Families and Friends for Drug Law Reform (ACT) Inc.

committed to preventing tragedy that arises from illicit drug use

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SUBMISSION OF FAMILIES AND FRIENDS FOR DRUG LAW REFORM TO THE INQUIRY OF THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INTO THE PROVISIONS OF THE LAW AND JUSTICE LEGISLATION AMENDMENT (SERIOUS DRUG OFFENCES AND OTHER MEASURES) BILL 2005

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I. INTRODUCTION

1. Families and Friends for Drug Law Reform is grateful to the Committee for the opportunity to comment on the Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005. This submission focuses on those aspects of the Bill that deal with drugs and in particular with those affecting drug users.

2. The Bill is misnamed. It 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.

3. The first part of the submission draws these conclusions from an analysis of the Bill. If the Commonwealth is intent upon legislating so broadly in the area of drugs it should separate out the penalties for those parts of the Bill that deal with drug users at the retail level from those parts that deal with commercially motivated drug crime further up the supply chain. The penalties concerning drug users at the retail level should be moderated.

4. The submission then examines the claim that the Bill will protect young people. It is a worry that legislation of potential application to the 2,510,100 Australians who are known to have used illicit drugs recently is founded on a principle of deterrence that admits to the objective of making "the life of the habitual user dangerous, arduous, frightening and expensive." Parents want their children protected from drugs but if they dabble in them they do not want them labelled as serious criminals who are made an example of in such callous ways.

5. The principal claim for the Bill is that it will "reduce the supply of illicit drugs". With regard to measures operating at higher levels of the distribution chain, the submission finds no good basis for this assertion. The heroin drought and other changes in drug supply and consumption patterns are examined in coming to this

conclusion. With regard to the expected impact of the Bill at the retail level it is even clearer that the Bill will not reduce the supply.

6. Finally the submission queries the reasons for the introduction of wide-ranging Commonwealth drug law. If it is to operate concurrently with State and Territory law it needs to respect rather than undermine those aspects of existing law that are for the benefit of drug users and young people that may experiment in drugs.

II. THE BILL CREATES SERIOUS OFFENCES OUT OF ACTIVITIES THAT ARE NOT SERIOUS DRUG OFFENCES

7. It is a misrepresentation that the Bill is confined to serious drug offences. It labels as serious drug offences and imposes draconian penalties on many activities engaged in by drug users that in plain language would not be regarded as "serious crimes".

8. The illicit drug market is organised as a pyramid selling system with those higher up the pyramid using the desperation of dependent users and venality of young people to sell to other young people. Probably the bulk of the grass roots distribution of drugs is in the hands of user-dealers. The Bill transforms all these into very serious criminals indeed. For addicted users without private income, dealing is a means of raising the substantial funds required to maintain a habit and is seen by many as preferable to the other main sources of finance: ripping off family and friends, property crime or prostitution. The addictive nature of the commodities concerned and the lucrative returns lead to the illicit drug market being particularly resilient. The vulnerable low level dealers are rapidly replaced. Those higher in the pyramid are very hard to catch. Stress imposed at the user-dealer level thus has little or no impact on the overall drug market.

9. In a large measure the Bill is appropriately directed at activities above the retail level. This is secured by the specification in cl. 314.1(1) of large amounts of drugs as marketable or commercial quantities which, except in the case of cannabis, are most unlikely to be met with at the retail level. Furthermore, the attention given to the commercial manufacture of controlled drugs is appropriate.

10. Where Families and Friends for Drug Law Reform has grave concern is in the Bill's characterisation as "serious drug offences" of a host of activities among users at the bottom of the drug distribution pyramid. In plain language these may be "drug offences" but not "serious drug offences." These encompass 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 (MCCOC). Penalties that the Bill lays down for these activities are grossly disproportionate to their gravity.

11. Parents who would support measures that they believe will help protect their children from the harm of drugs will just as much be concerned to ensure that their children's life is not blighted by a conviction for a "serious drug offence". If the Government has failed in the obligation it has assumed to keep drugs away from their children those children should not be disproportionately punished for youthful indiscretions in dabbling in them.

Recommendation 1: All the offences mentioned under the following headings of "mere possession" and "dealing in small quantities of drugs is defined as trafficking" should be excised from legislation on serious drug offences.

A. Mere possession

12. By a number of provisions, the Bill will characterise all drug users as guilty of "serious drug offences" for mere possession of a small quantity of drugs. This has no support even in the report of the Model Criminal Code Officers Committee (MCCOC) which makes the point that "not all drug offences are appropriately located in the Model Criminal Code" and that:

> "The central theme of this chapter [dealing with drugs] is that the serious offences should focus on individuals who make a business out of drug trafficking" (p. ii).

The following provisions of the Bill deal with mere possession including cultivation of plants for personal use.

1. Possession of imported drugs

13. Cl. 307.7 and 307.10 characterise as serious drug offences the possession of even small quantities of drugs that have either been unlawfully imported or which are suspected of having been unlawfully imported. This would apply particularly to drugs like heroin and cocaine and pure ecstasy tablets that are almost exclusively imported. A young person who is in possession of no more than a single deal for his or her own use would commit an offence under this "serious drug offences" legislation and be liable to two years in prison, a fine of 400 penalty units or both. Under s. 4AA of the *Crime Act,* one penalty unit is presently $110. This means that the young person would be liable for a fine of $44,000 for possession.

14. Moreover, users will be exposed to draconian penalties under the other provisions penalising the possession of larger quantities of imported drugs. This is because there is a grossly disproportionate difference between what are specified to be marketable quantities for imported drugs under cl. 314.4 compared to the marketable quantities specified in cl. 314.1 for the purpose of other provisions. For example, under cl. 314.4 a marketable quantity of ecstasy (MDMA) is 0.5g (item 101) compared to 100g in cl. 314.1, a marketable quantity of methamphetamine is 2.0g (item 99) compared to 250g and a marketable quantity of heroin is 2.0g (item 76) compared to 250g.

15. A person in possession of these small amounts faces 25 years imprisonment, a fine of $550,000. This is provided by cls. 307.6 and 307.9 which also impose the handicap of a set of rules regarding proof (absolute liability for some elements of the offences, recklessness rather than intention as the fault element for others) that come close to eliminate the basic rule of the criminal law that the prosecution must prove its case beyond a reasonable doubt. With these modified evidentiary rules, the small user-dealer or plain rash young person who has drugs for his or her own use will be facing the same penalties as those charged under cls. 302.2 and 302.3 for unquestionably serious charges of trafficking in marketable and trafficable quantities as defined in cl. 314.1. Quite rightly the prosecution in the case of those serious charges will be required to prove key elements of intention such as an intention to sell any of the drugs possessed. Those prosecuted under cls. 307.6 and 307.9 should be entitled to equivalent protections.

Recommendation 2: If possession of imported drugs in small quantities typical of users and user-dealers is to be made an offence, it should be the subject of a provision separate from cls. 307.6 and 307.9 to with much lower penalties apply.

Recommendation 3: 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.

2. Possession of drugs generally

16. Whereas cls. 307.7 and 307.10 bring across to this "serious drug offences" legislation existing offences under the *Customs Act*, cl. 308.1 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.

17. The Bill and explanatory memorandum explicitly recognise that cl. 308 has nothing to do with serious drug offences. As the explanatory memorandum explains, cl. 308.1(3)-(5) are intended to allow recourse to court diversion schemes.

> "The primary objective of the Diversion initiative is to increase incentives for drug users to identify and treat their illicit drug use early. It provides an opportunity for drug users early in their relationship with the criminal justice system to get the education, treatment and support they need for addressing their drug problem, and at the same time, avoid incurring a criminal record. If an offender chooses not to be 'diverted' into education or treatment, or fails to attend or participate in the required education or treatment sessions, they will be returned to the criminal justice system."

18. The young people using illicit drugs are the very ones whom the whole legal and administrative structure should be trying to protect. The very existence of the diversion scheme stands as recognition that the criminal processes – particularly by incurring a criminal record – can cause harm beyond the harm that use of the drug concerned may do. It is thus both potentially damaging to the people sought to be protected and a contortion of language to designate these offences as "serious".

19. Cl. 308(1) and the other possession offences will make "serious" criminals out of 2,510,100 Australians – every seventh member of the community – whom the 2004 household survey tells us can be expected to use drugs in a 12 months period (AIHW 2005 23 & xiv). Among these will be many, many children. The most recent published survey of secondary school students found that 27% of those between 12 and 17 had used an illicit drug at least once in their life time and that 13% had used one in the last month (White & Hayman 2004 37).

3. Possession assumed to amount to trafficking (cls. 302.4 & 302.5)

20. The possession of a drug with the intention of selling any of it is included in trafficking under cl. 302.1(e). If the amount involved is a trafficable quantity cl. 302.5 operates to reverse the burden of proof on an accused to prove on the balance of probabilities that he or she did not possess the drug with the intention of selling some of it or of otherwise trafficking in it.

21. As the explanatory memorandum explains:

> "Proposed subsection 302.5(1) provides that where the prosecution can show that a trafficable quantity is involved in the offence, the relevant commercial element of the trafficking offence need not be proven, but is presumed. It is intended that a trafficable quantity will be set at an amount less than a marketable quantity. The trafficable quantity threshold will reflect the strong

likelihood that an offence involving larger amounts will be commercially motivated, rather than intended for personal use" (p. 24).

22. By virtue of these provisions someone possessing the modest amounts of drugs listed as trafficable quantities in cl. 314.1 could be expected to be guilty of trafficking under cl. 302.4 and liable to be imprisoned for 10 years, fined $220,000 or to suffer both. The reverse in onus of proof would fall particularly hard on the person who grows his or her own cannabis. He or she could be expected to have the trafficable quantity specified for that drug (250g) from just one plant. That is on the assumption that the quantity specified in cl. 314.1 is the dry weight. He or she would exceed the limit many times over if the fresh weight of a harvested plant was applied. Families and Friends for Drug Law Reform understands that the dry weight is only about 30% of the fresh weight. The genuine home cultivator and consumer of cannabis would be caught by these provisions.

23. Apart from the home cannabis grower, cls. 302.4 and 302.5 seem tailored to catch the user-dealer of other drugs. These are the young people caught up in drugs which law and policy should be designed to help yet the burden of proof is reversed for them and not under cls. 304.2 and 304.3 for those likely to be far bigger fish who possess large commercial and marketable quantities. The reason can only be for the convenience of police and prosecutorial authorities.

Recommendation 4: The reversal of the burden of proof in cl. 302.5 should be deleted because it unfairly targets those whom drug policy and law should be designed to help.

4. Cultivation of a single cannabis plant

24. On its face mere possession of a single growing cannabis plants would be an offence under cl. 303.6 because that provision requires that the plant be cultivated "for a commercial purpose". Nevertheless, by virtue of the operation of the presumption in cl. 303.7, 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. This is because the plant could easily be of the 250g specified in cl. 314.2 that amounts to a trafficable quantity. If it is, as it would seem, open for the prosecution to select the fresh weight, only a modest size plant would trip the burden of proof. With the dry weight only about 30% of the fresh weight, the dry weight of a 250g fresh weight plant would be just 75g.

25. The possessor of this modest growing plant will have to "prove on the balance of probabilities that he or she did not have both the relevant intention and belief" (explanatory memorandum 29).

26. If convicted of cultivating controlled plants under cl. 303.6, this grower of a single modest cannabis plant would face a penalty of 10 years imprisonment, a $220,000 fine or both.

Recommendation 5: 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.

27. Furthermore, the reverse of the burden of proof under cl. 303.7 for the cultivation of cannabis is as unjustified as it is in the context of cl. 302.5 for trafficking. Contrary to what the explanatory memorandum states, the trafficable quantities specified in cl. 314.2 for cannabis (250g even if dry weight or 10 plants) are

set well below what "are indicative of an intention to sell rather than personal use" (explanatory memorandum 29). The proposal is targetted overwhelmingly at the very people the law and policy should be trying to help. For every grower participating in an organised collective scheme to grow large quantities of cannabis, every genuine grower user will face a reversal of a traditional burden of proof for an offence carrying severe penalties that could wreck their otherwise law abiding life far more than their cannabis consumption. The convenience of police and prosecutorial authorities should not override a basic principle of the criminal law.

Recommendation 6: The reversal of the burden of proof in cl. 303.7 should be deleted because it unfairly targets those whom drug policy and law should be designed to help.

5. Cultivation of very small cannabis plants

28. The home grower of cannabis will be in a similar situation under cl. 303.6 in the case of a tray of newly sprouted cannabis plants that have not been thinned or selected for desirable female plants. The officers committee itself acknowledged that "growers will commonly sprout many more seedlings than the intended number of mature plants, to enable male plants to be discarded and to insure against the usual hazards of gardening" (MCCOC 305). A trafficable quantity in cannabis is defined in cl. 314.2 as 250g or 10 plants. The alternative formulation ". . . gives discretion to the prosecution as to which quantitative measure to apply" (explanatory memorandum 105-06). There is likely to be many more than the 10 plants in the germinating tray which cl. 314.2 allows the prosecution to choose as the trafficable quantity.

> "[A] tray of sprouted seeds containing 100 distinct plants may or may not indicate an intention to bring that number of plants to maturity. Among mature plants, productivity varies enormously according to the sophistication of the methods of cultivation employed, the sex of the plant and the skill of the gardener" (MCCOC 301).

29. The formulation adopted in the Bill is once again one at the very low end of a range which will thus net as a "by-catch" many, many simple drug users in the hope of catching a few exploitative individuals. It seems a decision made just for the convenience of police and prosecutors without regard to the welfare of those involved in drugs whom law and policy should be there to help.

B. Dealing in small quantities of drugs is defined as trafficking

30. At the retail level, transactions between users are very common indeed. The marketing power of the peer group combined with the addictive qualities of the commodity are the underpinnings of the strong illicit drug economy. At the same time, it is largely young people who are attracted to and participate in this retail market. These are the very people whom we should seek to help. The particular challenge for policy is to weaken these underpinnings of the drug economy without causing significant harm to these same people.

31. With no support from the Officers Committee Report and without any supporting evidence of effectiveness, the Bill effectively designates transactions at this retail level as serious drug crimes. A drug user who sells any amount of a drug no matter how small is said to "traffic" in it (cl. 302.1). The term "sell" is broadly defined to include barter, exchange and agreement to sell (cl. 300.2).

1. Someone who sells a cannabis seedling

32. Under cl. 304.3 selling of even one growing cannabis plant is an offence carrying a penalty of 10 years imprisonment, a $220,000 fine or both. The related definition (cls. 300.2 & and 314.2 for "controlled plant") makes no distinction based on the size of the plant or whether it is the sought after female plant or just a male.

2. The party-goer who purchases ecstasy tablets for a group of friends

33. Ecstasy users are typically young adults. Nearly half use at between fortnightly and monthly intervals and typically take two tablets an episode. By far the most common source of ecstasy is friends. In the 2004 party drugs survey 82% reported that they had obtained it from friends and most often did so from friends' homes (Stafford *et al.* 2005 14, 18-19, 33-38). According to the Victorian Police custodial drug guide a street dose of ecstasy (methylenedioxymethylamphetamine (MDMA)) is between 50 and 100 mg (Victoria Police 2002, 1-53).

34. One of a group of five friends who purchases the supply for a night out can be expected to have at least 250 mg and may well have 500mg or more. The trafficable quantity for MDMA is specified in cl. 314.1 to be 500mg. If this person is caught reselling any of it to a friend he or she will be guilty of trafficking under cl. 302.4, face 10 years imprisonment, a $220,000 fine or both. He or she will be in virtually the same position if caught before reselling some because under cl. 302.1(1)(e) trafficking includes possessing the substance "with the intention of selling *any of it*".

35. It will be even easier for the prosecution to secure a trafficking conviction if the quantity possessed is 500mg or more because under cl. 302.5 the burden of proof is reversed about "the necessary intention or belief concerning the sale of the substance".

3. Selling a small quantity of a drug including cannabis

36. The situation of the friend who purchases enough for his or her mates to party at the end of the month is a particularly vivid example of the severe legal peril that an otherwise law abiding young person will be put to under the Bill. It is just one of many instances that arises in the grass level distribution of drugs. The enormous penalties under cl. 302.4 of a fine of $220,000, 10 years imprisonment or both would be applicable in the following circumstances:

- a child as young as 10 who swaps for a movie pass some cannabis leaf with another child who is interested in trying it (cl. 300.2 (definition of "sell"), cl. 302.4 & s. 7.2 of Criminal Code);
- someone who "for a favour" sells some of his home grown cannabis to the friend of a friend; and
- someone who sells a single seed of cannabis to someone else (cl. 314.1 listing cannabis).

4. The dependent user who finances a habit through dealing

37. The stereotypical drug user who is addicted to a drug like heroin does not live the otherwise law abiding life of the typical young party-goer or cannabis smoker who smokes cannabis to relax like others drink alcohol. An incessant but moderate addiction to heroin could well require $100 a day for a couple of 200mg deals. The dependent users who have not the means to pay for a habit typically have recourse to ripping off their family, prostituting themselves, stealing or dealing in drugs. Many

see dealing as the least unsavoury of these unsavoury options and the one that best preserves some sense of dignity.

38. Impecunious dependent users are an obvious and easy target for law enforcement whether in their own right or to provide information to target non-drug users higher in the distribution chain. The median of estimates of regular heroin users in Australia in 2002 was 45,100 – a big reduction from the estimate of 109,100 for 1999 before the heroin drought (Degenhardt *et al.* 2004b 28). The number has probably since climbed again with resumed easier availability of heroin. A high proportion of these will deal to support their habit. The Bill will brand all these as serious drug offenders for no obvious benefit. Even if law enforcement pressure tends to stimulate them to moderate their harmful drug consumption – which Families and Friends for Drug Law Reform contests – less draconian penalties would achieve the same end. Moreover, it is known that providing ready access to attractive treatments is a much more effective means of empowering them to improve their damaging life style. These options are available at a fraction of the cost of law enforcement.

39. Catching dependent drug users, prosecuting them for trafficking under cl. 302.4 for trafficking and imprisoning them for 10 years (for it would be useless to fine them $222,000) would add to their harms, make an insignificant impact on the drug market and cost the community valuable resources. In short it would do nothing to alleviate the problem.

5. Dependent drug users and combining parcels from multiple offences

40. The Bill permits the aggregation of amounts trafficked by dependent drug users so as to augment the quantity of drugs for which they may be prosecuted for trafficking in under s. 302.4. Under cl. 311.8 the prosecution can aggregate quantities of drugs sold over any length of time, the only limitation being that "each of these offences was committed not more than 7 days from another of those offences". The explanatory memorandum acknowledges this explicitly:

> "There is no limit to the length of time over which transactions can be aggregated, so long as they occur within intervals of 7 days or less" (p. 90).

41. The report of the Model Criminal Code Officer Committee (MCCOC) which this Bill is implementing admits "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." This possibility is actually presented as a virtue. It is included to cover "undercover police operations directed against dealers at the lower end of the illicit market." The report adds that: "The aggregation provision will allow police to target particular individuals for intensive buy and bust investigations. It may indeed be claimed as a virtue of the provision that it will encourage reliance on this technique." In plain language it leaves the door open for police to engage in entrapment of young people by provoking a long string of offences.

42. The one saving grace of the Bill in this matter of aggregation is the high levels of quantities specified in cl. 314.1(1) for marketable quantities except cannabis and the even higher commercial quantities. These quantities are most unlikely to be triggered by aggregation of deals from a dependent user to an undercover agent. There is a valid role for aggregation to achieve these bigger quantities typical of higher levels in the drug distribution pyramid. Families and Friends for Drug Law Reform believes cl. 302.4 which makes trafficking of less than a marketable quantity an offence should be omitted from this Bill on serious drug offences because it is not a

serious drug offence. However, if cl. 302.4 is to remain, aggregation should not be permitted under cl. 311.8 for an offence under cl. 302.4.

Recommendation 7: Aggregation should not be permitted under cl. 311.8 for an offence under cl. 302.4 of trafficking in less than a marketable quantity of controlled drugs.

C. Users likely to be liable for even more serious charges for dealing in larger quantities

43. Here is a couple of examples of action into which users are commonly sucked which, under cl. 302.3 could leave them facing 25 years in prison, a fine of $550,000 or both for trafficking in a trafficable quantity as defined in cl. 314.1:

1. The cannabis grower

44. The exposure of the grower of a single, modest sized, cannabis plant or a group of newly sprouted seeds to severe penalties under cl. 303.6 has already been examined. Depending how it is weighed, there is the likelihood that when harvested the grower of just a few plants could be exposed to even severer penalties for trafficking a marketable quantity under cl. 302.3. The penalties specified in cl. 302.3 are 25 years imprisonment, $550,000 or both.

45. The following is how the situation may arise:

(a) Cl. 314.1 defines cannabis as a controlled drug as “including flowering or fruiting tops, leaves, seeds or stalks, but not including Cannabis resin or Cannabis fibre”.

(b) A marketable quantity is specified in that clause to be 25kg. If the prosecutor takes this to include fresh plants this represents a little over three average mature plants.

The report of the Model Criminal Code Officer Committee (MCCOC) which this Bill is implementing notes that “an average cannabis plant 1.6m tall with a 1m girth will yield an average of 250g of dry useable cannabis” (p. 305). Fresh, this plant with stalk would probably weigh at least 8,333g. Three such harvested fresh plants would thus be more than 25kg.

(c) Under cl. 302.1(1)(e) someone is said to traffic in a drug if “the person possesses the substance with the intention of selling any of it.” This condition would be satisfied if the person intends to sell only a small part of his or her crop. The intention to traffic that the explanatory memorandum at p. 22 states is required to convict for this very serious offence could probably be satisfied by the prosecution leading evidence that the accused had in the past sold small quantities of his own cannabis to someone else and that given the amount the accused could be expected to do so again.

2. Preparing for supply &c

46. Users who assist in preparing a drug for supply, conceal it or transport it are traffickers under s. 302.1. The MCCOC Report admits these are “comparatively minor figures” (p. 73).

D. Children

47. According to the Attorney-General: “The bill also provides important protection to children.” He was referring to division 309 of the Bill which concerns “Drug offences involving children” under which “People who use children to traffic in drugs will be subject to heavier penalties”. On the other hand, in the real world, the legislation will expose hundreds of thousands of young people across the country to a new set of Commonwealth crimes.

48. Among these will be many, many children. The 2004 household survey estimated that 7.6% of children between 12 and 15 and 20.9% between 16 and 17 had used an illicit drug recently (AIHW 2005 25). As already mentioned, the most recent published survey of secondary school students found that 27% of those between 12 and 17 had used an illicit drug at least once in their life time and that 13% had used one in the last month (White & Hayman 2004 37). Cannabis remains overwhelmingly the drug most commonly used with significant quantities of pain killers, speed and ecstasy running well behind in a pack. Undoubtedly there will be some adults supplying or directly using children to distribute drugs and which new division 309 would target. This will be only a small part of the network by which drugs come into the hands of children. Friends and acquaintances – that is, other children – are the rule and these will be exposed to the other provisions of the Bill with its severe penalties.

49. Children, defined as people under 18, are excluded from liability for the offences of part 309 but not the rest of the Bill. In accordance with s. 7.2 of the Criminal Code, children above the age of criminal responsibility, which is 10 years of age, remain liable for the offences in other parts. The only slight protection for children between 10 and 14 is that “the child knows that his or her conduct is wrong”. The explanatory memorandum gives as the rationale for extending the Bill so widely that “persons who are 14 years or older are largely capable of looking after themselves” (p. 78).

50. The question has to be asked how the legislation will alleviate the problems associated with drugs among children whose interests Parliament has a special duty to protect. The Committee should assess this having regard to the real world of children and their families and not ruminations of desk bound lawyers and public servants or the convenience of police and prosecutors.

51. We know that a big proportion of children within a range of perfectly normal kids are at high risk of trying out illicit drugs. Indeed, research carried out for the Commonwealth Government revealed that illicit drugs were potentially attractive to a wide range of young people of normal personality types (Blue Moon Research 2000 1-30 particularly 27-29).

52. There were those who tend to be outward looking and those who tend to be inward looking. Outward looking ones tend to be more extrovert, positive and confident in their approach to life and were typically more independent and emotionally stable. Those who tend to look inwards were “generally more introvert and pessimistic in attitude. While many are serious and deep thinking they often appear to be less stable emotionally and more likely to follow the lead of others.” In both groups there are those who would be most unlikely ever to touch drugs. Among the outward lookers these are the “considered rejectors” who “believe that drugs are bad, and are a major problem in all circumstances. They are self-motivated people, with little or no need to add excitement to their lives. They are happy with their lives

and feel in control of things.” They account for 16% of 15 to 24 year olds. Among the inward lookers 13% of 15 to 24 year olds “have little or no need to add excitement to their lives. They differ from the Considered Rejectors in that they are not particularly happy or secure in their lives, and they do not feel in control of things.”

53. At the other end of the scale among the outward lookers are “thrill seekers” who are prepared to take risks. Comprising 20% of 15-24 year olds, they “. . . enjoyed the excitement of drugs, the ‘buzz’, the sense of risk, the excitement and the belief that drugs were ‘cool’. Their curiosity and pursuit of excitement could tempt them to trial ‘hard’ drugs, despite their awareness of the potential dangers.” Among the less confident inward lookers were “reality swappers” comprising 16% of 15-24 year olds. They “believed that the reality they experience while on drugs was better than the ‘straight’ world. They believed they lacked the self-respect, love and interests that their peers enjoyed. Moreover while they often acknowledged that their problems were increased because of the drugs they took, the only relief they knew was through drug-taking.” The heaviest drug users are likely to come from these two groups.

54. The 37% between the extremes of both the inward looking and outward looking personality types “showed a moderate level of use or potential use of illegal drugs”.

55. In short, among the young population there is a large proportion with personality types with a moderate or high potential risk of using illicit drugs. Some of the personality qualities such as preparedness to experiment and take risks that predispose young people to use are qualities that are generally admired. The point that drug use can be a problem in any family is also expressed in the Commonwealth Tough on Drugs booklet for parents: *Our strongest defence against the drug problem . . .* under the heading “Why do young people take drugs?”

> “Some parents think that young people use drugs only if they are having problems at home or at school. But there are many other reasons:
>
> - Availability and acceptability of the drug.
> - Curiosity and experimentation.
> - Wanting to be accepted by peer groups.
> - Rebellion.
> - Depression.
> - As a way to relax to cope with stress, boredom or pain.
> - To experience a high or a rush” (Australia 2001 10).

56. Into this environment of children where drug use is attractive to many and where drugs are widely available the Government proposes to propel this serious drug offences legislation. Under it a big proportion of Australian children will be serious drug offenders. Those who are caught for an activity likely to be motivated by rebellion, stress, risk taking or boredom may have their lives transformed for the worst. The Committee must ask itself how this legislation will serve to:

(a) make illicit drugs significantly less available to children;

(b) alleviate the serious harm that drug use causes to some children; and

(c) does not itself cause enormous harm to the life of young people.

Neither the second reading speech nor the explanatory memorandum provide answers to these questions.

III. PROTECTION OF YOUNG PEOPLE

57. The Attorney-General in presenting this Bill understated the extent of the problem that he put forward this Bill to address. "Drug abuse," he said, "directly touches the lives of thousands of Australians and indirectly affects us all." In fact there are millions. Families and Friends for Drug Law Reform has already draw attention to the 2004 household survey that tells us that 2,510,100 Australians – every seventh member of the community – can be expected to use drugs in a 12 months period (AIHW 2005 23 & xiv). 1,225,200 or 49% of these are young Australians in their teens and twenties. The same household survey reported that 21.3% of 14 to 19 year olds and 31.5% of 20 to 29 year olds had used an illicit drug in the last 12 months (*ibid.,* 23). The most recent published survey of secondary school students found that 27% of those between 12 and 17 had used an illicit drug at least once in their life time and that 13% had used one in the last month (White & Hayman 2004 37).

58. Because of the breadth of its scope as examined above, this proposed legislation will make most if not all of those 2,510,100 Australians serious drug offenders. If that is not an abuse of legislative power then it is, at least, an abuse of language. Unless this country is beyond redemption such common offences cannot justify the description "serious". This alone is reason to excise patently non-serious offences from serious offences that are dealt with in the bill. Penal law concerning the bottom of the drug distribution pyramid should be dealt with in separate legislation which moderates the ferocious penalties proposed in the present Bill.

59. There is also an issue of deeper concern that Parliament should address. This is to ensure itself that whatever drugs legislation is passed reduces and does not add to the harms that are intended to be addressed. The Committee must take on board what is known about the harms that are caused by excessive reliance on criminal prohibitions against drug use. The officers committee report itself acknowledged that the following harms to users arise from criminal prohibitions:

> "In the years since the 1980 Williams Royal Commission, it has become increasingly apparent that significant elements in the harm which results from habitual use of illicit drugs are a consequence of criminal prohibitions and their effects on the lives of users. Quite apart from the risks of arrest and punishment, there are risks to health or life in consuming illicit drugs of unknown concentration and uncertain composition. The circumstances in which illicit drugs are consumed and the widespread practice of multiple drug use add to those risks. Medical intervention in emergencies resulting from adverse drug reactions may be delayed or denied because associates fear the criminal consequences of exposing their own involvement. The illicit consumer's expenditure of money, time and effort on securing supplies may lead to the neglect of other necessities. It will often impose substantial costs on the community, and the user, if the purchase of supplies is funded from property crime. Further social costs result from the stigmatisation of habitual users as criminals and their alienation from patterns of conformity in employment, social and family life.
>
> "Risks are inherent, of course, in habitual use of most, if not all, recreational drugs. But criminal prohibitions amplify those risks. They amplify, for example, the risk of death from overdose" (MCCOC 6-7)

60. Submission no. 77 of Families and Friends for Drug Law Reform to the House of Representatives Standing Committee on Legal and Constitutional Affairs for its Inquiry into Crime in the Community: Victims, Offenders, and Fear of Crime (FFDLR 2002 pt. 5.1) provides more information on the wealth of evidence for these propositions.

61. In fact the explanatory memorandum includes some acknowledgement that procedures of the criminal law may wreak damage on young people caught up in it. This is in the context of cl. 308.1 which for that one provision provides diversion of some prosecuted under the Commonwealth funded illicit drug diversion scheme. The scheme:

> ". . . provides an opportunity for drug users early in their relationship with the criminal justice system to get the education, treatment and support they need for addressing their drug problem, and at the same time, avoid incurring a criminal record" (explanatory memorandum 61).

62. Unfortunately, the infliction of serious collateral harm on drug users underpins the recommendations of the Officers Committee which the Bill implements. After cataloguing the harms that criminal law heaps on drug users it concluded:

> "The greater the risks, the greater the deterrent effect, both on those who are habitual users and those who might otherwise be tempted by the lifestyle. Mark Moore, a leading American authority on drug law policy, refers to the 'effective cost' of heroin use – the effective cost of use is an amalgam of all those factors which make the life of the habitual user dangerous, arduous, frightening and expensive. To the extent to which criminal law prohibitions have as their object an increase in the effective cost of heroin use, they counter the requirements of humanity with the logic of pure deterrence." (MCCOC 7).

63. The profound immorality of setting out to ensure that the life of anyone should be "dangerous, arduous, frightening and expensive" should be self-evident to the committee. Nevertheless, the goal is callously justified on the ground of deterrence. Well, existing stringent penal laws across the Commonwealth and massive law enforcement effort have not prevented 2,510,100 Australians from using illicit drugs in the last 12 months. Could things be worse? This submission now turns to examine whether the Bill is likely to reduce the supply of illicit drugs.

IV. REDUCING THE SUPPLY OF ILLICIT DRUGS

64. The prime object of the Bill as announced by the Attorney-General to Parliament is "to reduce the supply of illicit drugs by strengthening anti-drug laws." What evidence is there that it will do this? This submission will address this question from two aspects. The first will consider the likely efficacy of those parts of the bill directed at the bottom of the drug distribution pyramid. These are the parts of most concern to Families and Friends for Drug Law Reform and are the ones examined above. The second aspect is the extent to which other parts of the Bill are likely to reduce supply at higher levels in the pyramid. The various points of possible intervention in the supply chain are roughly illustrated in the following table from a recently leaked British Government study. For practical purposes, in it Australia could be substituted for the UK.

INTERVENTIONS IN DRUG SUPPLY CHAIN

Objective	Nature of Intervention	Value of intervention
Reducing quantities of drugs released into supply chain	Compensated forced eradication	Release resources into local communities … but very expensive & encourages further planting by farmers
	Uncompensated forced eradication	Increases risks of illegal cultivation to farmers … but increases social tensions in poor communities, benefits anti-government groups & displaces cultivation to new regions
	Comprehensive set of alternative development interventions	By targeting causes of illicit cultivation, has a high impact on overall production levels & is sustainable … but is expensive, takes time & requires development of good governance in source country … and displaces cultivation to other countries
Seizing drugs before they reach the UK	Upstream supply chain seizures	Larger consignment sizes mean bigger seizures … but proximity to source means that consignments are low in value & easy to replace, and there is no assurance that consignments are UK-bound
	Downstream supply chain seizures (e.g. at UK border)	Proximity to UK means that seizures will directly reduce flow of drugs into the UK market, & consignments are of high value & harder to replace, but small consignment sizes mean smaller seizures & it is impossible to disrupt the large number of routes completely
Disrupting distribution networks within the UK	Targeting higher-level dealers (distributors and wholesalers)	Removes drugs before they hit the streets in small quantities…but resource-intensive & relatively little known about this part of the market
Disrupting retailer activity within the UK	Targeting street dealers	High visibility policing helps reduce anti-social street dealer behaviour … but street dealers replaced quickly & only tiny quantities of drugs removed from circulation
Reducing financial rewards for drugs-trafficking	Targeting proceeds and assets of drug groups	Attacks profits & hence rationale of drugs-traffickers … but is resource-intensive & technical, and money-laundering modus operandi likely to change as law enforcement focuses on this area

SOURCE: United Kingdom, Strategy Unit, *SU Drugs Project: Phase 1 Report: Understanding the Issues* (13 June 2003) at http://image.guardian.co.uk/sys-files/Guardian/documents/2005/07/05/Report.pdf visited 05/07/05, p. 93.

A. Disrupting retailer activity in Australia

65. One takes it that the many provisions of the Bill that apply to small quantities of drugs typically handled by drug users and user-dealers are intended to disrupt activity at the retail level. The British report bluntly asserts this to be ineffective in reducing supply:

> "High visibility policing helps reduce anti-social street dealer behaviour … but street dealers replaced quickly & only tiny quantities of drugs removed from circulation."

66. Indeed, this is also the documented experience in Australia of policing effort targeted at open drug scenes in Sydney and Melbourne. The most well known Australian study that has shown this is one carried out in NSW which found that:

> ". . . there was no detectable relationship between the price, purity or perceived availability of heroin at street-level in Cabramatta and average amount of heroin seized, either (a) across Australia, or (b) within New South Wales" (Weatherburn & Lind 1996, 194).

More generally, the same report concluded that:

> ". . . attempts to increase the street-price of heroin by creating a shortage of the drug, at least in Australia, would seem to have failed" (*ibid.,* 195).

67. This conclusion must now, of course, take account of the heroin drought. The extent to which law enforcement brought that about is looked at below. Assuming that law enforcement was effective then, they involved interventions higher up the distribution pyramid namely in the disruption of the supply chain into Australia and the interdiction of supply at and before the border. The experience of the heroin drought gives no support to the apparent rationale of a large element of this Bill that retail law enforcement will have a similar effect.

68. There are other persuasive reasons to believe that repressive measures at the retail level do not lead to any significant reduction in availability of drugs. These reasons include:

- the level of illicit drug use in various countries bears no direct relationship to the repressiveness of measures against that use; and
- in Australia a reduction in cannabis usage has accompanied the relaxation of cannabis law enforcement.

Each of these reasons is now examined.

1. The level of illicit drug use in various countries bears no direct relationship to the repressiveness of measures against that use

69. The degree of repressiveness of anti-drug measures varies greatly between countries. The relationship between the repressiveness and drug usage is often hard to gauge because of different survey methodologies of drug usage but in 1999 a survey was made of tenth graders in the United States and 30 European countries using methods designed to produce comparable results (SUNY 2001). The United States is generally very repressive. Most European countries are less so. The survey found that usage rates varied widely:

> "… 41% of 10th grade students in the United States had used marijuana or cannabis in their lifetimes. . . . [A]n average of 17% of 10th grade students in

> the 30 participating European countries had ever used marijuana or cannabis (19% in Northern Europe, 14% in Southern Europe and 16% in Eastern Europe). This proportion varies among European countries from 1% in Romania to 35% in the Czech Republic, France and the United Kingdom. All the participating European countries had a lower rate of lifetime cannabis use than did the United States."

70. 16% of 10th grade students in the United States had used amphetamines compared to an average of 2% for amphetamines across the European countries surveyed. The highest European rates of amphetamine use were 8% in the United Kingdom and 7% in both Estonia and Poland. The only countries with a rate of drug injection over 1% were Russia (2%) and the United States (3%).

2. A reduction in cannabis usage has accompanied the relaxation of cannabis law enforcement in Australia

71. The introduction in 1987 of the expiation notice system in South Australia did not lead to an increase in cannabis consumption to counter balance the benefits already mentioned. According to a study made of usage between 1985 and 1995 the rate of increase in lifetime cannabis use in South Australia "has been marginally greater than the average rate observed in the other jurisdictions over the same period." The study added that "there was as much variation in rates of cannabis use between jurisdictions that retained criminal penalties as there was between these jurisdictions and South Australia." If the expiation system ". . . has any effect, it has been a small increase in the number of adults, who are prepared to try, (or prepared to *report* that they have tried), cannabis."

72. Of most significance was the finding that:

> "There is no evidence to date that the [expiation] system in South Australia has increased levels of regular cannabis use, or rate of experimentation among young adults" (Donnelly *et al.* 1998, 13).

73. According to the household surveys since 1998, across Australia there has been a decline in the population that had used cannabis recently from 21.3% in 1998 to 18% in 2001 and to 11.3% in 2004 (AIHW 2002a, 3; Makkai & Payne 2003, 5; AIHW 2005, 4). This trend was also reflected in the surveys of secondary students since 1996. The 1999 survey reported that "among 16-17-year-olds the proportions using cannabis recently had decreased from 27% to 20% in 1999" (White 2001, 32). There was no statistically significant change between 1999 and 2002 of these students but a significant reduction in male students aged 16 to 17 who had used cannabis in the previous week as well as significantly fewer junior students compared to 1999 who had used cannabis in the past month or week (White & Hayman 2004, 20-21). Between 1999 and 2002 in the Australian Capital Territory (and thus before the 2004 winding back of the territory's cannabis expiation notice system):

> "There was a significant decrease in the proportion of students reporting use of cannabis in the last four weeks, between 1999 (16.2%) and 2002 (12.0%) (p=0.000)" (ACT Health 2004, 49).

74. Since 1996 both law enforcement effort and price across Australia seem to have declined. Between 1995-96 and 2001-02 there was a decline of 30% in arrests and expiation notices for cannabis related offences (AIC 2003a, 93-94; AIDR 2002, 94). In that time a gram of cannabis head seems to have fallen from mostly $30 or more in 1995-96 to between $20 and $25 in 2001-02 (AIDR 1996, 228-30; AIDR

2002, 106; AIDR 2003, 145). According to one study “the prevalence of marijuana use and the conditional demand for marijuana in the general population are responsive to changes in its money price” On the other hand, it found that while “decriminalisation is associated with an increase in the prevalence of use by males over the age of 25” it appears to have had no impact on use by young people whose consumption of the drug is the greatest cause for concern:

> “There is no evidence that decriminalisation significantly increases participation in marijuana use by either young males or females, or that decriminalisation increases the frequency of use among marijuana users” (Williams 2003).

75. In all these circumstances, the overall declines in cannabis consumption have important implications. In the first place, they point to the need for a careful assessment of the economic and other drivers influencing drug consumption for data like this indicate that trends in drug consumption are only weakly correlated with either price or law enforcement effort. It appears that some other factors are more influential. In the second place, the declines in cannabis consumption should serve as a warning against hasty moves such as seem reflected in the present Bill to tighten prohibition around cannabis in the light of alarm about reports of the dangers of cannabis use. Greater law enforcement is unlikely to lead to greater reductions in use than are already occurring but will almost certainly have harmful impacts on users caught up in the enforcement. The proposal to impose ferocious penalties for cannabis offences involving users smacks of a mindset that sees law enforcement as an end in itself rather than a means to an end.

B. Disrupting distribution networks to the border and within Australia

76. Families and Friends for Drug Law Reform has no brief for those involved in attempting to make easy money from supplying the import and wholesale markets. There are two qualifications to this. One is the concern we share with so many other Australians in witnessing the events in Bali. It is far too easy and attractive for gullible and venal young Australians to ruin their lives and even for the possibly innocent to be entrapped. Without doubt this Bill will be an instrument for more of these sad sagas. The other qualification is a general concern shared with all others anxious to maintain respect for our civil liberties. The fervency to combat illicit drugs has led to many abridgements of rights which were fought for over centuries. “Strict liability” and the reversal of burdens of proof in the criminal law with which the Bill abounds are just a few examples. This can serve to entrap the innocent as well as the guilty.

77. The question that this section examines is whether the Attorney-General’s assertion is justified that this Bill will reduce the supply of illicit drugs by disrupting distribution networks at the border and within Australia. This requires that attention be paid to the 2001 heroin drought which led to a big drop in overdose deaths and number of regular heroin users.

78. It will be argued that the Bill will facilitate large drug seizures. High levels of drug seizures are often cited as evidence of the effectiveness of law enforcement. For example, the Attorney-General pointed out last year that “Australian law enforcement agencies have stopped more than nine tonnes of serious illicit drugs from reaching Australia's shores” (Ruddock 2004). At best this is meaningless unless set against an estimate of the size of the drug market. More likely, the level of seizures reflects the

amount of drugs available with a high level of seizures pointing to greater availability. As explained in a West Australian parliamentary report: “seizures of drugs by law enforcement agencies . . . can provide an important insight into the actual trends in illicit drug production and trafficking” (WA 1997, v.1, §3.2.4, p. 61). Thus, police intelligence has acknowledged that: “While seizure rates do not necessarily correspond with production, they can be a good indicator of production trends” (Gordon 2001, 18). Research agencies regularly cite rising trends in the rate of seizure as evidence of greater availability (e.g. Topp *et al.* 2002, 67). In fact, the officially funded study of the 2001 heroin shortage acknowledges that the annual weight of heroin seized is “an indication of the amount of heroin imported” (Degenhardt et al. 2004a, 45-46).

79. The 2001 heroin drought and its consequent drop in overdose deaths are commonly cited as demonstrating the efficacy and benefits of vigorous law enforcement effort to reduce supply. The study on the shortage concludes that “the heroin shortage was probably caused by changes in heroin supply to Australia related to Australian drug law enforcement rather than to natural events (such as changes in heroin production)” (*ibid.,* 93). The case that it makes out for concluding that law enforcement was responsible is much the same as a conclusion that gravity was responsible for the collapse of a badly designed bridge.

80. The study identifies a unique set of circumstances in which law enforcement probably influenced a decision by drug dealers to reduce the supply of heroin to Australia. However, it is clear from the report that law enforcement was not responsible for those circumstances. It acknowledged that the circumstances may well change (if they have not done so already) and that law enforcement may again be as incapable of stemming a growth in the supply of heroin:

> (a) as it was during the 1990s when there was a huge growth in heroin supply; or
>
> (b) as it has been incapable of stemming the importation of the dangerous new methamphetamines at the same time that law enforcement was said to be successful in reducing heroin supply.

81. The study of the heroin shortage and the sister study of the methamphetamine situation in Australia identify the following unique circumstances over which Australian law enforcement had no significant influence:

> (a) Large quantities of new potent imported methamphetamines were indeed being imported into Australia during the time of the heroin shortage: “the more potent forms of 'base' and 'Ice' methamphetamine were first detected in 1999. Since 2001 all forms of methamphetamine (i.e., 'Ice', 'base' and powder methamphetamine or 'speed') appeared to be readily available to users” (McKetin & McLaren 2004, vii).
>
> (b) The heroin shortage study records that there was a big shortfall in production of opium where Australia’s heroin originates: “There was a continuing downwards trend in opium cultivation from the mid-1990s in the South East Asian cultivation regions, with more marked decreases in cultivation noted in 1998 and 1999 due to drought conditions in the area” (Degenhardt et al. 2004a, 22). This trend was large. Production declined by about a half over this period.

> (c) From this smaller harvest traffickers were supplying a new booming market in China. The study tells us that during the 1990s "the number of opiate dependent people registered in China - 80% of whom are heroin dependent – increased almost ten-fold" (*ibid.,* 57).
>
> (d) In contrast to heroin, the same region was producing increasing amounts of potent methamphetamines. The study speaks of their production by "large-scale groups who were already involved in heroin production. These people already had connections, trafficking routes, money and power" (*ibid.,* 55).
>
> (e) A number of heroin traffickers to Australia had switched to methamphetamines: It adds that "some traffickers previously involved in heroin production and trafficking to Australia are now involved in methamphetamine production and trafficking" (*ibid.,* 58).

82. The combination of these circumstances which law enforcement did not bring about forms the background to the reduction in heroin supply to Australia. The study does not assert that law enforcement physically prevented the import of the usual large supplies of heroin. This possibility was ruled out because methamphetamines was continuing to arrive from the same area and through the same hands as heroin had. Instead, what the study asserts is that Australian law enforcement influenced a decision by financiers of heroin to withdraw from sending large quantities:

> "[Key informants] consistently reported that a small number of key groups had traditionally financed major heroin imports to Australia in the 1990s, and these groups had withdrawn from the financing and facilitating these imports in the late 1990s" (*ibid.,* 77).

83. The study hangs upon the assessment that this decision by financiers to withdraw sending the same quantity of heroin to the Australian market was influenced by Australian law enforcement.

> "A large proportion of the heroin supply is thought to have relied on a centralised network based around a small number of key wholesale suppliers (Australian Crime Commission 2003). These wholesalers relied on large sea cargo shipments. Despite the centralised collaborative networks that provided organisational support and security, there was an increased risk of detection as a result of the coordinated action of Australian law enforcement (Australian Crime Commission 2003). It is considered likely that the 'major players' responsible for financing heroin imports to Australia may have withdrawn their involvement to some extent because of these changes" (*ibid.,* 61)

84. It is apparent that the correctness of the assessment that law enforcement was a material cause of the heroin shortage hangs on the thinnest of threads, namely a second guess of what was in the mind of certain financiers. It is a possibility that is largely undermined by the study's own conclusion:

> "The combination of low profits and increased success of law enforcement, probably led to the reduced dependability of key suppliers of heroin to Australia. This occurred against a backdrop of gradually declining production in South East Asia" (*ibid.,* 48).

The study thus admits that criminals made a commercial decision to reduce heroin supply to Australia in a context of low profits and shortage of supply. The admitted role of Australian law enforcement was thus only marginal and heavily dependent on

circumstances which law enforcement did not bring about and which it has little or no capacity to reproduce.

85. Probing the causes of the heroin shortage calls for a combination of judicial and intelligence assessment skills such as might be found in a Royal Commission and not the method used in the study. The study itself acknowledges that its method of approaching key informants "to analyse a reduction in heroin supply has the potential to be biased because the reduction in supply is itself an aim of drug law enforcement and is actively pursued" (Degenhardt et al. 2004a, 6).

86. The lack of rigour of the study may flow from this. The following are some examples. It puts much store on Canada not experiencing a heroin shortage even though it too is supplied from South East Asia. There are obvious commercial reasons why traffickers would have chosen to reduce heroin supply to Australia. Something like a third less heroin is used in Canada and the market could be easily poached by traffickers with other sources.

87. In the same way the study does not take into account the probability that the 600 kg of heroin seizures in the year before the drought amounted to little more than a month's supply. Earlier seizures of similar magnitude did not reduce availability. Nor does the study explain why law enforcement was so unsuccessful in stemming the flood of stimulants through similar channels. It makes no mention of the prediction of these events by the Office of Strategic Crime Assessment on the ground, firstly, that new markets in China for illicit opiates would outstrip supply from the Golden Triangle (notably Burma) and, secondly, the boom in manufacture of the new methamphetamines (Wardlaw 1999, 5). Nor does the study explain why the since abolished National Crime Authority with its extensive access to intelligence declared at the height of the drought that existing approaches were not reducing the problem of illicit drugs:

> "Whatever steps are taken, the scale of the illicit drug problem and its onward progression is such as to demand the highest attention of government and the community - it simply is not a battle that can be won by law enforcement alone or in partnership with the health sector. A co-ordinated and holistic approach is required, building upon and updating the foundation already established" (NCA 2001, 23).

88. In 2001 the Australian Federal Police Commissioner revealed criminal intelligence that:

> (a) drug syndicates "have their market research which tells them that these days people are more prepared to pop a pill than inject themselves" (Moor 2001); and.
>
> (b) there had been "a business decision by Asian organised crime gangs to switch from heroin production as their major source of income to the making of methamphetamine, or speed, tablets. . . . [T]he Asian drug barons would continue to supply some heroin to the Australian market, but intelligence suggested they were gearing up to aim for a new and much bigger market of people prepared to use methamphetamine pills" (*ibid.*).

89. The heroin shortage combined with a flood of the new potent methamphetamines is thus consistent with the business plan of criminals. As shown by the recently leaked British study, official analysts in that country doubted that law enforcement played a key role in the Australian heroin drought:

> "there were . . . severe droughts at the same time in source countries and the drought may have been due to marketing by Asian crime syndicates to promote methamphetamines" (UK 2003, 97).

It is thus of the gravest concern that anyone should regard this study on the heroin drought as recognising "the pivotal role of law enforcement in reducing the availability of heroin" (Ellison 2004). It did not do anything of the kind. "There is no evidence to suggest that law enforcement can create such droughts" (UK 2003, 102).

90. A detailed analysis of the evidence is at Bush 2004, FFDLR 2005 appendix and Bush *et al.* 2004.

V. COVERING THE FIELD OF STATE AND TERRITORY LAW

91. This Commonwealth Bill is a striking extension of Commonwealth legislative authority into the heartland of criminal law in this country. State law has traditionally occupied the field of criminal law apart from criminal law intimately associated with specific areas of Commonwealth responsibility such as communications, customs and aviation. Over the years, the criminal law on drugs has become a large and important part of State criminal law with Commonwealth criminal law on the subject being confined principally to its responsibilities for banking and overseas trade.

92. Founded as drug policy largely is on treaties and other international co-operation, the Commonwealth has long probably had the legislative capacity to regulate most if not all the field under the external affairs power. Why it should have decided to do so now is not explained. The 1998 United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances which the Bill in cl. 300 purports to implement has long been in force and, indeed, was implemented so far as the Commonwealth then chose to implement it by the *Crime (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*. The present Bill would supersede that act. It and complementary State and Territory law would have been regarded as a sufficient basis for Australia to meet its international obligations under the convention.

93. That the Government has used the occasion of implementation of Chapter 6 on serious drug offences of the Model Criminal Code to extend the Commonwealth's legislative reach into State and Territory criminal law is all the more curious. The Model Criminal Code was conceived of as a model State and Territory law. The present Bill does not implement that concept. The Commonwealth, by legislating across Australia may be seen to have made the code exercise redundant so far as Chapter 6 on drug offences is concerned.

94. The explanatory memorandum comes across as somewhat ingenuous when it asserts that the Bill proposes nothing out of the ordinary:

> "Overlapping State and Territory drug offences will also continue to operate alongside the offences in Part 9.1 of the Criminal Code. This approach is consistent with the approach taken in other areas of criminal law, such as terrorism, fraud, computer crime, money laundering and sexual servitude. It is intended that drug offences will continue to be investigated in accordance with the established division of responsibility between federal and State and Territory law enforcement agencies" (p. 2).

The precedents are all confined, relatively new and linked to areas of particular Commonwealth responsibility.

95. A cynic may see the present initiative as an attempt by the Commonwealth to exercise greater control over the area of drugs on the cheap. Drug law is an enormously expensive area of criminal law to implement. An economic study estimated that in 1998-99 the crime cost borne by the budgets of State and local governments were at least $1,427m for police, criminal courts and prisons. Enforcement costs of the federal government were unspecified but they would be a fraction of those of the States (Collins & Lapsley 2002, 67 & 40-41). The Bill would give the Commonwealth the option of intervening concerning an aspect of State (and Territory) drug law that it did not like without the need for it to foot the broad range of enforcement costs.

96. This submission will briefly refer to several aspects of the law of some States and Territories that the present Bill may seem to provide a means to trump. These are provision for expiation notices for minor cannabis offences and provisions for the provision of syringes and medically supervised injecting rooms.

A. Expiation notices for minor cannabis offences

97. In addition to concurrent operation (cl. 300.4), the Bill provides several other savings for State and Territory law. The rule against double jeopardy in s. 4C(2) of the *Crimes Act* will operate so that someone punished under a State or Territory law may not be prosecuted under the proposed legislation for the same matter. The Bill also allows as a defence conduct justified or excused (or reasonably thought to be justified or excused) under the law of a State or Territory (cls. 313.1 & 313.2). Finally, provision is made for people charged with possession of a drug under cl. 308.1 to be dealt with under procedures of State or Territory law. A note explains that this "allows for drug users to be diverted from the criminal justice system to receive the same education, treatment and support that is available in relation to drug offences under State and Territory laws." This is a saving for court diversion schemes.

98. Neither this nor the other savings for State and Territory law would seem to prevent a Commonwealth prosecution under the Bill where proceeding under a cannabis expiation notice system may seem to be appropriate. Nor does the wording in cl. 308.1(3) seem wide enough to have recourse to a State or Territory expiation system once a person is charged with possession under the Commonwealth Bill.

99. Cannabis expiation notices may be issued under legislation in South Australia, the Australian Capital Territory and Western Australia before any charge is laid against a person viz:

(a) expiation of simple cannabis offences under s. 45A of the *Controlled Substances Act 1984* (SA)

(b) simple cannabis offence notices under s. 171A of the *Drugs of Dependence Act 1989* (ACT)

(c) cannabis infringement notices under the *Cannabis Control Act 2003* (WA).

Recommendation 8: Provision should be made for the discontinuance of proceedings under the Bill to permit the issue and expiation of a notice for a minor cannabis offence under State or Territory law.

B. Provision of syringes and medically supervised injecting rooms

100. Where they exist, medically supervised injecting rooms and the provision of syringes, operate under State or Territory law in something of a legal twilight. While

legislative provision seems to be made for dispensing syringes, their operation could be frustrated by, for example, law enforcement action that targeted drug users patronising them. The same considerations also apply to Australia's only operating medically supervised injecting room in Kings Cross which operates under *the Drug Misuse and Trafficking Act 1985* (NSW). Legislation for a similar facility also exists in the Australian Capital Territory. The *Supervised Injecting Place Trial Act 1999* (ACT) provides for the development of a law enforcement protocol before the trial of such a place commences. Among other things, the protocol must deal with "the detection, investigation and prosecution of offences by a person who self-administers a substance at the facility".

11 July 2005

VI. REFERENCES

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