3 *Submission 8*.

4 See, for example, Western Australia Police (WA Police), *Submission 5*; FFDLR, *Submission 8*, pp 21-23.

5 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 26 May 2005, p. 6; see also Attorney-General's Department, *Committee Hansard*, 3 August 2005, p. 14.

3.5 For example, the Australian National Council on Drugs (ANCD) recognised 'the inherent benefits of the criminal justice sector implementing a consistent approach across jurisdictions to the treatment of serious drug offences.'[6] The ANCD was particularly supportive of the development of a nationally consistent list of drugs and quantities to be linked to the model drug offences.[7]

3.6 Similarly, Dr Gregor Urbas welcomed the Bill's 'move towards greater consistency and uniformity in Australian drug law'.[8] He hoped that the Bill would provide a 'more settled and comprehensive model for the States and Territories to follow in reforming their own criminal laws.'[9]

3.7 The Queensland Police Service stated that the Bill mirrors some of the provisions of Queensland's *Drugs Misuse Act 1990*. The Queensland Police Service also observed that the Bill would not affect the operations of the *Drugs Misuse Act 1990* (Qld) 'because the Bill expressly states that the Commonwealth law is not intended to limit the State law'.[10] The Queensland Police Service further submitted that:

> Similar offences are currently being formulated for inclusion in the State legislation and the new penalties proposed in the Bill are consistent with existing State legislation.[11]

3.8 Similarly, the South Australia Police noted that draft South Australian legislation to amend its *Controlled Substances Act 1985* (SA) is currently being considered, and that the changes proposed in the draft state legislation and the Bill are 'largely consistent with each other.'[12]

3.9 In contrast, Mr Brian McConnell of the FFDLR argued that the Bill is 'a radical and heavy-handed extension of the Commonwealth's legislative authority into the criminal law on drugs.'[13] The FFDLR were particularly concerned that the Bill would give the Commonwealth greater control over the area of drugs, and potentially provides a means to 'trump' several aspects of the law of some states and territories. In particular, they were concerned about the impact on:

- provisions for 'expiation notices' for minor cannabis offences (under legislation in South Australia, Western Australia and the Australian Capital Territory); and

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6 *Submission 1*, p. 1.

7 *Submission 1*, p. 1.

8 *Submission 4*, p. 1.

9 *Submission 4*, p. 5.

10 *Submission 2*, p. 1.

11 *Submission 2*, p. 1.

12 *Submission 7*, p. 1; see also WA Police, *Submission 5*, p. 2.

13 *Committee Hansard*, 3 August 2005, p. 8; see also *Submission 8*, p. 21.

- legislation for the provision of syringes and medically supervised injecting rooms (under legislation in New South Wales and the Australian Capital Territory).[14]

3.10 Mr Bill Bush from the FFDLR further queried the need for Commonwealth legislation in this area at all:

> …why is the Commonwealth at this stage enacting general drug legislation applying across the Commonwealth?...[D]rug legislation has been here for years and years, and it has been regulated…on the basis that it has been adequately covered by state legislation.[15]

3.11 The Western Australia Police (WA Police) also expressed concerns about aspects of the Bill's relationship with state legislation. The WA Police had no objection to the transfer of existing offences from the Customs Act into the Criminal Code. However, the WA Police believed that other offences proposed in the Bill could 'result in complicated over-regulation in relation to controlled drugs and plants.'[16] The WA Police noted that certain provisions in proposed Divisions 302, 303 and 305 of the Bill create offences that are already provided for under state legislation such as the *Misuse of Drugs Act 1981* (WA) (MDA). For example, in relation to the manufacturing offences in proposed Division 305 of the Bill, the WA Police argued that:

> …all matters related to manufacturing of illicit drugs should be controlled by State legislation without the complication of Commonwealth legislation.[17]

3.12 At the same time, the Western Australian (WA) Government submitted that:

> The Bill provides for the concurrent operation of the Commonwealth law alongside existing State and Territory law, and if enacted, its provisions would not interfere with the operation of our State regime. The new offences do, however, apply to drug dealing interstate and give more flexibility to Commonwealth law enforcement agencies to encroach on matters that were previously for exclusive consideration by the State.[18]

3.13 The WA Government concluded that the Bill 'conforms largely in content with the Western Australian regime and any divergences are, in any event, in line with the overarching purpose and appropriate intentions of our own regime.'[19]

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14 *Submission 8*, pp 22-23; see also *Committee Hansard*, 3 August 2005, pp 11-12.

15 *Committee Hansard*, 3 August 2005, p. 11; see also *Submission 8*, p. 21.

16 *Submission 5*, p. 1.

17 *Submission 5*, p. 2.

18 *Submission 11*, p. 1.

19 *Submission 11*, p. 3.

3.14 At the hearing, a representative of the Attorney-General's Department (the Department) acknowledged that if the Bill is passed:

> For the first time there will be a comprehensive range of drug offences at Commonwealth level and that will give Commonwealth agencies the flexibility to deal with the full range of conduct that they come across in the course of drug investigations.[20]

3.15 The representative continued:

> The objective of the Bill is not to override state and territory laws. They will be preserved by the operation of section 300.4. The aim is to avoid a situation where Commonwealth agencies need to prosecute under state law or refer a case to state authorities in order to deal with the full range of conduct that comes to light in a Commonwealth investigation.[21]

3.16 Similarly, the Commonwealth Director of Public Prosecutions (DPP) submitted that:

> …section 300.4 provides that Part 9.1 is not intended to exclude or limit the concurrent operation of any law of a State or Territory. This has the effect that some alleged conduct might be prosecuted pursuant to State or Commonwealth law.[22]

3.17 The DPP believed that the new Commonwealth offences, particularly in proposed Divisions 302-306, would have the advantage that:

> …in many circumstances it will not be necessary for joint trials of Commonwealth and State/Territory offences to be conducted, as Commonwealth provisions may be relied on. This will avoid the complexity involved in running trials involving both Commonwealth and State/Territory offences.[23]

3.18 The DPP further noted the EM's statement that 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 enforcement agencies.[24]

3.19 Similarly, the Attorney-General stated in his second reading speech that the offences in the Bill:

> …will operate alongside state and territory offences to give more flexibility to law enforcement agencies. This approach will ensure there are no gaps between federal and state laws that can be exploited by drug cartels.[25]

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20 *Committee Hansard*, 3 August 2005, p. 13.

21 *Committee Hansard*, 3 August 2005, p. 13.

22 *Submission 3*, p. 1.

23 *Submission 3*, p. 2; see also DPP, *Committee Hansard*, 3 August 2005, pp 14 and 23.

24 *Submission 3*, p. 1.

Fault elements and burdens of proof

Presumptions and absolute liability

3.20 Some submissions expressed concerns about the use of presumptions, and the application of absolute liability, to certain elements of some offences in the Bill.

3.21 For example, the Law Council noted that there are a range of presumptions attached to certain offences in the Bill, including:

- presumptions, where a trafficable quantity of drugs is involved, of an intention or belief to sell the substance;[26] and
- presumptions of intention to manufacture, or to sell where another person has manufactured a substance, where that manufacture was not authorised by law (where required) and/or a marketable quantity of the substance is involved.[27]

3.22 The Law Council further noted that, for many offences, absolute liability attaches to the quantity of controlled drugs or plant.[28] Mr John North, President of the Law Council, stated that the Law Council was opposed to 'this scheme of shifting the burden of proof upon the defendant by introducing a raft of presumptions and absolute liability.'[29] The Law Council argued that the operation of these presumptions and absolute liability favour the prosecution, and 'effectively shifts the burden from proving guilt to establishing innocence.'[30] The Law Council felt that this was 'unfair and unjust' and undermined the presumption of innocence as set out in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).[31] Mr North further explained:

> …the trouble is if you are the innocent person who is caught up in the absolute liability or in the presumptions and find yourself incarcerated for 20 years to life on a serious matter when you are not guilty. That is the reason why, for murder and everything else, we say that when the crown, with all of its resources, goes against the individual, the crown should prove things beyond reasonable doubt...[32]

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25 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 26 May 2005, p. 6.

26 See, for example, proposed ss. 302.5, 303.7, 305.6 and 309.5 as outlined in chapter 2 of this report.

27 *Submission 10*, p. 3; see also proposed ss. 306.6, 306.7, 306.8, 307.14(1) and 307.14(3).

28 See, for example, proposed ss. 302.2(3), 302.3(3), 303.4(3), 303.5(3), 304.1(3), 304.2(3), 305.3(3), 305.4(3), 306.2(3), 306.3(3) as outlined in chapter 2 of this report.

29 *Submission 10*, p. 3; *Committee Hansard*, 3 August 2005, p. 3.

30 *Submission 10*, p. 4.

31 *Submission 10*, p. 4.

32 *Committee Hansard*, 3 August 2005, p. 4.

3.23 The FFDLR were also concerned about the application of absolute liability, particularly in relation to elements of the import-export offences in proposed Division 307 of the Bill,[33] and recommended that:

> The evidentiary rules in favour of the prosecution in cls. 307.6 and 307.9 and in related provisions should be trimmed back better to reflect the basic rule of the criminal law that the prosecution should prove its case beyond a reasonable doubt. [34]

3.24 However, the DPP submitted that:

> Based on our practical experience in prosecuting drug matters, in our submission providing for absolute liability in relation to this single element is justified and vital to the effective operation of these offences. Were it not applied, a requirement to prove fault in relation to this element would undermine the effectiveness of the offence and its deterrent effect. Currently, the objective fact of the amount of drug involved determines the available penalty, though subjective knowledge as to the amount may be relevant to the sentence imposed.[35]

3.25 Similarly, the FFDLR also raised concerns about the presumptions in the Bill where a trafficable quantity of drugs is involved. In particular, the FFDLR were concerned about the application of this presumption in proposed sections 302.5 and 303.7 in the context of user-dealers and cannabis growers. For example, the FFDLR argued that a single, average size cannabis plant could meet the threshold for a trafficable quantity of 250g (as specified in proposed section 314.2). The FFDLR argued that a home cultivator and consumer of cannabis could therefore be caught by these provisions, and as a result:

> …the onerous burden will be thrown onto the cultivator of an average size plant to prove that he or she was not cultivating to sell.[36]

3.26 The FFDLR disagreed with the statement in the EM that trafficable quantity thresholds, at least in relation to cannabis, are 'indicative of an intention to sell rather than personal use'.[37] The FFDLR therefore suggested that the reversal of the burden of proof in proposed sections 302.5 and 303.7 should be deleted because it 'unfairly targets those whom drug policy and law should be designed to help.'[38]

3.27 However, the DPP expressed support for these provisions, stating that:

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33 See discussion of proposed Division 307 in chapter 2 of this report; *Explanatory Memorandum*, pp 46 and 52.

34 *Submission 8*, p. 4.

35 *Submission 3*, pp 3-4.

36 *Submission 8*, p. 5.

37 *Explanatory Memorandum*, p. 29; and *Submission 8*, pp 5-6.

38 *Submission 8*, pp 5-6.

> …this presumption is appropriate when such a [trafficable] quantity is involved. The presumption does not apply if the person proves on the balance of probabilities that he or she had neither that intention nor belief.[39]

3.28 The DPP further maintained that:

> In our view stating that absolute liability applies to quantity, together with the burden discussed above on the defendant to establish a lack of commercial intention are essential components of these offences, as without them, the prosecution would face formidable difficulty in securing convictions. The effective operation of these proposed offences is heavily dependent on these provisions.[40]

3.29 However, Mr John North of the Law Council argued that:

> People get caught on a daily basis coming into Australia with suitcases of drugs or drugs hidden in machinery or anything else, and convictions are regularly obtained...If someone is found bringing drugs in on their person then the presumption is there…It is a very difficult presumption to get over. In other ways they are getting convictions on a daily basis in the courts under the existing law. There is not an outcry that lots of drug smugglers or drug dealers are walking the streets having been freed.[41]

3.30 In the same vein, Mr Bill Bush of the FFDLR argued that:

> The government's intention should be to police existing drug laws and, if necessary, to put more resources into the policing of those laws. But to remove those protections which…are protections that were established through many centuries and of which we are the inheritors—to do it for this particular end, or for any reason, is unsound.[42]

3.31 However, a representative of the Department pointed out that the use of rebuttable presumptions is not new in drug law:

> There is nothing new about reversing the onus of proof in relation to various elements. It is in the Customs Act. It is in state laws…law enforcement community agencies…find those essential to the proper prosecution of the offences. The reason is quite simple. Because it is very difficult to know what is going on in the mind of a person, you have to look at the surrounding circumstances…If you find somebody with a warehouse full of drugs, you can assume they intend to sell it.[43]

3.32 Indeed, South Australia Police submitted that a similar presumption occurs in section 32 of the *Controlled Substances Act 1985* (SA), noting that it had found that:

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39 *Submission 3*, p. 2.

40 *Submission 3*, p. 2.

41 *Committee Hansard*, 3 August 2005, p. 7.

42 *Committee Hansard*, 3 August 2005, p. 9.

43 *Committee Hansard*, 3 August 2005, p. 21.

> …the inclusion of an evidentiary presumption in the State legislation has proven to be of significant benefit to this agency when prosecuting drug sale and supply matters.[44]

3.33 Similarly, the WA Government observed that its MDA also imposed a presumption of commercial intent where a specified threshold quantity is involved. It noted, however, that the Bill imposes this presumption in a wider range of circumstances, such as the preparation, transportation or concealment of a trafficable quantity.[45]

Import-export offences – fault elements

3.34 Some submissions also commented on the fault elements in proposed Division 307 of the Bill. For example, Dr Gregor Urbas welcomed proposed Division 307, stating his belief that this will bring 'a greater degree of clarity and predictability to this area of Commonwealth criminal law.'[46] Dr Urbas explained that section 233B of the Customs Act has been problematic, noting that:

> …there has been considerable judicial uncertainty about the *mens rea* or…fault elements for the importation and possession offences under this provision.[47]

3.35 Dr Urbas observed that the provisions of the Bill are consistent with the courts' analysis of section 233B of the Customs Act, but:

> …given the altogether more explicit drafting of the new provisions, in conformity with the methodology underlying the Criminal Code, there should now be little doubt as to the requisite fault elements for the offence and the appropriate directions to give to a jury.[48]

3.36 Dr Urbas concluded:

> …it is to be hoped that the days of successful appeals based on judicial uncertainty over the requisite physical and fault elements for the central offence of narcotics importation are in the past. While s233B and the caselaw it has generated have been important in shaping Australian criminal law, and of considerable interest to legal academics, the greater certainty provided by relocating this and other Commonwealth drug offences under the *Criminal Code Act 1995* (Cth) is to be welcomed.[49]

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44 *Submission 7*, p. 1.

45 *Submission 11*, p. 2.

46 *Submission 4*, p. 5.

47 *Submission 4*, p. 2.

48 *Submission 4*, p. 4.

49 *Submission 4*, p. 4.

3.37 In contrast, the Law Council expressed opposition to the proposed standards in the Bill. The Law Council pointed to the history of section 233B of the Customs Act, and suggested that the proposed amendments would replace the higher threshold of 'guilty knowledge' with a lower standard of 'recklessness'.[50] It argued further that:

> A central objective of criminal law of deterring criminal behaviour is better achieved by punishing a person who knowingly and intentionally commits an offence.[51]

3.38 The Law Council concluded that:

> …it is unnecessary to lower the fault element to recklessness as there is authority that in appropriate circumstances the requisite intention or knowledge may be inferred where there is awareness of a "real chance" that drugs were imported…the High Court [has] held that it is sufficient to infer intention or knowledge if the accused realised there was a likelihood that the substance he or she was importing or had in his or her possession was a prohibited drug.[52]

3.39 However, the Department and the DPP disagreed with the Law Council's interpretation of the existing provisions in the Customs Act, and its conclusion that the Bill would lower the standards of proof required.[53] A representative of the DPP stated that the provisions:

> …do not involve lowering the proof; the stated aim was to replicate the current proof requirements of the Customs Act in the proposed offences in division 307 of the bill.[54]

3.40 Similarly, a representative of the Department stated that 'the approach that has been taken is that there should be no diminution of existing law dealing with drug offences at Commonwealth level or with the penalty levels that apply to them.'[55] Indeed, the DPP submitted that, in relation to the offences in proposed Division 307:

> The proposed offences require that the prosecution must prove that a defendant was reckless as to whether the substance involved was a border controlled drug. This replicates the existing position in section 233B of the Customs Act 1901 after it was amended by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures Act (No 2)*

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50 *Submission 10*, pp 4-5; see also Mr John North, Law Council, *Committee Hansard*, 3 August 2005, p. 3.

51 *Submission 10*, p. 5.

52 *Submission 10*, p. 5.

53 *Committee Hansard*, 3 August 2005, pp 13 and 14.

54 *Committee Hansard*, 3 August 2005, p. 14.

55 *Committee Hansard*, 3 August 2005, 13.

2004 which came into effect on 28 September 2004. In our submission this is appropriate.[56]

Other specific aspects of the drugs offence provisions

3.41 A number of other specific aspects of the drugs offence provisions were also raised in submissions and evidence. Some of these are discussed below.

Interim regulations

3.42 The Law Council raised concerns with the use of interim regulations and emergency determinations in proposed Division 301 to prescribe controlled substances and threshold quantities for 12 months. As Mr John North stated:

> The interim regulations concern us because they will have an effective life of 12 months and they will allow authorities to proscribe substances that have not yet been checked by experts. The Law Council are concerned that interim regulations could take effect without any adequate public consultation and there would be great uncertainty created by regulations due to lack of public knowledge. There is an absence of full consideration by experts. The possibility of not enacting the legislative amendments prior to the lapse of the interim regulations is also of concern.[57]

3.43 The Law Council therefore recommended that:

> …interim regulations should be introduced once full consideration by experts has occurred. This will provide some certainty and minimise changes in the legal status of substances and plants. For the same reasons, the Law Council also recommends that legislative amendments be introduced as soon as practicable following the introduction of interim regulations.[58]

3.44 Mr North elaborated on this in response to the committee's questioning:

> …the people who are brought before the courts under these new bills need…to understand the law. You cannot understand the law if you do not even know that a substance is prohibited because it is there by way of an interim regulation. [59]

3.45 Mr North explained that the Law Council's objections also flowed from the fact that criminal liability for 'severe' penalties flowed from these regulations.[60]

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56 *Submission 3*, p. 4.

57 *Committee Hansard*, 3 August 2005, p. 2; see also Law Council, *Submission 10*¸ p. 2.

58 *Submission 10*, p. 2.

59 *Committee Hansard*, 3 August 2005, p. 2; see also Law Council, *Submission 10*¸ p. 2.

60 *Committee Hansard*, 3 August 2005, p. 4.

3.46 A representative of the Department explained that the purpose behind the interim regulations and emergency determinations is:

> …to make this legislation responsive, flexible and able to be effective. There have been situations where drugs have been on the way to Australia or a new drug has been manufactured. The provision for emergency determinations is meant to cover those situations. It can take time to get regulations, even interim regulations, enacted.[61]

3.47 In response to the Law Council's concerns as to what might happen if such a determination or interim regulation lapsed, the departmental representative stated:

> There is an assumption that, if the drug is seen to be a serious enough risk by the responsible minister to make its way into an emergency determination, eventually it will make its way into the schedule. It is possible theoretically that parliament might decide not to pass an act or an amendment to the schedule, but by that stage parliament would have passed up the opportunity to disallow the emergency determination and the interim regulations. It is not as though it will come as an amendment before the parliament for the first time.[62]

3.48 The representative also pointed out that there are qualifications in the Bill on the ability to make such interim regulations and emergency determinations:

> The minister has to be satisfied that taking the drug 'would create a substantial risk of death or serious harm' or 'would have a physical or mental effect substantially similar to that caused by taking' another illicit drug and there is a substantial risk that the drug will be 'taken without appropriate medical supervision'. [63]

3.49 In response to the committee's questioning, the Department submitted that, once a particular substance has been prescribed in regulations for a period of 12 months, it cannot be re-prescribed in regulations.[64]

3.50 The committee also notes that, under the *Legislative Instruments Act 2003*, the interim regulations will be subject to parliamentary scrutiny and possible disallowance, and will also be publicly available on the Internet.

Defences and alternative verdicts

3.51 The Law Council also commented on proposed Division 313, which sets out complete defences for conduct justified or excused under state or territory law. The Law Council appreciated the need for these defences, but stated its hope that:

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61 *Committee Hansard*, 3 August 2005, p. 18.

62 *Committee Hansard*, 3 August 2005, pp 18-19.

63 *Committee Hansard*, 3 August 2005, p. 18.

64 *Submission 13*, p. 6; see also proposed ss. 301.3(3) and 301.4(3).

> …the prosecution would not pursue a matter to trial should its investigation lead to a conclusion that the conduct was justified or excused under a State or Territory law or where the circumstances, say a valid licence was believed to be held though the relevant authority was found to make an administrative error.[65]

3.52 However, the Law Council was opposed to the alternative verdict provisions in proposed section 313.3, stating its belief that:

> …alternative verdicts should only be permitted where the prosecution has raised them at the outset of the trial at the very latest. This is a basic safeguard to achieve procedural fairness.[66]

3.53 As Mr John North of the Law Council explained:

> …in the determination of any criminal charge against any person, as a minimum they should be informed in detail of the charges against them and have adequate time and facilities for the preparation of a defence. That does not occur if you allow alternative verdicts, even at the time the judge is summing up.[67]

3.54 In particular, the Law Council was concerned that these provisions could breach the ICCPR:

> According to the proposal, it would appear that an alternative verdict can be raised by the judge or jury in the absence of an alternative charge. This feature does not necessarily allow the defendant to be fully informed of all the charges against him or her and to have adequate time to prepare a defence, thereby breaching the ICCPR. Had all the charges been known, the defendant would have been able to better prepare his or her defence.[68]

3.55 The Law Council also suggested that the alternative verdict provisions could heighten the prospects of appeals on the basis of a denial of procedural fairness.[69] The Law Council therefore recommended that 'the use of alternative verdicts be limited to circumstances where the alternative verdict is raised in the indictment or at the outset of the trial and is truly an appropriate alternative to the offence charged.'[70]

3.56 In contrast, the DPP expressed support for the alternative verdict provisions in proposed Division 313, noting in particular that:

> Clause 313.3 is significant in relation to prosecutions in providing flexibility as it allows for an alternative verdict where the trier of fact is not

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65 *Submission 10*, p. 6.

66 *Submission 10*, p. 6.

67 *Committee Hansard*, 3 August 2005, p. 3.

68 *Submission 10*, p. 7.

69 *Submission 10*, p. 7.

70 *Submission 10*, p. 7.

> satisfied that the defendant is guilty of the alleged offence but is guilty of another offence against the Part and the maximum penalty for the other offence is not greater. The trier of fact may find the defendant guilty of that other offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.[71]

3.57 A representative of the DPP also pointed out that there are other alternative verdict provisions in the Criminal Code, for example, in relation to money laundering offences.[72]

3.58 The committee also notes that proposed section 313.3 specifically states that the trier of fact may only find the defendant guilty of another offence 'so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.'[73]

Import-export offences

3.59 As outlined in chapter 2, proposed Division 307 would relocate the import-export offences from the Customs Act (particularly section 233B) into the Criminal Code. Both the DPP and the Australian Customs Service (Customs) supported proposed Division 307 of the Bill.[74]

3.60 Customs noted that the Bill 'addresses a number of important issues for Customs in its role in border security and regulation as well as in its investigation capability.'[75] In particular, Customs accepted the removal of serious narcotic offences from the Customs Act to the Criminal Code as proposed by the Bill.[76] Customs also noted that the Bill maintains, and does not extend, appropriate law enforcement powers for the investigation and prosecution of these offences.[77] For example, Customs stated that the Bill would maintain its existing powers to seize illicit drugs and precursors.[78]

3.61 However, the FFDLR expressed concern that, under proposed Division 307, the possession of even small quantities of imported drugs would be an offence, with quite severe penalties. The FFDLR suggested that possession of imported drugs in small quantities typical of users and user-dealers should be a separate offence (if at all), with much lower penalties.[79] As discussed elsewhere in this report, the FFDLR

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71 *Submission 3*, pp 2-3.

72 *Committee Hansard*, 3 August 2005, p. 24.

73 See also DPP, *Committee Hansard*, 3 August 2005, p. 24.

74 DPP, *Submission 3*, pp 3-6; Customs, *Submission 9*, p. 3.

75 *Submission 9*, p. 3.

76 *Submission 9*, p. 3.

77 *Submission 9*, pp 2, 4-6; see also *Committee Hansard*, 3 August 2005, p. 24.

78 *Submission 9*, p. 4.

79 *Submission 8*, p. 3.

and the Law Council both raised concerns with the presumption and the application of absolute liability in this proposed division of the Bill.

Calculation of weight

3.62 The WA Police was concerned that proposed Division 312 of the Bill could potentially cause confusion in relation to the calculation of the weight of drugs involved in the proposed offences. The WA Police submitted that:

> Under Western Australia legislation, the total weight of the substance (drug + admixture) is taken to be the relevant weight of the drug for the purposes of prosecution. In contrast, s312.1 of the Bill sets out a complicated method of ascertaining quantity based on purity or the quantity of the 'pure' form of the drug...The MDA is more practical to apply as illicit drugs are rarely found in pure form, but are most commonly found as a substance comprised of the drug 'cut' with an admixture. The purity or percentage (ie strength) of the drug is then taken into consideration at sentencing.[80]

3.63 However, the committee notes that the EM states that:

> The quantities of controlled drugs and border controlled drugs are able to be specified as either a pure or dilute quantity, or both…Dilute quantities are not listed in proposed Division 314, however it is intended that they will be added in future.[81]

3.64 The FFDLR also raised concerns about the calculation of weights in relation to cannabis, pointing out their understanding that the dry weight is only about 30% of the fresh weight.[82] The FFDLR recommended that:

> Given the vast discrepancy between dry and fresh weights of cannabis and the prospect that if the prosecution used fresh weight genuine consumer growers would routinely commit crimes carrying enormous penalties, the weights specified for cannabis in cls. 314.1 and 314.2 should be specified to be dry weight or dry weight equivalent.[83]

3.65 However a representative of the Department stated that 'our view of how this provision should be interpreted is that it is the weight of the plant at the time it is seized.'[84] The representative pointed out that:

> …we do not think any other test is workable. What are you going to do—take a plant and dry it, so it has to go through some chemical process? What if there is a paddock full of plants? It is hard enough to count them, harder

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80 *Submission 5*, p. 2.

81 *Explanatory Memorandum*, p. 98.

82 *Submission 8*, p. 5.

83 *Submission 8*, p. 5; see also Mr Bill Bush, *Committee Hansard*, 3 August 2005, p. 11.

84 *Committee Hansard*, 3 August 2005, p. 21.

> to weigh them, virtually impossible to dry them all in some scientific way and weigh the dry product.[85]

Aggregation

3.66 The DPP welcomed the provision in proposed Division 311 to enable charges to be brought based on combined amounts of drugs, plants or precursors.[86] The DPP noted the EM's explanation that:

> The primary object of the [aggregation] provision[s] is to expose offenders who engage in frequent small dealings to the higher penalties usually reserved for those who deal in bulk quantities.[87]

3.67 However, the DPP commented that:

> If enacted, whether or not these provisions were utilised would depend on the circumstances involved. For example, they would not be appropriate where individual dealings involved substantial amounts and the laying of separate charges would be necessary to reflect the criminality involved.[88]

3.68 The WA Government also appeared to support these provisions, submitting that:

> Significantly, the Bill closes the legal loopholes that are exploited by drug traffickers who fragment their commercial dealings to avoid the full consequences of the law…The Western Australian regime does not provide for the accumulation of transactions in this way.[89]

3.69 In contrast, the Law Council expressed concern about aspects of proposed section 311.2, which allows parcels of controlled drugs to be combined where the prosecution can show that the defendant was involved in an organised commercial activity. As the EM notes, there is no restriction on the amount of time over which the organised commercial activity takes place in order to use this type of aggregation.[90] The Law Council suggested that:

> …section 311.2(2) which permits the prosecution to not provide exact dates of alleged occasions of trafficking and exact quantities trafficked on each occasion should be removed. The Law Council considers that details pertaining to each alleged act should be specified and supporting evidence in relation to each act provided by the prosecution.[91]

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85 *Submission 8*, p. 5; see also Mr Bill Bush, *Committee Hansard*, 3 August 2005, p. 11.

86 *Submission 3*, pp 6-7.

87 *Explanatory Memorandum,* p. 84.

88 *Submission 3*, p. 6.

89 *Submission 11*, p. 2.

90 *Explanatory Memorandum*, p. 85.

91 *Submission 10*, p. 6; see also Mr John North, Law Council, *Committee Hansard*, 3 August 2005, p. 3.

3.70 The FFDLR recognised that there is a valid role for aggregation at higher levels in the drug distribution pyramid. However, the FFDLR pointed out the MCCOC report admitted that 'aggregation of small transactions has the potential to amplify the liability of habitual users who engage in frequent small sales to sustain a habit.'[92] The FFDLR therefore suggested that aggregation should not be permitted for an offence under proposed section 302.4 of trafficking in less than a marketable quantity of controlled drugs.[93]

3.71 However, the EM states that:

> Evidence that a large quantity was involved in a particular transaction is often a good indication that the offender was a major dealer. However, seizure of a small quantity is less often a good indication of minor dealing. This is because the particular person may have taken care to avoid large transactions on any particular occasion (to try to avoid the higher penalties), or an offender who is a major supplier may have simply been caught with a small quantity because stocks were low at that time.[94]

3.72 The committee also notes the MCCOC report's conclusion that:

> …there is a limit to the precision with which the effects of criminal prohibitions can be limited to their intended targets. Though culpability for dealing in commercial quantities may be less when the offender is an habitual users, this is a consideration which must be addressed in sentencing rather than in the definition of the aggravated forms of trafficking.[95]

Offences involving children

3.73 Some submissions were particularly supportive of the Bill's provisions relating to the endangerment of children in the trafficking and manufacture of drugs.[96] For example, the WA Government submitted that:

> These measures recognise the harm that may be caused to innocent bystanders to clandestine laboratories and provides an appropriate deterrent to such acts…the inclusion of specific provisions in drug legislation renders offenders placing children in danger in these circumstances more amenable to justice.[97]

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92 *Submission 8*, p. 8; see also MCCOC report, p. 191.

93 *Submission 8*, pp 8-9. Note that the FFDLR's first preference was for this proposed offence to be omitted from the Bill altogether.

94 *Explanatory Memorandum,* p. 83.

95 MCCOC report, p. 193.

96 See, for example, WA Government, *Submission 11*, p. 3; Law Council, *Submission 10*, p. 5.

97 *Submission 11*, p. 3.

3.74 The WA Police noted that, while there are currently no provisions in drugs legislation in its state which specifically relate to children, it is:

> …developing a proposal that will deal with drug offences relating to the endangerment of children. As part of this exercise Western Australia Police will take into consideration the draft provision of the Commonwealth Bill in framing any equivalent State legislation.[98]

3.75 The FFDLR noted the Attorney-General's comments that the Bill 'also provides important protection to children', particularly through the offences for endangering children during the drug manufacturing process, or using children to traffic drugs.[99] However, the FFDLR suggested that consideration should be given to the harm caused to children and young people by the Bill as a result of 'excessive reliance on criminal prohibitions against drug use.'[100] The FFDLR argued that the Bill, if enacted, would 'expose hundreds of thousands of young people across the country to a new set of Commonwealth crimes.'[101] They pointed to research indicating that a high number of children had used illicit drugs, or were at risk of trying out illicit drugs, and argued that under the Bill, 'a big proportion of Australian children will be serious drug offenders.'[102] They also noted that children are excluded from liability for the offences under proposed Division 309 (offences for people using children to traffic drugs), but not the other offences in the rest of the Bill.[103] As Mr Brian McConnell observed:

> Parents do not want their children's life chances destroyed by a conviction for a serious drug offence…children should not be disproportionately punished for the youthful indiscretion of dabbling in drugs.[104]

Precursor offences

3.76 In relation to the proposed precursor offences in proposed Division 306 of the Bill, the WA Government noted that similar measures were recently inserted into the WA MDA.[105] However, the WA Police observed the offences in the Bill only relate to:

> ...prescribed controlled precursors (essential chemical ingredients such as pseudoephedrine). However, the MDA is broader and more practical in that

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98 *Submission 5*, p. 3; see also WA Government, *Submission 11*, p. 3.

99 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 26 May 2005, p. 6.

100 *Submission 8*, p. 12.

101 *Submission 8*, p. 10.

102 *Submission 8*, p. 11.

103 *Submission 8*, p. 10.

104 *Committee Hansard*, 3 August 2005, p. 8.

105 *Submission 5*, p. 3; see also Queensland Police Service, *Submission 2*, p. 1.

> it also includes substances and chemicals that *facilitate* the manufacturing process, such as iodine and hypophosphorous acid.[106]

Penalties

3.77 The WA Government observed that there are significantly larger penalties for the possession of equipment for manufacture than in the WA legislation.[107] Otherwise, the WA Government submitted that the penalties proposed by the Bill:

> …are not identical with penalties in the WA Act, however they do conform generally in the sense of the ratio of culpability to punishment. The new increased penalties in the Bill that apply to the manufacture of commercial quantities of controlled drugs represent a general deterrent in the face of increasing manufacture and trade in 'designer drugs'. Those measures appear appropriate in that context.[108]

3.78 On other hand, the FFDLR argued that the penalties in the Bill are disproportionate and 'draconian'.[109] These concerns are discussed further in the section on 'impact of the Bill' later in this chapter.

Consultation with state and territory governments

3.79 The Queensland Police Service submitted that it had not been consulted about the Bill.[110] In response to the committee's questioning on the level of consultation in relation to the Bill, the Department noted that neither the draft Bill, nor an exposure draft of the Bill, had been provided to state and territory governments prior to its introduction to Parliament.[111] However, the Department did note that many provisions of the Bill were subject to extensive consultation as part of the MCCOC Model Criminal Code development process.[112] In particular, the Department submitted that:

> In 2002, Commonwealth, State and Territory jurisdictions resolved at the Leaders Summit on Terrorism and Multi-jurisdictional Crime to implement the model offences recommended in the MCCOC Report.[113]

3.80 The Department also noted that the Working Party established by the Ministerial Council on Drug Strategy[114] includes representatives of state and territory

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106 *Submission 5*, p. 3.

107 *Submission 11*, p. 3.

108 *Submission 11*, p. 3.

109 Mr Brian McConnell, *Committee Hansard*, 3 August 2005, p. 8; *Submission 8*, p. 1.

110 *Submission 2*, p. 1.

111 *Submission 13*, pp 10-11.

112 *Submission 13*, pp 10-11; see also *Committee Hansard*, 3 August 2005, p. 22.

113 *Submission 13*, p. 10.

114 See para 2.44 of chapter 2; and *Explanatory Memorandum*, pp 103-104.

governments and police. The Department further submitted that departmental representatives attended a meeting of the Working Party in July 2005 and gave a presentation on the Bill.[115]

3.81 Further, the committee notes that several state agencies made submissions to this inquiry, and the overwhelming majority of these appeared to be supportive of the Bill.[116]

Policy aspects of the Bill

3.82 Concerns were also raised in submissions and evidence in relation to policy aspects of the Bill, particularly the impact of the Bill on smaller scale drug crime; and on the supply of illicit drugs. These are discussed below.

Impact of the Bill

3.83 The FFDLR raised a number of concerns about the impact of the Bill on smaller scale drug crime. In particular, the FFDLR argued that the Bill:

> …is far from confined to serious drug offences by large scale suppliers. It is a radical extension of Commonwealth legislative authority into the criminal law of drugs with potential application to every drug user in the country. Moreover, it does this in a heavy handed way. Actions that in plain language would not be regarded as 'serious crimes' will be labelled as serious drug offences to which draconian penalties will apply.[117]

3.84 In contrast, Drug Free Australia believed that the characterisation of offences as 'serious offences' was appropriate given the serious consequences associated with drug use, including adverse individual and public health consequences, and other wider considerations such as crime and public amenity.[118] Drug Free Australia submitted that:

> …any manufacture, importation, interference with, trafficking, possession, or use of goods generally known as 'illicit drugs' is a most serious matter of a criminal nature and should therefore be dealt with in an appropriately serious manner before the courts.[119]

3.85 However, while the FFDLR appeared to support the Bill where it targets commercially motivated drug crime further up the supply chain, they were particularly

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115 *Submission 13*, p. 11.

116 Queensland Police Service, *Submission 2*; South Australia Police, *Submission 7*; WA Government, *Submission 11*; cf WA Police, *Submission 5*.

117 *Submission 8*, p. 1; see also Mr Brian McConnell, *Committee Hansard*, 3 August 2005, p. 8.

118 *Submission 12*, p. 3.

119 *Submission 12*, p. 1.

concerned that the Bill might transform user-dealers into 'very serious criminals'.[120] Mr Brian McConnell explained:

> The attention given to the commercial manufacture of controlled drugs is appropriate, but that is the top end of the market. Families and Friends for Drug Law Reform are more concerned about the bottom end of the market. We have grave concerns that the bill characterises as serious drug offences a host of activities among users at the bottom of the drug distribution pyramid. In plain language, these may be drug offences but they are not serious drug offences. They are offences involving possession and dealing in small quantities. A number of these are not even recommended in the report of the Model Criminal Code Officers Committee.[121]

3.86 In particular, the FFDLR were concerned that dealing in small quantities of drugs will be caught by the provisions of the Bill. Mr McConnell pointed out that:

> By way of example, under clause 302.4 a young person who has grown just one mature cannabis plant weighing at least 250 grams could be expected to be found guilty of trafficking and could be liable to be imprisoned for 10 years or fined $220,000 or to suffer both penalties. Given the quantity, the onus of proof would fall on him to prove that he did not intend to sell any of it. As another example, a young woman who bought ecstasy tablets for a night out with a few friends would face similarly draconian consequences.[122]

3.87 The FFDLR also raised objections to the possession offence in clause 308.1 of the Bill, arguing that it:

> …is a new catch-all provision for the mere possession of even small quantities of drugs. It can be aimed only at drug users. They will end up with a conviction under "serious drug offences" legislation that can blight their whole life and be liable to two years in prison, a fine of $44,000 or both.[123]

3.88 The FFDLR pointed to recent research indicating that 2,510,100 Australians can be expected to use drugs in any 12 month period. The FFDLR submitted that this offence would therefore make 'serious' criminals out of those Australians – or every seventh member of the community.[124] The FFDLR therefore made a number of recommendations for amendments to the Bill, which were:

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120 *Submission 8*, p. 2.

121 *Committee Hansard*, 3 August 2005, p. 8. As noted in chapter 2, the possession offences in proposed ss. 308.1 and 308.2 of the Bill have no corresponding offences in the Model Criminal Code: see *Submission 13*, p. 8.

122 *Committee Hansard*, 3 August 2005, p. 8; see also *Submission 8*, p. 7.

123 *Submission 8*, p. 4.

124 *Submission 8*, p. 4.

> …intended to restore some balance in this bill so that its application does not cause more harm to the young people we should protect and does not undermine some of the basic tenets that form the foundation of our criminal justice system.[125]

3.89 These recommendations included the removal of a range of offences relating to 'mere possession' or dealing in small quantities of drugs; and changes to the burden of proof in relation to certain offences.[126] Some of the FFDLR's suggestions are considered in the discussion of specific offences earlier in this chapter.

3.90 However, Drug Free Australia submitted its belief that:

> It is wrong to argue that something so serious is "mere possession" of small quantities of illicit drugs, or even the use of small quantities of illicit drugs for that matter, play any less of a part in the seriousness of the overall illicit drug problem. Without the user the entire supply chain breaks down as having no purpose.[127]

3.91 In this context, the committee also notes that MCCOC considered the exclusion of dependent users from the proposed offences, and concluded that this would be 'unwise' and politically divisive. The MCCOC report concluded:

> Political acceptability aside, the consequences in terms of harm minimisation, are incalculable. The restrictions which would be necessary to avoid creating loopholes for abuse might deprive the defence of all practical effect. To the extent to which lenience is justifiable, when trafficking by dependent users is in issue, discriminating exercise of the prosecutorial and sentencing discretions offers a more flexible method of mitigating the harms associated with law enforcement.[128]

3.92 Mr Bill Bush of the FFDLR responded to the suggestion that prosecutorial and sentencing discretions are the appropriate manner of dealing with those at the lower end of the drug market as follows:

> Why don't we just have, under the penal code, one sentencing provision: life imprisonment and a $10 million fine? The fact is that in the media the seriousness of the proscribed offence is used as an argument in relation to the expectations of the community of the penalty that should be imposed. It is an indication to the police in their work as to the seriousness of the offence for which they should be deploying their resources. It means something. It is not just an irrelevant thing.[129]

3.93 Mr Bush continued:

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125 Mr Brian McConnell, *Committee Hansard*, 3 August 2005, p. 9.

126 *Submission 8*, pp 2 and 4-6.

127 *Submission 12*, p. 5.

128 MCCOC report, pp 10-11.

129 *Committee Hansard*, 3 August 2005, p. 10.

> …the effect of a particular level of penalty affects the response of those who administer the law and it affects the response of the courts. They have to get their cue as to what the parliament regards as the level of penalty to be applied. That is done by the reference to the penalty that is imposed in the act...it sends a message.[130]

3.94 In response to the FFDLR's concerns as to the impact of the Bill, a representative of the Department stated that 'possession of a plant for personal use is not caught by these provisions.'[131] The representative further pointed out that:

> There is nothing in this [A]ct which is going to criminalise something that is not already criminal at state level. This is the concept of consistency with state law that I talked about…There can be differences with penalties, expiation notices and diversion schemes. If you go to specific state laws you may very well find that in some states a person who is prosecuted under one of these provisions would be dealt with in a different way. And that is something we decry. Basically what we want to see at the Commonwealth level is consistent drug laws…We see this as very much a trigger or a basis for the Commonwealth to now go to the states, which have not all enacted MCCOC model laws, and say, 'Please do so. Let us have some consistent laws.'[132]

Reducing the supply of illicit drugs

3.95 The Attorney-General stated in his second reading speech that:

> This bill demonstrates the government's commitment to reduce the supply of illicit drugs by strengthening anti-drug laws.[133]

3.96 However, the FFDLR disputed whether the Bill would actually achieve this aim.[134] In particular, they argued that there are 'persuasive reasons to believe that repressive measures at the retail level do not lead to any significant reduction in availability of drugs'.[135] They pointed to relevant research, and other reasons including that:

- the level of illicit drug use in various countries bears no direct relationship to the repressiveness of measures against that use; and

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130 *Committee Hansard*, 3 August 2005, p. 11.

131 *Committee Hansard*, 3 August 2005, p. 21.

132 *Committee Hansard*, 3 August 2005, p. 20.

133 The Hon Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 26 May 2005, p. 6.

134 Mr Brian McConnell, *Committee Hansard*, 3 August 2005, pp 8-9; and *Submission 8*, pp 13-21.

135 *Submission 8*, p. 15.

- in Australia a reduction in cannabis usage has accompanied the relaxation of cannabis law enforcement.[136]

3.97 The FFDLR also queried whether the Bill would reduce the supply of illicit drugs by disrupting distribution networks at the border and within Australia.[137] By way of example, the FFDLR argued that the recent 'heroin drought' in Australia was not brought about by law enforcement, but by a number of other circumstances.[138]

3.98 In contrast, Drug Free Australia submitted that:

> The strong nexus between supply and use of illicit drugs should never be overlooked, nor can it be discounted that the primary aim of supply is aimed at inducting persons to, and prolonging use.[139]

3.99 Further, the DPP submitted that:

> Intercepting drugs before they enter the community and are distributed has always been regarded as vital…substantial and deterrent sentences are required in order to protect the community and 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.[140]

Other schedules in the Bill

Schedule 4 – Australian Federal Police Act 1979

3.100 Some submissions commented on the amendments to the AFP Act in Schedule 4 of the Bill, which would clarify that the functions of the AFP extend to providing assistance to, and cooperating with, Australian and foreign law enforcement agencies, intelligence or security agencies and government regulatory agencies.

3.101 In particular, the WA Government observed that the provisions to clarify the scope of the AFP's functions 'may provide an avenue for increased involvement by the AFP in matters previously handled by State law enforcement agencies.'[141]

3.102 The Law Council supported these amendments in principle, but believed that:

> …the AFP should not assist countries in circumstances in which the assistance could potentially lead to a person being sentenced to treatment that is harsh, cruel and inhumane by international standards. For instance, in

136 *Submission 8*, p. 15.

137 *Submission 8*, p. 17.

138 *Submission 8*, pp 17-21.

139 *Submission 12*, p. 5.

140 *Submission 3*, p. 1.

141 *Submission 11*, p. 3.

> assisting Indonesian authorities in relation to drug traffickers, there is a risk that a person who is convicted of a drug offence could be sentenced to death.[142]

3.103 The Law Council therefore suggested that the AFP should only provide such assistance where there is a memorandum of understanding (MOU) between Australia and the foreign jurisdiction. The Law Council suggested that such an MOU should state that cruel, harsh or inhumane treatment or punishment, such as the death penalty, would not be applied where the AFP assisted in the process of conviction.[143]

3.104 Mr John North of the Law Council noted the recent case of the 'Bali 9' as an example of the problems that may arise in this situation. The 'Bali 9' refers to nine Australians arrested in Bali, Indonesia, earlier this year, who were allegedly involved in smuggling heroin.[144] Mr North commented:

> The Bali nine is an unfortunate situation because, as we understand it, the AFP cooperation with the Indonesians occurred at the police to police level, not at the government level. I understand that had our Attorney-General and others been involved the Bali nine would not be open to charges that carry the death penalty. The Australian government at this moment understands that the death penalty should not be there. I believe that the cooperation was at the police to police level, and we are saying that needs to be looked at.[145]

3.105 Mr North further explained:

> Our information is that the AFP acted according to internal policy and not with any MOU or any other government interference in place, because we wonder whether the Australian government would have wanted them arrested there and be subject to the death penalty. I have spoken personally to the Attorney-General, and the Australian government, as I understand it, remains very much opposed to placing Australians in jeopardy of the death penalty.[146]

3.106 In response to the committee's questioning on this issue, the AFP noted that it may sometimes have an MOU with a particular country. However, a representative of the AFP stated that:

> The Australian Federal Police have an internal guideline which replicates government policy in relation to how we go about investigating offences that may attract the death penalty. It clearly sets out what information we

142 *Submission 10*, p. 8.

143 Mr John North, *Committee Hansard*, 3 August 2005, p. 3; *Submission 10*, p. 8.

144 See further: "Nine Aussies face death over Bali drug bust" *The Australian*, 19 April 2005, p. 1; "Australia to hand over Bali 9 evidence", *Sydney Morning Herald*, 25 April 2005, p. 1.

145 *Committee Hansard*, 3 August 2005, pp 4 and 6.

146 *Committee Hansard*, 3 August 2005, p. 6.

> will pass over to foreign law enforcement agencies, what we will not and at what stages we will do that.[147]

3.107 However, the AFP noted that the guidelines distinguish between situations where no charges have been laid and situations where charges have been laid under the law of that foreign country.[148] Once a person has been charged with an offence that carries the death penalty, advice must be provided to the Attorney-General and the Minister for Justice and Customs. However, up until that point, the guidelines state that the AFP may provide such assistance as is requested, irrespective of whether the investigation may later result in charges being laid which may attract the death penalty.[149]

3.108 The committee understands that, in cases where the Australian Government receives a formal request for assistance from a foreign government to investigate an offence which carries the death penalty, the *Mutual Assistance in Criminal Matters Act 1987* provides the Attorney-General or the Minister for Justice and Customs with a discretion to refuse to provide assistance at the point before charges have been laid. Where a person has been charged with, or convicted of, an offence which carries the death penalty, the responsible Minister must refuse to provide the assistance unless there are special circumstances.[150] Assistance not involving coercive powers and given directly by police or other law enforcement agencies is not regulated by the *Mutual Assistance in Criminal Matters Act 1987*, but by administrative direction. That is, in the AFP's case, by the above-mentioned guidelines.[151]

Schedule 8 – bail conditions

3.109 Customs expressed support for a technical amendment to section 219ZJC of the Customs Act in Schedule 8 of the Bill. Section 219ZJC currently provides a power for Customs to detain a person at the border where they are subject to a warrant or certain bail conditions. Customs explained in its submission that:

> Customs is concerned that as there are a variety of ways in which bail conditions may be expressed, the existing effect of s.219ZJC could be to be unable to provide a basis for detention unless there is a specific reference to the bailee not leaving Australia. This might be the case even if following

147 *Committee Hansard*, 3 August 2005, p. 14.

148 The *AFP Practical Guide on International Police to Police Assistance in Death Penalty Charge Situations*, Tabled Document No. 6, Senate Legal and Constitutional Legislation Committee Budget Estimates 2005-2006, 24 May 2005.

149 See also, AFP, *Committee Hansard*, 3 August 2005, p. 15.

150 See s. 8, *Mutual Assistance in Criminal Matters Act 1987*. Special circumstances include where the evidence would assist the defence or where the foreign country undertakes not to impose or carry out the death penalty.

151 See also Attorney-General's Department, *Estimates Hansard*, 23 May 2005, p. 105; Attorney-General's Department and AFP, *Estimates Hansard*, 23 May 2005, pp 42-43.

> what was required by the bail conditions could have the effect of preventing the person departing Australia.[152]

3.110 Customs explained that this amendment would ensure that Customs would have the power to detain a person at the Australian border where that person is subject to bail conditions which effectively prevent them from leaving Australia, however that bail condition is expressed.[153] A representative of Customs further explained in response to the committee's questioning on this issue that:

> …we already have a clause that enables a person on bail to be detained at the port of entry. All this does is to clarify the situation where we have a range of different ways in which the condition might be expressed. It ensures that, however it is expressed, we can still detain someone.[154]

3.111 The representative continued:

> It is simply that bail conditions were expressed in different ways, and you could take the view that at times the effect of the wording was to prevent a person leaving the country. But on a strict reading, it did not actually say that. What we were after was an amendment that ensured that, however the condition was expressed, we could still take the action.[155]

3.112 The committee notes there are conditions on the detention powers of Customs officers under section 219ZJC, including that the person must be delivered, as soon as practicable, into the custody of a police officer to be dealt with according to law.[156]

Schedule 2 – children in armed conflict

3.113 The Human Rights and Equal Opportunity Commission (HREOC) welcomed the proposed amendments in Schedule 2 of the Bill to implement Australia's obligations under the Optional Protocol. HREOC noted that the Optional Protocol was the subject of inquiry and report by the Joint Standing Committee on Treaties.[157] In particular, HREOC noted that Defence Instruction (General) PERS 33-4 sets out, among other matters, the minimum age of voluntary recruits into the Australian Defence Force. HREOC supported the recommendation of the Joint Standing Committee on Treaties that this Defence Instruction should be made readily accessible to the public, for example, by making it available on the Department of Defence

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152 *Submission 10*, p. 7.

153 *Submission 9*, p. 8.

154 *Committee Hansard*, 3 August 2005, p. 17.

155 *Committee Hansard*, 3 August 2005, p. 17.

156 s. 219ZJC(3).

157 *Submission 6*, p. 1; see also Joint Standing Committee on Treaties, *Review of treaties tabled on 7 December 2004*, *Report 63,* Chapter 8.

website.[158] However, the committee considers that this issue is outside the scope of this inquiry.

The committee's view

3.114 The committee acknowledges that the overwhelming majority of the submissions received during this inquiry supported the Bill.

3.115 The committee notes that issues were raised during the inquiry in relation to the interaction of the Bill with state and territory legislation. However, the committee notes that the Bill provides for the concurrent operation of state and territory legislation, and that the state government agencies that provided evidence to the committee generally supported the Bill. The committee further acknowledges the evidence that the intention is that the Bill will give law enforcement agencies greater flexibility, and that drug offences will continue to be investigated in accordance with the established division of responsibility between federal, state and territory enforcement agencies. In particular, the committee supports the need for greater national consistency in Australian drug law.

3.116 In relation to the concerns raised about the use of presumptions and absolute liability in the Bill, the committee considers that these provisions have been adequately justified in the Explanatory Memorandum and by departmental representatives. In particular, the committee received evidence that similar presumptions are used in many state laws, and that the defence of mistake is available where absolute liability applies. The committee further notes that the use of absolute liability was supported by MCCOC, and endorsed by the Standing Committee of Attorneys-General. However, the committee suggests that the Working Party established by the Ministerial Council on Drug Strategy may wish to examine whether the thresholds for 'trafficable quantities' of controlled drugs and plants are set at an appropriate level.

3.117 The committee also received evidence of concerns about the potential impact of the Bill, particularly on smaller scale drug crime. However, the committee notes that many of the offences in the Bill already exist at the state and territory level. The committee also acknowledges the MCCOC report's conclusions that this issue can best be addressed in prosecution and/or sentencing processes.

3.118 As to the other specific issues raised in relation to the drug offence provisions in the Bill, the committee considers that the Explanatory Memorandum, the Department and the DPP have adequately responded to these concerns. The committee therefore considers that these provisions of the Bill are appropriate.

3.119 In relation to the other schedules of the Bill, the committee acknowledges the evidence of Customs in relation to the need to clarify the detention power in the

158 *Submission 6*, p. 1.

Customs Act relating to bail conditions (in Schedule 8 of the Bill). The committee also notes that there are conditions in the Customs Act on the exercise of this power.

3.120 However, in relation to Schedule 4 of the Bill, the committee acknowledges concerns that the AFP is providing assistance in matters in foreign countries which may result in Australians facing the death penalty. The committee particularly notes the Law Council's suggestion that the AFP should only provide such assistance where there is an MOU between Australia and the foreign jurisdiction which states that cruel, harsh or inhumane treatment or punishment such as the death penalty would not be applied where the AFP assisted in the process of conviction. The committee is also concerned that AFP internal guidelines do not appear to adequately deal with this situation. The committee therefore recommends that the Australian Government, in conjunction with the AFP and other stakeholders, review its policy and procedures on this issue. In particular, the Australian Government should ensure appropriate ministerial supervision of assistance provided by Australian law enforcement agencies, where that assistance may expose Australians overseas to cruel, harsh or inhumane treatment or punishment, including the death penalty.

Recommendation 1

3.121 The committee recommends that the Australian Government, in conjunction with the Australian Federal Police and other stakeholders, review its policy and procedures on international police to police assistance. In particular, the Australian Government should ensure appropriate ministerial supervision of assistance provided to overseas jurisdictions by Australian law enforcement agencies, where that assistance may expose Australians overseas to cruel, harsh or inhumane treatment or punishment, including the death penalty.

Recommendation 2

3.122 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Marise Payne
Chair