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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMINAL CODE (SERIOUS DRUG OFFENCES) AMENDMENT BILL 2004

REVISED

EXPLANATORY STATEMENT

Circulated by authority of
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Outline

The Criminal Code (Serious Drug Offences) Amendment Bill 2004 (the Bill) amends the *Criminal Code 2002* (the Criminal Code) by inserting a new chapter 6, which is the next stage in a process that began in September 2001 to progressively reform the criminal law of the ACT. The reforms are primarily based on the Model Criminal Code (the MCC), developed by the national Model Criminal Code Officers Committee (MCCOC) and established by the Standing Committee of Attorneys-General (SCAG). MCCOC is made up of Territory, State and Commonwealth criminal law advisers who have since 1991 embarked on an extensive consultative program developing nine chapters of the MCC for implementation by all Australian jurisdictions.

The Criminal Code currently consists of chapters 1 to 4. Chapter 1 is yet to commence and will eventually contain some mechanical provisions of the Criminal Code. Chapter 2 sets out the general principles of criminal responsibility that apply to all ACT offences created on or after 1 January 2003 and eventually will apply to all ACT criminal law. Chapter 3 codifies the law on theft, fraud and bribery while Chapter 4 codifies the law on property damage, including computer and sabotage offences.

The offences in this Bill are primarily based on the MCCOC, chapter 6 report entitled "Serious Drug Offences" (the chapter 6 report) but includes some modifications to the requirements for proving the relevant offences and associated defences subsequently recommended by MCCOC and approved by SCAG at its meeting in November 2003. The Bill also includes some additional offences based on offences in the *Drugs of Dependence Act 1991* (DDA) including lower order offences for cannabis and cannabis plants. The DDA currently governs ACT drug laws, however, in common with most other Australian jurisdictions, the ACT's offences for dealing with the illicit drug trade were essentially grafted onto the DDA, which was originally designed for regulating the legal distribution and use of poisons, pharmaceutical drugs and other dangerous substances used in medicine, industry and agriculture. Consequently the offences are not well-designed to deal effectively with the illegal trade. The DDA will continue to be the primary legislative tool for regulating the legitimate manufacture, supply, use and misuse of pharmaceuticals and controlled drugs in the ACT.

The offences in the Bill have a greater organised crime focus and cover a much broader range of criminal activity than the DDA. Consequently the Bill offences for trafficking not only cover selling and possessing controlled drugs to sell (which are covered by the corresponding DDA offences) but also preparing and packaging the drugs for supply and transporting, guarding or concealing them for selling or engaging in such activities believing that someone else intends to sell the drugs. There is also a comprehensive range of additional offences (focusing on organised crime) that are not currently in the DDA. These include offences of receiving money or property derived from a drug offence (clause 640) and concealing, transferring, converting or removing money or property from the ACT that has been derived from a drug offence (clause 639). There are also new offences of possessing equipment, substances and instructions with the intention of manufacturing or cultivating controlled drugs or plants (clauses 614 and 621) and related but more serious offences of supplying others with such equipment and instructions etc so that they may manufacture or cultivate controlled drugs and plants for sale (clauses 613 and 620). The Bill will also enact two new offences for the protection of children. They are offences of procuring a child to traffic in drugs (25 years imprisonment - clause 624) and supplying drugs to a child for the child to sell (25 years imprisonment - clause 622).

One of the more significant improvements this Bill will make to the drug laws in the ACT is the inclusion of offences with respect to "precursors". Essentially, "precursors" are the raw chemical components of a controlled drug. Many precursors are present in products that are readily available off the shelf in pharmacies, supermarkets and hardware stores and are commonly extracted in backyard laboratories to manufacture controlled drugs, particularly amphetamines. The problem has become particularly acute over recent years and accordingly chapter 6 includes a range of offences to deal with those who manufacture, sell or possess "controlled precursors" to manufacture controlled drugs (clauses 610, 611 and 612).

Chapter 6 also includes a range of provisions to improve the effectiveness and enforceability of the offences in the Bill. Perhaps the most important improvement concerns controlled drugs that are commonly sold in a diluted form on the black market. For those drugs the regulations will specify different prohibited weights for the drugs in their pure form and in a mixture (which, by its nature, will be set at a higher weight). The prosecution will then be able to elect to establish the quantity of the drug involved in an offence by reference to the pure drug weight or the mixed drug weight. The Bill also incudes a number of provisions that allow the prosecution to prove the quantity of the drug involved in an alleged offence (eg, "a large commercial quantity" or "a commercial quantity" etc) by aggregating the amount of drugs trafficked over repeated transactions and aggregating different kinds of drugs involved on one occasion. The purpose of these measures is to enable the imposition of severe penalties on those who deal in bulk by an accumulation of small sales.

The explanatory statement reproduces extracts from the MCCOC report and these have been amended slightly to ensure references to particular provisions reflect the numbering of the ACT Bill. The government is grateful to MCCOC for making their report available for use by the ACT.

Financial Impact

The Bill is not expected to have a financial impact in itself, however, the continuing development of the Criminal Code will involve a considerable amount of drafting. This drafting will be funded from existing resources.

NOTES ON CLAUSES

Chapter 6 Preliminary
Clause 1 Name of Act

This clause explains that the name of the Act is the *Criminal Code (Serious Drug Offences) Amendment Act 2004*.

Clause 2 Commencement

This is a technical provision that explains that this Act commences on a day to be fixed by the Minister by written notice.

Clause 3 Acts amended

This clause explains that the Bill will amend the *Criminal Code 2002*.

Clause 4 New chapter 6

This clause sets out the provisions of new chapter 6 of the Criminal Code, which are explained below.

Chapter 6 Serious offences
Part 6.1 Interpretation for chapter 6
Clause 600 Definitions for chapter 6

The definitions in these clauses apply generally throughout the whole of chapter 6.

Cannabis and Cannabis plant – These provisions define 'cannabis' as the fresh or dried parts of a cannabis plant, other than goods that consist completely or mainly of cannabis fibre or tetrahydrocannabinol ('THC') and 'cannabis plant' as a plant of the genus cannabis. THC is the major alkaloid in cannabis that gives it its psychoactive effect.

Controlled drug, Controlled plant and Controlled precursor – The offences in chapter 6 will only apply to substances and plants that are listed in the tables in the proposed regulations as controlled drugs, controlled plants and controlled precursors. Accordingly, a 'controlled drug' is defined as a substance that is specified or described in the regulations as a controlled drug (though note that it does not include a growing plant – see below).

This method of defining 'prohibited' substances and plants by reference to tables in the regulations is currently used in the ACT (Drugs of Dependence Regulations 1993 (DDR) and in most other jurisdictions in Australia. There are two important advantages to this approach. First, the tables can be changed in rapid response to developments in the illicit market and secondly it encourages and facilitates consistency between the jurisdictions, not only with respect to the kinds of drugs prescribed but also with respect to the quantities involved. Tables of prohibited drugs and the specifications of commercial and large quantities are an essential element of the scheme.

The definition of controlled drug expressly excludes growing plants. This is important because sometimes the tables of 'controlled drugs' and 'controlled plants' in the

regulations refer to the same substance. 'Cannabis' is a good example. Therefore, whether the cannabis involved in an offence is to be treated as a controlled drug or a controlled plant will essentially depend on whether the cannabis has been cut from the ground or pot etc or is still growing. This distinction is emphasized in the definition of a 'controlled plant', which is expressly defined as a 'growing' plant (including a seedling) prescribed in the regulations.

A controlled precursor is also defined as a substance prescribed in the regulations as a controlled precursor. Essentially, 'precursors' are the raw chemical materials that can be used to manufacture controlled drugs, particularly amphetamines. The list of controlled precursors in the regulations will be derived primarily from the relevant list of precursors identified in the United Nations *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.*

Conceal – This definition extends the meaning of the term 'conceal' wherever it is used in chapter 6. The term covers conduct that conceals or disguises the nature, source, location or movements of a thing; the identity of the owner of a thing or someone's rights with respect to the thing. The definition is expressed in inclusive terms so that, depending on the circumstances, other conduct may amount to 'concealing' for the purposes of this chapter.

The expression is used in a number of provisions in the chapter including the definition of 'trafficking' in clause 602 (guarding or concealing a drug intended or believed to be for sale); the definition of 'cultivate' in clause 615 (guarding or concealing a plant); the meaning of 'procure' in clause 624 (procuring a child to guard or conceal a drug intended for sale) and clause 639 (which is a money laundering offence aimed, amongst other things, at those who conceal property directly or indirectly derived from a drug offence).

A broad definition of this term is particularly important for the money laundering offence in clause 639 where the 'concealment' can consist of complex transactions involving intangibles. Concealment would include disguising financial transactions or ownership of a chose in action.

Possession - This definition also extends the meaning of the term "possession" wherever it is used in chapter 6. In addition to the usual meaning of "being in possession", the definition covers receiving or obtaining possession, having control over the disposition of a thing (even if it is not in the person's custody) and possessing a thing jointly with someone else. The term is used in a number of provisions in the chapter including the definition of 'trafficking' and the presumption as to trafficking in clauses 602 and 604; and the offences in clauses 614 and 621 (concerning the possession of substances, plants, equipment or instructions for manufacturing or cultivating controlled drugs or plants).

Prepare – This definition extends the meaning of the term 'prepare' a drug for supply to include packaging the drug or separating the drug into discrete units. The term is used in the definitions of 'trafficking' in clause 602 (prepare the drug for supply) and 'procuring' a child for trafficking in subclause 624(7) (procuring a child to prepare a drug for supply).

Sell – This is one of the more important definitions in the Bill because of the extensive use of the term "sell" (or sale etc) throughout the Bill. In addition to the usual meaning of sell, the term also covers barter or exchange (whether for goods or services); an agreement to sell and giving controlled drugs etc to another believing that he or she will provide property or services in return at a later time, whether by agreement or otherwise. An

agreement to sell (paragraph (c) of the defintion) can encompass a simple handshake to clinch the deal, even if no drugs are present at the point of sale and no particular parcel of drugs has been designated or appropriated to the sale or agreement to sell. Also liability will be incurred even though the accused is mistaken about the nature of the substance sold, or mistaken in the expectation that supplies could be obtained and the transaction will amount to a sale even though the vendor cannot satisfy the buyer's expectations.

Supply – This is a broader term than 'sell'. The definition not only covers cases where a person supplies a controlled drug etc by way of a sale but also where a person gives a gift of a controlled drug etc or simply agrees to supply someone sometime in the future. The definition is needed to cover cases of preparing drugs for supply (such as packaging) within the notion of 'trafficking' (subclause 602(b)). The term is also used in the offence in clause 625, which concerns the supply of controlled drugs to children. Generally the serious offences in chapter 6 focus on commercial trafficking but the gratuitous supply of drugs to children warrants inclusion in the Criminal Code as a serious drug offence.

Transport – This term is defined to include deliver. The term is used in the definition of 'trafficking' (subclause 602(c)) and is necessary to adequately cover the activities of couriers.

Clause 601 Meaning of trafficable quantity, commercial quantity and large commercial quantity

The offences in chapter 6 generally vary in seriousness depending on the quantity of the substance or plant involved. This is currently the case in the ACT and in most other jurisdictions in Australia. However, whereas the DDA refers to only two quantities (commercial and trafficable), chapter 6 refers to three. That is, 'large commercial quantity', 'commercial quantity' and 'trafficable quantity'. Thus, the trafficking offences in clause 603 apply maximum penalties of life imprisonment for trafficking in a large commercial quantity of a controlled drug, 25 years for a commercial quantity, 10 years for a trafficable quantity of cannabis or any other less than a commercial quantity.

The definitions in subclause 601(1) are similar to the definitions of 'controlled drug' etc in clause 600 in that the terms 'trafficable quantity', 'commercial quantity' and 'large commercial quantity' are defined by reference to the quantities specified for each plant or substance listed in the tables in the regulations. Thus, a 'commercial quantity' of a controlled drug is defined as a quantity of the drug that is not less than the quantity of that drug specified in the regulations as a commercial quantity. Again, this method for defining prohibited quantities will allow the law to be updated quickly when required and will facilitate consistency amongst the jurisdictions.

However, where controlled drugs are concerned an issue arises as to whether the quantity should be determined according to the total weight of the substance seized or the weight of the pure drug contained in the substance. In the ACT quantity is currently determined by reference to the amount of the pure drug in the substance but other Australian jurisdictions are divided on this issue and many determine quantity according to the total weight of the substance involved.

The MCCOC assessed the arguments for both methods of determining quantity at pages 23 to 39 of its report on Serious Drugs and concluded with the following remarks:

> It is apparent that there is no single correct answer to the question whether quantitative measures should be based on pure weight or total weight of the controlled drug involved in an illicit

> transaction. The answers vary according to the purpose for which the measure is taken. One thing is plain, however, when the liability of major traffickers for transactions involving kilogram quantities is in issue, insistence on pure weight measures would be counterproductive. (p.39)

To resolve the issue MCCOC recommended the inclusion of subclause 601(2) together with a proposal that the table in the regulations for controlled drugs specify both pure and dilute weights for those drugs that are commonly sold in the illicit market in a diluted form. In those cases subclause 601(2) will allow the prosecution to elect to establish the quantity of the drug involved either by reference to the weight specified in the table for the pure drug or the weight specified for a mixture that contains the drug. The relevant amounts will be set at levels determined by the experts but based on the quantities suggested by the MCCOC that the prosecution could prove, for example, that the defendant possessed a commercial quantity of cocaine by electing to establish either that he or she had 25 grams of the pure drug or 50 grams of a mixture that contained the drug.

Part 6.2 Trafficking in controlled drugs

Trafficking in controlled drugs is the central and amongst the most serious of the offences in chapter 6. The offences in this part are graded according to the quantity of controlled drug trafficked. The offences range from trafficking in a large commercial quantity of a controlled drug for which a maximum penalty of life imprisonment applies to trafficking in any quantity of cannabis for which a maximum penalty of three years prison or 300 penalty units ($30,000) applies. This is consistent with the penalties that currently apply for the sale or supply of a prohibited substance or a drug of dependence under the DDA. The concept of trafficking adopted in chapter 6 is broad, extending from those who plan and direct the operation to comparatively minor figures, who assist in packaging, handling, storage or transport of the drug for payment in kind.

Clause 602 Meaning of trafficking

This clause defines what is meant by the term ‘trafficking in controlled drugs’ for the purposes of the offences in clause 603. The definition is exhaustive so that unless the defendant’s activities fall within the terms of the definition he or she cannot be found to have ‘trafficked’.

The definition sets out five categories of trafficking. The first is selling a controlled drug (subclause 602(a)), which is the central form of trafficking. As explained in the commentary to clause 600, the essential element of a sale is the agreement to buy and sell. Once the agreement is made there is a sale even if the vendor subsequently fails to deliver or the purchaser fails to accept delivery. This is an important feature of the concept of sale because it ensures that major drug dealers who transact their business but leave it to others to effect the actual exchange of money and drugs will be caught by the trafficking offences. However, as the definition of ‘sell’ in clause 600 makes clear, the sale need not be for money but can be for an exchange of goods or services. Also, since no fault element is specified for trafficking by sale, and since the prohibition specifies conduct alone (that is, a sale or an agreement to sell), the prosecution will be required to establish that the accused intended to make a contract to sell a controlled drug (see subsection 22 (1) of the Criminal Code).

Subclause 602(e) provides that the possession of a controlled drug with the intention of selling any of it will also constitute trafficking. It makes no difference whether the offender intends another to sell the drug or intends to sell it personally. If the possession is for sale

the person will be liable for trafficking. It is important in this context to bear in mind the extended definition of 'possession' which includes receiving or obtaining possession, having control over the disposition of a thing (even if it is not in the person's custody) and possessing a thing jointly with someone else.

The next category is set out in subclause 602(b). It provides that it is 'trafficking' if a person prepares a controlled drug for supply with the intention of selling any of it or believing that someone else intends to sell any of it. The concept of 'preparing' a drug for supply is defined in clause 600 to include packing the drug or separating it into discrete units. Activities of this kind are more closely related to sale than they are to manufacturing and so have been included here to form part of the trafficking offences.

Imported heroin and other drugs frequently require dilution, packaging and other preparatory steps before they are sold to traffickers or consumers. Often the person who prepares the drug also intends to sell it, in which case paragraph 602(b)(i) will apply to make him or her liable for trafficking. However, it is also often the case that the person who does the packaging etc is simply doing it for a fee and has no interest in selling the drug. In these cases the person may not be in possession (and therefore not caught by a simple possession offence) because he or she may have no more than mere custody of the drugs in order to prepare them. However, paragraph 602(b)(ii) will ensure that he or she is caught for trafficking because it extends that concept to cover those who prepare drugs for supply believing that someone else intends to sell them.

The fourth category is set out in subclause 602(c). It provides that it is 'trafficking' if a person transports a controlled drug with the intention of selling any of it or believing that someone else intends to do so. The prohibition is essentially aimed at couriers who transport or deliver drugs for others and is therefore closely related to the prohibition against trafficking by preparing and packaging drugs (subclause 602(b)). Accordingly a person will be liable for trafficking under this clause if he or she intends to personally sell the drug or believes that someone else intends to do so.

The final category appears in subclause 602(d). It provides that it is 'trafficking' if a person guards or conceals a controlled drug with the intention of selling any of it or assisting another to sell it. The term 'guard' has its natural meaning but 'conceal' has an extended meaning (clause 600) to cover disguising the nature of the substance involved (a controlled drug) and its source, location or movements and also concealing or disguising the identity of the owner of the drug or someone's rights with respect to it. To establish this category of trafficking the prosecution will have to prove that the defendant guarded or concealed the drugs with the intention of selling them or helping someone else to sell them.

Clause 603 Trafficking in controlled drugs

This clause contains the trafficking offences of chapter 6. Like the DDA and the drug legislation of most Australian jurisdictions, the seriousness of an offence in this chapter will generally depend on the quantity of the drug involved. Essentially this is because quantity provides the most realistic measure of the commercial magnitude of the unlawful enterprise. Accordingly this clause provides for a range of offences graded according to the quantity of drug trafficked, though in the case of the lower order offences (subclauses 603(5), 603(7) and 603(8) a distinction is also made between cannabis and other controlled drugs. The sale and supply offences in the DDA also make a distinction between cannabis (for which lower maximum penalties apply) and other kinds of prohibited substances (compare sections 164 and 165 of the DDA).

The first of the trafficking offences appears in subclause 603(1). It provides that a person commits an offence if he or she traffics in a large commercial quantity of a controlled drug. What constitutes a 'controlled drug' and a 'large commercial quantity' of a controlled drug will be set out in the regulations to chapter 6 but in many instances the substances and quantities will be similar to those that are currently prescribed in the DDR.

As explained in the commentary to clause 602, a person will be taken to have engaged in 'trafficking' if, together with the relevant fault elements, he or she sells, prepares, packages, transports, delivers, guards, conceals and possesses for sale a controlled drug. The maximum penalty for this offence is life imprisonment, which is the same penalty for selling, supplying and possessing for sale comparable quantities of a prohibited substance or drug of dependence under the DDA (see subsections 164(2)(a) and 164(3)(a)).

The trafficking offence in subclause 603(3) is the same as the previous offence except that it applies where the quantity of controlled drug involved is a 'commercial quantity' but not a 'large commercial quantity'. The maximum penalty is 2500 penalty units, 25 years imprisonment or both, similar to the penalty for selling, supplying and possessing for sale comparable quantities of a prohibited substance or drug of dependence under the DDA (see subsections 164(2)(b) and 164(3)(b)).

The remaining three offences in this clause make a distinction between cannabis and other kinds of controlled drugs. The offence in subclause 603(5) covers trafficking in cannabis while subclause 603(7) applies to other controlled drugs. Both offences apply a maximum penalty of 10 years imprisonment or 1000 penalty units ($100,000) or both but subclause 603(5)) only applies to trafficking in a 'trafficable' quantity of cannabis whereas subclause 603(7) applies to trafficking in <u>any amount</u> of any other controlled drug. The offence in subclause 603(7) is similar to the offence in paragraph 164(2)(d)) which also applies to <u>any quantity</u> of a prohibited substance but the maximum penalty in the DDA offence is five years imprisonment. The increased maximum penalty in subclause 603(7) accords with the penalty recommended by MCCOC and is justified given the increased use and proliferation of controlled drugs (particularly amphetamines) into the community since the enactment of the DDA.

If a person trafficks in less than a trafficable quantity of cannabis the offence in subclause 603(8) will apply for which the maximum penalty is three years imprisonment or 300 penalty units ($30,000) or both. This is similar to the offence in paragraph 165(1)(d) which applies a slightly lower maximum penalty of two years imprisonment.

As indicated above, the offences in this clause will replace (for the illegal trade) the offences in sections 164 and 165 of the DDA, which prohibit the "sale or supply" of a prohibited substance, drug of dependence or cannabis, whichever the case may be. In some respects the offences in this clause are wider because 'trafficking' is defined to extend to activities associated with the illegal trade, such as preparing a drug for supply, transporting, guarding and concealing etc. On the other hand the offences in this clause do not extend so far as to catch mere 'supply'. This is because it is considered that trafficking should be restricted to conduct that has a commercial object. Prohibitions that extend trafficking to instances of gratuitous supply reach well beyond the machinations of the illicit market. However, an exception is made for cases involving gratuitous transfers of controlled drugs to children. Such transfers are the subject of a distinct offence in clause 622 of this Bill. The MCCOC explained its position on this issue at pages 49 to 53 of the chapter 6 report. After observing that the meaning of 'supply' has been the subject of litigation and conflicting authorities, it remarked as follows:

> Though the word obviously extends to the activities of commercial suppliers, it is equally capable of extending to gratuitous transfers without commercial motivation. Not all transfers amount to supply however. Existing authorities on 'supply' hold that the offence is not committed if D is a mere custodian who returns a controlled drug to B who owns the drug. The offence is taken to require proof that D provided something which B did not have before. If D provides no more than custody or safekeeping, there is no supply of the thing itself.
>
> The complexity of the law on the meaning of supply is a cogent reason for avoiding reliance on the concept if an alternative can be found. There is an additional consideration. Since 'supply' does not include the return or delivery of drugs to their owner, a prohibition against supply is likely to obscure the obvious possibility that the individual who returned the drugs is guilty as an accomplice who provided storage or other facilities: see *Carey* (1990) 50 A Crim R 163 at 168-169.
>
> It is unnecessary to include prohibitions against supply in trafficking legislation. There are two sets of circumstances in which a prohibition against supply might be thought to have a role in a scheme of prohibitions aimed at commercial trafficking or other major drug crime. The first of these involves commercially motivated gifts to minors. These are the subject of specific prohibition in section 6.4.4 – Supply of drugs to a child. The second area of possible application arises when a person provides storage facilities, transport or other services which involve a transfer of possession of controlled drugs to that person without sale. Such cases are covered, however, by the general provisions on accomplices in [part 2.4] of Chapter 2 of the [ACT Criminal Code] or in specific prohibitions in this Chapter.

The 'sale or supply' offences in sections 164 and 165 of the DDA also include prohibitions against 'permitting' the use of premises for the purpose of trafficking (see paragraphs 164(9)(b) and 165(3)(b)). The offences in this clause do not go so far because in many instances the provision of premises would amount to complicity in an offence of trafficking committed by another and therefore caught by the offences in part 2.4 of the Criminal Code. If the conduct does not amount to complicity, however, it is unlikely to be of sufficient gravity to deserve the very heavy penalties reserved for trafficking.

An important feature of the offences in subclauses 603(1), 603(3) and 603(5) is that absolute liability applies to the circumstance that the quantity trafficked was a 'large commercial quantity', a 'commercial quantity' or a 'trafficable quantity', as the case may be (see subclauses 603(2), 603(4) and 603(6)). What this effectively means is that it is not necessary for the prosecution to prove that the defendant knew or intended to traffic in a 'large commercial quantity' etc of the drug involved or that he or she had any other fault element with respect to the amount trafficked. Of course the prosecution will still have to prove that the amount of drug involved in the offence was <u>in fact</u> a 'large commercial quantity' etc. Also, it is important to stress that the application of absolute liability to the 'quantity element' of these offences does not render them absolute liability offences. Rather, absolute liability will only apply to that one element of the offence involved. For example, the prosecution would still have to prove that the defendant <u>intended</u> to sell the drug (though note the further discussion with regard to clause 604 below).

It is important in this regard to read subclause 603(2) etc with clause 634. That provision (clause 634) allows the accused a defence that will permit the court to convict of a lesser offence if the accused proves on the balance of probabilities that he or she gave consideration to the quantity of drug he or she was trafficking etc but was under a mistaken belief about the quantity of the drug involved. That is, if the accused establishes to the relevant standard that he or she considered the question but mistakenly believed that the quantity involved was 'Y' grams (a commercial quantity) rather than 'X' grams (a large

commercial quantity) the court can return a guilty verdict for the lesser offence of trafficking in 'a commercial quantity' of a controlled drug (subclause 603(3)). Alternatively if the accused establishes that he or she mistakenly believed that the amount involved was 'Z' grams (less than a commercial quantity) the court can return a guilty verdict for the lesser offence of trafficking in a controlled drug (subclause 603(7)).

The application of absolute liability to the quantity element of these offences is considered appropriate for a number of reasons. First, the inclusion of the mistaken belief defence in clause 634 effectively allows the court to give consideration to matters of fault with respect to quantity and to impose a penalty that is appropriate for the amount that the accused believed he or she was trafficking. Also the reversal of the onus of proof is justified in this context (that is the requirement for the defendant to prove the mistaken belief) given the mischief that these offences are intended to address and that the matter that the defendant is required to prove (mistaken belief) is a matter that would be peculiarly within his or her knowledge. Further, the corresponding offences in the DDA (subsections 164(2)(a), 164(3)(a) and 165(1)(a)) also effectively impose absolute liability with respect to the quantity of drugs involved. Therefore from the defendant's perspective the inclusion of clause 634 represents a softening of the current state of the law on this matter. Finally, it is worth noting that the application of absolute liability as to quantity and the inclusion of clause 634 accords with MCCOC's revised chapter 6 recommendations delivered to SCAG in November 2003.

There are two other issues that need to be considered in relation to the offences in this clause. The first concerns clause 604 and the manner of proving 'commercial intent'. That is, the manner of proving that a person engaged in the activities referred to in subclauses 602(b) to 602(e) with the intention of selling or believing that someone else intends to sell the controlled drug involved. This is dealt with in the commentary to clause 604.

It is also important to draw attention to section 43 of the Criminal Code, which provides that a person is not liable for an offence if the conduct required for the offence is justified or excused under law. Accordingly a person who, for example, is authorised under the DDA to sell or possess controlled drugs or is an exempt person, such as a police officer or analyst, is not liable to the offences under chapter 6 to the extent of his or her authorisation or exemption. The lawful authority defence in section 43 of the Criminal Code also applies to the other offences in this chapter.

Clause 604 Trafficking offence – presumption if trafficable quantity possessed etc

An important feature of the offences in subclauses 603(1), 603(3) and 603(5) relates to subclause 604(1) and the definition of trafficking in clause 602. As noted in the commentary to clause 602, a person is not liable for trafficking simply for preparing a controlled drug for supply. It must also be established that the defendant prepared the drug (for example) with the intention of selling any of it or believing that someone else intends to sell any of it (subclause 602(b)). The trafficking categories of 'transporting', 'guarding or concealing' and 'possessing' a controlled drug also incorporate a 'commercial intent' requirement. For transporting the required commercial intent is the same as for preparing a controlled drug for supply (that is, an intention to sell or the belief that someone else intends to sell - subclause 602(c)). For guarding or concealing the commercial intent is an intention to sell or to help someone else to sell (subclause 602(d)) and for possessing it is simply an intention to sell (subclause 602(e)).

Clause 604 concerns the manner of proving 'commercial intent' with regard to the four categories of trafficking referred to in the preceding paragraph. It provides that if, in a prosecution for a trafficking offence under clause 603, the prosecution proves that the accused prepared for supply or transported, guarded, concealed or possessed a 'trafficable' quantity of a controlled drug, it is presumed that the defendant had the relevant intention or belief about the sale of the drug required for the offence. The defendant can displace the presumption but to do so he or she must prove on the balance of probabilities (the legal burden) that he or she did not in fact intend to sell the drug or have the required belief about sale. The relevant DDA provisions include a similar presumption, however, they impose an evidential burden on the defendant to displace the presumption (see subsections 162(5), 164(8) and 165(5)). That is, the presumption is displaced if the defendant points to evidence that suggests a reasonable possibility that he or she did not intend to sell etc the drug.

It is important to stress that the presumption only arises if the prosecution first proves that the amount of drug the defendant prepared or transported etc was in fact a 'trafficable' quantity. Trafficable quantities specified in the regulations are intended to represent quantities that so far exceed the likely requirements of personal use as to provide a rational basis for the inference that a person in possession etc of such quantities is likely to be engaged in trafficking. In other words, the preliminary burden on the prosecution to establish that a 'trafficable' quantity was involved in the alleged offence provides a solid evidentiary basis for activating the legal presumption and effectively requires the prosecution to go a significant part of the way towards proving commercial intent before the presumption arises. When this is viewed in conjunction with the mischief these offences are intended to address the inclusion of this clause is considered justified. This clause also accords with MCCOC's revised chapter 6 recommendations delivered to SCAG in November 2003.

Subclause 604(2) provides an important exception to the application of the presumption in subclause 604(1). In certain circumstances clause 629 allows the quantities of a number of transactions to be added together where the offence concerned is a general trafficking offence (clause 603) or an offence of supplying controlled drugs to children (clause 622). In such cases if, for example, there are a series of transactions, each involving less than a 'commercial quantity' but together involving more than a 'commercial quantity', the prosecution can charge the person with a single offence for the combined quantity of drugs involved (a commercial quantity). However, subclause 604(2) makes it clear that clause 629 cannot be relied upon to invoke the 'commercial intent' presumption in subclause 604(1) unless each transaction that is relied upon involves a trafficable quantity. This exclusion is justified because a person who is caught in possession of small quantities on several occasions is more likely to be a user than a person engaged in trafficking and that being so it would not be appropriate to apply the presumption in such cases.

Clause 605 Complicity, incitement and conspiracy offences do not apply to buyers of drugs

This clause provides that a person does not commit an offence of complicity (section 45 of the Criminal Code), incitement (section 47) or conspiracy (section 48) simply by buying or intending to buy a controlled drug from someone else. Since those who buy drugs often do so for personal use and not for any commercial purpose it would be incongruous to impose liability on them for trafficking in the drug. However, this provision does not prevent a person being convicted of complicity, incitement or conspiracy when the purchaser and seller have some further criminal object in view. Nor is there any impediment to a

conviction for trafficking on the ground that the purchaser acquired possession of the drug, or attempted to do so, with intent to sell. In this case the purchaser is directly liable for trafficking. The provision merely ensures that purchase alone does not make the buyer an accomplice in the vendor's crime.

Part 6.3 Manufacturing controlled drugs

This part contains offences of 'manufacturing' controlled drugs and 'precursors' and a range of associated offences, including offences of selling and possessing controlled precursors for manufacturing controlled drugs; possessing substances, equipment and instructions to manufacture controlled drugs; and supplying others with equipment and instructions etc to manufacture controlled drugs. Chapter 6 distinguishes the offences of trafficking and manufacturing, primarily to achieve clarity in defining the elements of each offence. However, the essential underlying structure of the trafficking and manufacturing offences are generally the same, requiring proof of commercial motivation to engage in the conduct.

Clause 606 Meaning of *manufacture*

This clause defines what is meant by 'manufacture' and who is to be taken 'to manufacture' for the purposes of the offences in this part. The first part of the clause defines 'manufacture' as any process by which a substance is produced, including the process of extracting or refining a substance and transforming a substance into a different substance. However, the cultivation of a plant is expressly excluded from the meaning of 'manufacture' because cultivation is the subject of a separate set of offences in part 6.4 of the Bill. This is similar to the position under the DDA and the corresponding definition of 'manufacture' in section 3 of that Act. However, in one respect the Bill's definition is more restrictive than the DDA provision, which includes packing and preparing drugs for sale within the notion of 'manufacturing' (see paragraphs 3(d) and (f) of the DDA definition). But since these activities are more closely associated with selling than manufacturing, they have been incorporated in the trafficking offences (see clause 603 and the definition of 'prepare' in clause 600).

The second part of the clause explains that a person is to be taken to manufacture a substance if the person engages in its manufacture, or exercises control or direction over its manufacture or provides finance or arranges for the provision of finance for its manufacture. Often those who are most directly involved in the process of manufacturing illegal drugs will be minor players in the unlawful enterprise. This provision ensures that offenders who distance themselves from the process and confine their activities to financing and arranging finance for the operation or organising, directing or controlling the enterprise will also be caught. This corresponds to subsection 161(4) of the DDA, which similarly extends the reach of the manufacturing offence in that Act. However, unlike subsection 161(4), the definition in this clause does not go so far as to impose liability on a person who simply permits manufacturing to occur or for his or her premises to be used for manufacturing. To the extent that the person's passive conduct amounts to complicity, incitement or conspiracy in the manufacturing offence of another, it will be caught by the offences in Part 2.4 of the Criminal Code. However, if the conduct does not amount to complicity etc, it is unlikely to be of sufficient gravity to deserve the very heavy penalties that the manufacturing offences apply.

Clause 607 Manufacturing controlled drug and controlled precursors for selling

This clause contains the chapter 6 offences relating to the manufacture of controlled drugs. The clause follows the general approach of the trafficking offences in clause 603 by providing for a range of offences that are graded in seriousness depending on the quantity of the drug involved.

The first of these offences appears in subclause 607(1). It provides that a person commits an offence if he or she manufactures a large commercial quantity of a controlled drug with the intention of selling any of the drug or believing that someone else intends to sell any of it. As noted above, what constitutes a 'large commercial quantity' of a controlled drug will be set out in the regulations to chapter 6. Similarly, what amounts to 'manufacturing' is defined in clause 606.

The maximum penalty for this offence is life imprisonment, whereas the manufacturing offence in section 161 of the DDA applies a maximum penalty of 10 years for any quantity of drug manufactured. However, an important difference between the two offences is that the Bill offence requires an additional element to be satisfied. Namely that the accused manufactured the drug with the intention of selling any of it or believing that someone else intends to sell any of it. It makes no difference that a part of the manufactured drug was intended for personal use rather than sale. If a large commercial quantity is produced with the intention of selling only some of it, this offence will apply. The offence will also apply to individuals who have no direct interest in the sale (eg paid employees) but nevertheless manufacture the drug believing that someone else intends to sell it or part of it. Since the liability of the defendant at the time of manufacture depends on a future state of affairs that may never eventuate, the fault element here is 'belief ' rather than knowledge.

As in the case of the relevant trafficking offences in clause 603, the manner of proving that the accused manufactured the controlled drugs to sell or in the belief that someone else would sell them (the commercial intent) is affected by the presumption in clause 608. This is discussed in more detail in the commentary to clauses 604 and 608.

Like a number of the trafficking offences in clause 603, subclause 607(2) and 607(4) also provide that absolute liability applies to the circumstance that the quantity manufactured was a 'large commercial quantity' or a 'commercial quantity', as the case may be. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to manufacture a 'large commercial quantity' etc of the drug concerned or that he or she had any other fault element with respect to the quantity of drug involved. However, clause 634 applies so that it is open to the court to convict the accused of a lesser offence if he or she proves on the balance of probabilities that he or she gave consideration to the quantity of drug he or she was manufacturing but was under a mistaken belief about the quantity of the drug involved. This issue is discussed in more detail in the commentary to clause 603.

The manufacturing offence in subclauses 607(3) and 607(5) are the same as the offence in subclause 607(1) except that the offence in subclause 607(3) applies where a 'commercial quantity' of a controlled drug is manufactured and the offence in subclause 607(5) applies to the manufacture of any quantity of controlled drug. The maximum penalty for these offences is imprisonment for 25 and 15 years respectively.

Clause 608 Manufacturing offence – presumption if trafficable quantity manufactured

This clause affects the manner of proving that the accused manufactured a controlled drug with the intention of selling any of it or believing that someone else intended to sell any of it. It provides that if the prosecution proves that the accused manufactured a 'trafficable' quantity of a controlled drug, it is presumed that the defendant had the relevant intention or belief about the sale of the drug required for the offence. The defendant can displace the presumption but to do so he or she must prove on the balance of probabilities that he or she did not in fact intend to sell the drug or have the required belief about sale. The matter is discussed in more detail in the commentary to clause 604.

Clause 609 Manufacturing controlled drug

This clause provides that a person commits an offence if the person manufactures a controlled drug. The maximum penalty is 10 years imprisonment or 1000 penalty units ($100,000) or both. It differs from the offences in clause 607 in that it applies to any quantity of controlled drug and does not require proof of an intention to sell the drug or a belief that someone else intends to sell it. It is sufficient that the person manufactures the drug. This is similar to the existing manufacturing offence in section 161 of the DDA, which also applies a maximum prison term of 10 years.

Clause 610 Selling controlled precursor for manufacture of controlled drug

This clause creates offences of selling 'controlled precursors' for the manufacture of controlled drugs. Controlled precursors will be prescribed in the regulations and are essentially the raw chemical materials that can be used to manufacture controlled drugs, particularly amphetamines. The offences in this clause are designed to catch individuals who engage in conduct preparatory to the manufacture of illicit drugs – those who supply the raw materials for manufacture but may have no interest or involvement in the manufacture.

Similarly to the offences of trafficking and manufacture, clause 610 provides for graded offences – large commercial quantity, commercial quantity and a base level (no quantity). Subclauses (1), (3) and (5) make it an offence to sell a controlled precursor believing that the person it is sold to, or someone else, intends to manufacture a controlled drug. The fault element is sale of the precursor with the belief that it will be used to manufacture a controlled drug. If the person has that belief it does not matter that the controlled drug is not manufactured in fact. Subclause (1) (large commercial quantity) applies a maximum penalty of 25 years imprisonment or 2500 penalty units ($250,000) or both. Subclause (3) (commercial quantity) applies a maximum penalty of 15 years imprisonment or 1500 penalty units ($150,000) or both and subclause (5) applies a maximum penalty of seven years imprisonment or 700 penalty units ($70,000) or both. A supplier of precursors is generally distant from the manufacturing of the drugs, but nonetheless involved, so a lesser penalty is appropriate

Also, like the trafficking and manufacturing offences, absolute liability applies to the circumstance that the quantity of controlled precursor sold was a 'large commercial quantity' or a 'commercial quantity'. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to sell a 'large commercial quantity' etc of the precursor or that he or she had any other fault element with respect to the quantity of precursor involved. However, clause 634 applies so that it is open to the court to convict

the accused of a lesser offence if he or she proves on the balance of probabilities that he or she had a mistaken belief about the quantity of the precursor involved. This issue is discussed in more detail in the commentary to clause 603.

Clause 611 Manufacturing controlled precursor for manufacture of controlled drug

This clause contains the chapter 6 offences relating to the manufacture of controlled precursors. The clause generally follows the approach of the trafficking and manufacturing offences in clauses 603 and 607 by providing for a range of offences that are graded in seriousness depending on the quantity of the precursor manufactured.

The first of these offences appears in subclause 611(1). It provides that a person commits an offence if he or she manufactures a "large commercial quantity" of a controlled precursor and does so (1) with the intention of manufacturing a controlled drug and (2) with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug. The maximum penalty for this offence is 25 years imprisonment, 2500 penalty units ($250,000) or both.

This offence is essentially a preparatory offence that operates as an adjunct to the law of attempt by imposing liability on those who intend to engage in the commercial manufacture (clause 607) and sale (clause 603) of controlled drugs but have not progressed beyond the preparatory stages of assembling the raw materials. MCCOC explained this offence in the following terms:

> Manufacture of a precursor with the intention of manufacturing a drug for sale requires proof that the defendant was involved in a planned sequence of conduct designed to produce and market controlled drugs. The offender is liable if the plan involved manufacture of a controlled drug for sale by any person. It is not necessary for the prosecution to prove that the offender, who undertook manufacture of the precursor and controlled drug, intended to sell it personally. Since the liability of the defendant at the time of manufacturing the precursor depends on a future state of affairs, which may never eventuate, the fault elements here are 'intention' and 'belief ' rather than 'knowledge' (p. 127)

Although this offence is preparatory in character, there is no impediment to a charge of attempting (section 44 of the Criminal Code) to manufacture a controlled precursor. As in other attempts, impossibility of success is no barrier to the conviction of individuals who try and fail for want of knowledge or skill.

The offence in subclause 611(3) is similar to the previous offence except that it is aimed at people who manufacture a controlled precursor to sell the precursor to someone else to manufacture into a controlled drug. It provides that a person commits an offence if the person manufactures a "large commercial quantity" of a controlled precursor (1) with the intention of selling any of the precursor to someone else and (2) in the belief that the other person intends to use the precursor to manufacture a controlled drug. As the relevant quantity for this offence is also a "large commercial quantity" the maximum penalty is the same as the maximum penalty for the offence in subsection 610(3), namely 25 years imprisonment or 2500 penalty units ($250,000) or both. Like the offence in subclause 610(1) this is also a preparatory offence but its aim is to impose liability for conduct preparatory to sale of a controlled precursor (clause 610).

The offences in subclauses 611(5) and 611(9) are similar to the offence in subclause 611(1) except that they apply respectively to a "commercial quantity" and any quantity of a controlled precursor. The maximum penalties that apply are 15 years imprisonment, 1500 penalty units ($150,000) or both, for the commercial quantity offence and

seven years imprisonment, 700 penalty units ($70,000) or both, for manufacturing any quantity of a controlled precursor. Similarly, the offences in subclauses 611(7) and 611(10) correspond to the offence in subclause 611(3) except that they apply respectively to a "commercial quantity" and any quantity of a controlled precursor. The maximum penalties that apply are 15 years imprisonment, 1500 penalty units ($150,000) or both, for the commercial quantity offence and seven years imprisonment, 700 penalty units ($70,000) or both, for manufacturing any quantity of a controlled precursor.

Like a number of offences referred to above, absolute liability applies to the circumstance that the quantity of manufactured controlled precursor was a 'large commercial quantity' or a 'commercial quantity' for the purposes of the offences in subclauses 611(1) to 611(7) inclusive. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to manufacture a 'large commercial quantity' etc of the controlled precursor or that he or she had any other fault element with respect to the quantity of precursor involved. However, clause 634 applies so that it is open to the court to convict the accused of a lesser offence if he or she proves on the balance of probabilities that he or she had a mistaken belief about the quantity of precursor manufactured. This issue is discussed in more detail in the commentary to clause 603.

Clause 612 Possessing controlled precursor

The offences in this clause are similar to the offences in subclauses 611(1), 611(5) and 611(9) except that they target those who 'possess' controlled precursors to manufacture them into controlled drugs for sale. For example, subclause 612(1) provides that a person commits an offence if he or she 'possesses' a 'large commercial quantity' of a controlled precursor and does so (1) with the intention of using any of it to manufacture a controlled drug and (2) with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug. The maximum penalty for this offence is 25 years imprisonment or 2500 penalty units ($250,000) or both. The offences in subclauses 612(3) and 62(5) are the same except that they respectively apply to the possession of a 'commercial quantity' and any quantity of a controlled precursor. The maximum penalties that apply are 15 years imprisonment, 1500 penalty units ($150,000) or both, for the commercial quantity offence and seven years imprisonment, 700 penalty units ($70,000) or both, for possession (to manufacture and sell) any quantity of a controlled precursor.

The term 'possession' is broadly defined in clause 600 to encompass those who have control of the precursors, though not the physical custody of them. But there must be proof of an intention to possess the precursors (section 22 of the Criminal Code) together with proof of intention to manufacture a controlled drug for sale. These offences are also preparatory offences that operate as an adjunct to the law of attempt by imposing liability on those who intend to engage in the commercial manufacture (clause 607) and sale (clause 603) of controlled drugs but have not progressed beyond the preparatory stages of assembling the raw materials. The focus of the offences is on the purposes and plans of the accused and the precursors in possession, in many cases, are no more than a tangible manifestation of those plans.

Like a number of offences referred to above, absolute liability applies to the circumstance that the quantity of manufactured precursor was a 'large commercial quantity' or a 'commercial quantity' for the purposes of the offences in subclauses 612(1) to 612(3) inclusive. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to possess a 'large commercial quantity' etc of the controlled precursor

or that he or she had any other fault element with respect to the quantity of precursor involved. However, clause 634 applies so that it is open to the court to convict the accused of a lesser offence if he or she proves on the balance of probabilities that he or she had a mistaken belief about the quantity of precursor he or she possessed. This issue is discussed in more detail in the commentary to clause 603.

Clause 613 Supplying substance, equipment or instructions for manufacturing controlled drug

The offences in this clause are directed at those who supply others with the raw materials, equipment or instructions to manufacture controlled drugs. Subclause 613(1) provides that a person commits an offence if the person supplies another with any substance, equipment or instructions for manufacturing controlled drugs, (1) believing that the other person intends to use the equipment etc to manufacture controlled drugs and (2) with the intention of selling the manufactured drug himself or herself or believing that the other person or someone else intends to sell the manufactured drug. The offence in subsection 613(2) is the same except that it applies to a person who possesses any substance, equipment or instructions to supply to others to manufacture controlled drugs for sale. The maximum penalty for both these offences is seven years imprisonment, 700 penalty units ($70,000) or both.

Although, these offences will apply in cases where the intention is for the recipient to ultimately sell the manufactured drugs, the major focus is on the entrepreneur who organises and supplies small backyard operations with the means to manufacture drugs so that they (the entrepreneurs) can sell them on the black market. For this reason the offences will apply whether the relevant materials and equipment etc are sold, given or loaned to the manufacturer (see the definition of supply in clause 600).

Clause 614 Possessing substance, equipment or instructions for manufacture of controlled drug

This clause extends liability to persons who engage in conduct preparatory to manufacture of a controlled drug by possessing a substance, equipment or instructions to manufacture controlled drugs. The clause provides that a person commits an offence if the person possesses any substance, equipment or instructions for manufacturing controlled drugs (1) with the intention of using it to manufacture a controlled drug and (2) with the intention of selling the manufactured drug or believing that someone else intends to do so. The maximum penalty is five years imprisonment, 500 penalty units ($50,000) or both.

The offence is restricted to possession with a view to sale of the products of manufacture. That is, the person must intend to use the substance, equipment etc to manufacture a controlled drug and to sell the product. A person can also commit the offence if he or she manufactures the drug believing that someone else intends to sell it.

The offence does not restrict the nature of the substance or equipment that might be possessed by a person to manufacture a controlled drug. Commonly the manufacture of drugs does not require sophisticated equipment or substances. However, the more common the equipment and substances, the more important it will be to produce other evidence to prove that the defendant possessed them to manufacture controlled drugs for sale.

Part 6.4 Cultivating controlled plants

This part contains the chapter 6 offences on cultivating controlled plants and includes a range of associated offences, such as selling controlled plants, possessing equipment, instructions and plants (for example, seeds) to cultivate controlled plants and supplying others with equipment and instructions etc to cultivate controlled plants. The cultivation offences generally follow the same structure as the trafficking and manufacturing offences. However, the important distinguishing feature is that the cultivation offences only apply to activities involving plants that are still growing or activities undertaken to grow plants (see the definition of 'controlled plant' in clause 600). As soon as the plants are harvested, the relevant offences for consideration are the trafficking offences and no longer the cultivation offences.

Clause 615 Meaning of *cultivate*

This clause contains important definitions for the cultivation offences in the part. The first two items in the clause define what is meant by 'cultivate' and who is to be taken to cultivate for the offences in the part. In addition to the usual meaning of 'cultivate' – preparing the soil and nurturing, tending to and growing a plant – the expression is defined in inclusive terms to also encompass 'guarding or concealing' a plant against interference or discovery (by humans or natural predators) and 'harvesting' a plant, including picking any part of the plant or separating any resin or other substance from the plant. This extended definition is intended to ensure that any activity that goes to the commercial cultivation of controlled plants, including the posting of guards to prevent theft etc, is caught by the cultivation offences.

The clause also provides that a person is to be taken to cultivate a controlled plant if the person engages in its cultivation, or exercises control or direction over its cultivation or provides finance or arranges for the provision of finance for its cultivation. Often those who are most directly involved in the growing process are the minor players in the unlawful enterprise. This provision ensures that offenders who distance themselves from the process and confine their activities to financing and arranging finance for the operation or organising, directing or controlling the enterprise will also be caught. This corresponds to subsection 162(4) of the DDA, which similarly extends the reach of the cultivating offences in that Act. However, unlike subsection 162(4), the definition in this clause does not go so far as to impose liability on a person who simply permits cultivation to occur or for his or her premises to be used for cultivation. To the extent that the person's passive conduct amounts to complicity, incitement or conspiracy in the cultivating offence of another, it will be caught by the offences in Part 2.4 of the Criminal Code. However, if the conduct does not amount to complicity etc, it is unlikely to be of sufficient gravity to deserve the very heavy penalties that the cultivating offences apply.

This clause also defines 'product of a plant' to include the seed of a plant, a part of a plant (whether live or dead) and a substance separated from the plant. The definition is particularly important to the offences in clause 616, which apply if a person cultivates controlled plants to sell them or any of their products. The definition is also relevant to clauses 620 and 621, which relate to the possession and supply (to others) of equipment, instructions, plants and products of a plant for the purposes of cultivating controlled plants.

Clause 616 Cultivating controlled plant for selling

This clause contains the cultivation offences of chapter 6. Like the DDA and the trafficking and manufacturing provisions above (clauses 603, 607 and 611), the seriousness of an offence in this clause primarily depends on the quantity of plants cultivated. However, in the case of the lower order offences (subclauses 616(5), 616(7) and 616(8)) a distinction is also made between cannabis and other kinds of controlled plants (such as opium). This is consistent with the DDA, which also makes a distinction between cultivating cannabis plants (for which lower maximum penalties apply) and other kinds of prohibited plants (see section 162 of the DDA).

The first of the cultivating offences appears in subclause 616(1). It provides that a person commits an offence if he or she cultivates 'a large commercial quantity' of a controlled plant with the intention of selling any of the plants or their products or believing that someone else intends to sell any of the plants or their products. What constitutes a 'controlled plant' and a 'large commercial quantity' of a controlled plant will be set out in the regulations to chapter 6 but in most instances the plants and quantities will be similar to those that are currently prescribed in the DDR.

As indicated in the commentary to clause 615, a person will be taken to cultivate a controlled plant if, together with the relevant fault elements, he or she plants the seed (seedling or cutting) of a controlled plant, transplants a controlled plant, nurtures, tends after or otherwise grows it, guards or conceals the plant or harvests it, which includes picking any part of it or separating any resin or other substance from it. The maximum penalty for this offence is life imprisonment, which is the same penalty for cultivating a comparable quantity of controlled plants under the DDA (see subsection 162(3)(a)).

The cultivation offence in subclause 616(3) is the same as the previous offence except that it applies where the number of controlled plants grown is a 'commercial quantity' but not a 'large commercial quantity'. The maximum penalty is 2500 penalty units, 25 years imprisonment or both, similar to the penalty for cultivating a comparable quantity under the DDA (see subparagraph 162(3)(b)(ii)).

Similar to the trafficking offences (clause 603), the remaining three offences in this clause make a distinction between cannabis and other kinds of controlled plants. The offence in subclause 616(5) concerns the cultivation of cannabis while subclause 603(7) applies to other controlled plants. Both offences apply a maximum penalty of 10 years imprisonment, 1000 penalty units ($100,000) or both, but subclause 616(5) only applies to the cultivation of a 'trafficable' quantity of cannabis plants whereas subclause 616(7) applies to the cultivation of any number of any other controlled plant. The offences in subclauses 616(5) and 616(7) correspond to the offences in subparagraphs 162(3)(c)(i) and 162(3)(c)(ii) respectively of the DDA. If a person cultivates less than a trafficable quantity of cannabis plants for sale, the offence in subclause 616(8) will apply for which the maximum penalty is three years imprisonment, 300 penalty units ($30,000) or both. This is similar to the offence in paragraph 162(1)(d) which applies a slightly lower maximum penalty two years imprisonment.

As in the case of the relevant trafficking and manufacturing offences in clauses 603 and 607, the manner of proving that the accused cultivated the controlled plants to sell or in the belief that someone else would sell them (the commercial intent) is affected by the presumption in clause 617. This is discussed in more detail in the commentary to clause 604 and 617. Also, like a number of the trafficking and manufacturing offences,

subclauses 616(2), 616(4) and 616(6) also provide that absolute liability applies to the circumstance that the number of plants cultivated was a 'large commercial quantity' or a 'commercial quantity' or a 'trafficable quantity', as the case may be. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to cultivate a 'large commercial quantity' etc of the plant concerned or that he or she had any other fault element with respect to the amount involved. However, clause 634 applies so that it is open to the court to convict the accused of a lesser offence if he or she proves on the balance of probabilities that he or she had a mistaken belief about the number of plants involved. This issue is discussed in more detail in the commentary to clause 603.

Clause 617 Cultivating offence – presumption if trafficable quantity cultivated

This clause affects the manner of proving that the accused cultivated a controlled plant with the intention of selling any of it (or its products) or believing that someone else intended to sell any of it (or its products). It provides that if the prosecution proves that the accused cultivated a 'trafficable' quantity of a controlled plant, it is presumed that the defendant had the relevant intention or belief about the sale of the plant required for offence. The defendant can displace the presumption but to do so he or she must prove on the balance of probabilities that he or she did not in fact intend to sell the plant (or its products) or have the required belief about sale. The matter is discussed in more detail in the commentary to clause 604.

Clause 618 Cultivating controlled plant

This clause will replace the offence in subsection 162(2) of the DDA. It provides that a person commits an offence if the person cultivates any quantity of a controlled plant that is not cannabis (such as opium), three or more cannabis plants, or one or two 'artificially cultivated' cannabis plants. The term 'artificially cultivate' is defined as 'hydroponically cultivate or cultivate with the application of an artificial source of light or heat'. The person need not cultivate the plant to sell or supply to someone else. It is sufficient if he or she cultivates the plant for personal use. It is important to note that an 'artificially cultivated' cannabis plant is still a cannabis plant under the Bill so that if a person artificially grows three or more cannabis plants, the conduct is caught by paragraph 618(2)(a) of this offence. The maximum penalty for these offences is two years imprisonment or 200 penalty units or both.

Currently under subsection 162(2) of the DDA, a person who cultivates five or less cannabis plants for personal use is liable to a maximum penalty of not more than one penalty unit ($100). Also if the police serve a notice on the offender and the fine ($100) is paid within 60 days a conviction is not recorded and no further action is taken on the matter. The DDA offence and the associated notice scheme are commonly referred to as SCONS, the 'simple cannabis offence notice scheme'.

One effect of this provision is that it will reduce the number of cannabis plants covered by SCONS from five to two (provided they are naturally grown) and treat hydroponically grown cannabis plants on the same basis as any other controlled plant grown for personal use (see the proposed consequential amendments in part 1.3 of the Bill to sections 162 and 171A of the DDA). This is warranted because the current amount of five plants is considered to far exceed an individual's reasonable requirements for personal use, which gives rise to a serious danger that home grown cannabis will be redirected for sale on the street. This is particularly a problem with hydroponically cultivated plants because they

are generally much larger, have a higher concentration of THC and are capable of yielding up to five crops of cannabis per year.

Clause 619 Selling controlled plant

It is important to note that the offences in this clause are limited to growing plants. Once the plant is cut or is otherwise no longer growing, the sale of the plant is covered by the trafficking offences in clause 603 and not by the offences in this clause. The offences follow the same general tiered approach as the trafficking, manufacturing and cultivating offences but like the trafficking and cultivating offences, a distinction is also made in relation to the lower order offences (subclauses 619(5), 619(7) and 619(8)) between cannabis and other kinds of controlled plants.

Subclause 619(1) provides that a person commits an offence if he or she sells 'a large commercial quantity' of a controlled plant. The maximum penalty is life imprisonment, which is the same as the maximum penalty for selling a comparable quantity of controlled plants under the DDA (see subsection 164(2)(a) and 165(1)(a)). Unlike manufacturing and trafficking in controlled drugs, liability for the offences in this clause is based on the number of plants, rather than their weight. The offences can be committed at any stage in the life of the growing plant, from seedling to a fully mature plant.

The offence in subclause 619(3) is the same as the previous offence except that it applies where the number of controlled plants sold is a 'commercial quantity' but not a 'large commercial quantity'. The maximum penalty is 25 years imprisonment, 2500 penalty units ($250,000) or both, which corresponds to the penalty for the similar offence in paragraph 164(2)(b) of the DDA.

The remaining offences in this clause follow the same approach as the trafficking and cultivation offences, with a distinction between cannabis and other kinds of controlled plants. The offence in subclause 619(5) relates to cannabis plants and subclause 619(7) applies to other controlled plants. Both offences apply a maximum penalty of 10 years imprisonment, 1000 penalty units ($100,000) or both, but subclause 619(5) only applies if the offender sells a 'trafficable' quantity of cannabis plants whereas subclause 619(7) applies to the sale of any number of any other controlled plant. The offences in subclauses 619(5) and 619(7) correspond to the offences in subparagraphs 164(2)(d), 164(3)(d) and 165(1)(b) respectively of the DDA.

If a person sells less than a trafficable quantity of cannabis plants, the offence in subclause 619(8) will apply for which the maximum penalty is three years imprisonment, 300 penalty units ($30,000) or both. This is similar to the offence in paragraph 162(1)(d) which applies a slightly lower maximum penalty two years imprisonment.

As in the case of a number of the trafficking, manufacturing and cultivating offences, subclauses 619(2), 619(4) and 619(6) provide that absolute liability applies to the circumstance that the number of plants sold was a 'large commercial quantity' or a 'commercial quantity' or a 'trafficable quantity', as the case may be. In other words, it is not necessary for the prosecution to prove that the defendant knew or intended to sell a 'large commercial quantity' etc of the plant concerned or that he or she had any other fault element with respect to the amount involved. However, clause 634 applies so that it is open to the court to convict the accused of a lesser offence if he or she proves on the balance of probabilities that he or she had a mistaken belief about the number of plants sold. This issue is discussed in more detail in the commentary to clause 603.

Clause 620 Supplying plant material, equipment or instructions for cultivating controlled plant

The offences in this clause are similar to the offences in clause 613, except that they apply to cultivation and not manufacturing. The offences are primarily directed at those who supply others with the raw materials, equipment (eg hydroponic systems) or instructions to cultivate controlled plants. Subclause 620(1) provides that a person commits an offence if the person supplies another with a controlled plant (or product of a plant) or any equipment or instructions for cultivating controlled plants, (1) believing that the other person intends to use the equipment etc to cultivate controlled plants and (2) with the intention of selling the controlled plants himself or herself or believing that the other person or someone else intends to sell the controlled plants. The offence in subsection 620(2) is the same except that it applies to a person who possesses any controlled plant, equipment or instructions to supply to others to cultivate controlled plants for sale. The maximum penalty for both these offences is seven years imprisonment, 700 penalty units ($70,000) or both.

Although, these offences will apply in cases where the intention is for the recipient to ultimately sell the manufactured drugs, the major focus is on the entrepreneur who organises and supplies small backyard operations with the means to cultivate controlled plants so that they (the entrepreneurs) can sell them on the black market. For this reason the offences will apply whether the relevant materials and equipment etc are sold, given or loaned to the grower (see the definition of supply in clause 600).

Clause 621 Possessing plant material, equipment or instructions for cultivating controlled plants

The offence in this clause is similar to the offence in clause 614, except that it applies to cultivation and not manufacturing. Essentially this offence extends liability to persons who engage in conduct preparatory to cultivating a controlled plant by possessing a controlled plant (or plant product) or any equipment (eg hydroponic systems) or instructions for the cultivation of controlled plants. The clause provides that a person commits an offence if the person possesses any controlled plant, equipment or instructions for the cultivation of controlled plants, (1) with the intention of using it to cultivate a controlled plant and (2) with the intention of selling the cultivated plant (or plant products) or believing that someone else intends to do so. The maximum penalty is five years imprisonment, 500 penalty units ($50,000) or both.

The offence is restricted to possession with a view to sale of the cultivated plants. That is, the person must intend to use the equipment etc to cultivate a controlled plant and to sell it or its products. A person can also commit the offence if he or she cultivates the plant believing that someone else intends to sell it.

The offence does not restrict the nature of the equipment etc that might be possessed by a person to cultivate a controlled plant. More recently growers have been making use of hydroponic systems to cultivate cannabis and such systems would clearly qualify for the purposes of this offence. However, the more common the equipment etc, the more important it will be to produce other evidence to prove that the defendant possessed them to cultivate a controlled plant for sale.

Part 6.5 Drug offences involving children

The offences in this part are intended to supplement the general trafficking offences, imposing higher penalties on those who exploit children for profit. Like the DDA, this part includes offences that will apply higher penalties for the supply of drugs to children. However, the part will also add two new sets of offences directed at those who recruit children to traffick in the drug trade (clauses 622 and 624). A child for the following provisions is defined in the dictionary of the *Legislation Act 2001* as a person under the age of 18 years of age.

Clause 622 Supplying controlled drug to child for selling

This clause contains two offences aimed specifically at criminal entrepreneurs who employ children to distribute drugs. The first offence in subclause 622(1) applies if a person supplies a 'commercial quantity' of a controlled drug to a child or possesses a 'commercial quantity' of a controlled drug to supply to a child and the person does so believing that the child intends to sell any of the drug. The maximum penalty is life imprisonment. The offence in subclause 622(3) is the same, except that it applies to any quantity of a controlled drug supplied or possessed for supply to a child for sale and the maximum penalty is 25 years imprisonment, 2500 penalty units ($250,000) or both.

Importantly, the offences in this clause are not limited to 'selling' drugs to children but also apply to gratuitous transfers of drugs (see the definition of 'supply' in clause 600). Also, it is not necessary to show that the offender stood to gain any of the proceeds of the child's sale of the drugs. Any act of supply to a child falls within the scope of these offences provided that the offender believes that the child intends to sell the drug or any part of it. Further, it is not necessary to prove that the offender intended the child to sell. The offence is committed even though the supplier may have no interest in any subsequent sale. Also, since "belief " rather than knowledge is required, liability can be imposed even in cases where the child had no intention to sell in fact.

Subclause 622(2) applies absolute liability to two elements of the offence in subclause 622(1). Paragraph 622(2)(a), is similar to a number of absolute liability provisions that have been discussed in relation to the trafficking, manufacturing and cultivating offences. It provides that absolute liability applies to the circumstance that the quantity of drugs supplied (or possessed for supply) to the child was a 'commercial quantity'. That is, it is not necessary for the prosecution to prove that the defendant knew or intended to supply etc a 'commercial quantity' of the drug to the child or that he or she had any other fault element with respect to the amount involved. However, clause 634 applies so that it is open to the court to convict the accused of the lesser offence in subclause 622(3) if he or she proves on the balance of probabilities that he or she had a mistaken belief about the quantity of drugs supplied (or possessed for supply). This issue is discussed in more detail in the commentary to clause 603.

Paragraph 622(2)(b) also applies absolute liability to the circumstance that the person to whom the controlled drug was supplied (or for whom the controlled drug was possessed for supply) was a child. That is, it is not necessary for the prosecution to prove that the defendant knew that he or she was supplying (or intended to supply) a child or that he or she had any other fault element with respect to the age of the person he or she was supplying. Of course the prosecution will still have to prove that the person the accused supplied etc was in fact a child. Also, it is important to read this provision in conjunction with subclause 622(5), which provides that it is a defence to the offences in this clause if

the defendant proves on the balance of probabilities (the legal burden) that he or she considered whether or not the person he or she supplied (or intended to supply) was a child and had no reasonable grounds for believing that the person was a child. If the defendant gives the matter no consideration at all the defence is not available. Subclause 622(4) also applies absolute liability to this matter in relation to the offence in subclause 622(3).

The application of absolute liability in paragraph 622(2)(b) and the reversal of the onus of proof in subclause 622(5) are justified given the mischief that these offences are intended to protect against. Dealers do most harm when they supply to children engaged in early experimental use. A dealer who is prepared to sell or supply indiscriminately to strangers is particularly likely to supply children and new or experimental users. It is consistent with the policy of severe punishment for those who encourage new or experimental users to enact provisions that make supply or other unlawful activity involving children particularly perilous. Also people who supply controlled drugs to others or who supply controlled drugs for sale, are already engaged in illegal conduct of a serious nature. In such circumstances it is not inappropriate to cast a heavier burden on potential offenders to ensure that the vulnerable do not fall victim to their criminality.

As in the case of the relevant trafficking, manufacturing and cultivation offences in clauses 603, 607 and 616, the manner of proving that the accused had the belief (referred to in paragraph 622(1)(b)) that the child intended to sell the drugs supplied etc (the commercial intent) is affected by the presumption in clause 623. This is discussed in more detail in the commentary to clause 604 and 623.

Clause 623 Supplying offence – presumption if trafficable quantity supplied

This clause effects the manner of proving that the accused supplied controlled drugs or possessed controlled drugs for supply, to a child, believing that the child intended to sell the drugs. It provides that if the prosecution proves that the accused supplied (or possessed for supply) a 'trafficable' quantity of the controlled drug, it is presumed that the defendant had the relevant belief about the child's intention to sell the drug. The defendant can displace the presumption but to do so he or she must prove on the balance of probabilities that he or she did not in fact believe that the child intended to sell the drug. The matter is discussed in more detail in the commentary to clause 604.

Subclause 623(2) provides an important exception to the application of the presumption in subclause 623(1). In certain circumstances clause 629 allows the quantities of a number of transactions to be added together where the offence concerned is a general trafficking offence (clause 603) or an offence of supplying controlled drugs to children (clause 622 and 625). In such cases if, for example, there are a series of transactions, each involving less than a 'commercial quantity' but together involving more than a 'commercial quantity', the prosecution can charge the person with a single offence for the combined quantity of drugs involved (a commercial quantity). However, subclause 623(2) makes it clear that clause 629 cannot be relied upon to invoke the 'commercial intent' presumption in subclause 623(1) unless each transaction that is relied upon involves a trafficable quantity. This exclusion is justified because a person who is caught in possession of small quantities on several occasions is more likely to be a user than a person engaged in trafficking and that being so it would not be appropriate to apply the presumption in such cases.

Clause 624 Procuring child to traffic in controlled drug

Like the preceding offence provision, the offences in this clause of procuring a child to traffic in controlled drugs, are directed at individuals who involve children in drug trafficking. The first of the offences appears in subclause 624(1). It provides that a person commits an offence if the person 'procures' a child to traffic in a 'commercial quantity' of a controlled drug. What amounts to a 'commercial quantity' of a controlled drug will be set out in the regulations to chapter 6, however, it is relevant to consider subclause 624(3) in this context because it provides that the offence in subclause 624(1) will apply whether the child was procured to traffic in a commercial quantity on a single occasion or over a period of time. So, for example, an offender who recruits a child to sell a commercial quantity of a controlled drug will be guilty of this offence whether the sale involved a single parcel of the drug on a single occasion or repeated transactions involving a commercial quantity in total. The maximum penalty for this offence is life imprisonment.

The offence in subclause 624(4) is a less serious version of the preceding offence, because it applies to cases where a child is procured to traffic in any quantity less than a commercial quantity of a controlled drug. The maximum penalty is set accordingly lower at 25 years imprisonment, 2500 penalty units ($250,000) or both. Also, since this offence applies regardless of the quantity of controlled drug involved, subclause 624(3) has no application.

Generally speaking, a person will be taken to 'procure' another to engage in conduct if the person employs, uses or otherwise induces the other to engage in the conduct. Since the prohibitions in this clause are directed against those who 'procure a child to traffic', subclause 624(7) has been inserted to give an extended meaning to that term so that it correlates to the activities that fall within the general meaning of "trafficking" in clause 602. Accordingly, for the offences in this clause a person will be taken to procure a child to traffic in controlled drugs if the person procures a child to sell the drugs, guard, conceal or transport drugs intended for sale and 'prepare' or package drugs for supply (see in this context the definition of prepare in clause 600). Therefore, any person who employs, uses or induces a child to engage in these activities will be taken to 'procure the child to traffic'.

Subclause 624(2) is similar to subclause 622(2) above, in that it applies absolute liability to two elements of the offence in subclause 624(1). Namely, it applies absolute liability to the circumstance that the quantity of drugs for which the child is procured to traffic is a 'commercial quantity' and the circumstance that the person procured is a child. Subclauses 624(5) and 624(6) are also related to these matters and correspond to subclauses 622(4) and 622(5). These provisions are discussed in detail in the commentary to clause 622.

Clause 625 Supplying controlled drugs to child

This clause contains three offences relating to the supply of drugs to children and completes the package of offences in chapter 6 that are specifically designed for the protection of children. The first offence in subclause 625(1) applies to all controlled drugs except cannabis and the remaining two offences only apply to cannabis for which lower maximum penalties apply. The sale and supply offences in the DDA also make a distinction between cannabis (for which lower maximum penalties apply) and other kinds of prohibited substances (compare sections 164 and 165 of the DDA).

The first offence appears in subclause 620(1). It provides that a person commits an offence if the person supplies a controlled drug, other than cannabis, to a child or possesses a

controlled drug, other than cannabis, for supply to a child. What constitutes a 'controlled drug' will be set out in the regulations to chapter 6 but in many instances the substances will be similar to those that are currently prescribed in the DDR. The offence is not limited by quantity so that any amount of a controlled drug (other than cannabis) that is supplied to a child will be caught. Also the offence is not limited to the sale of drugs to children and will apply equally to cases where a person gives a gift of drugs to a child (see the definition of 'supply' in clause 600). The maximum penalty for this offence is 20 years imprisonment, 2000 penalty units ($200,000) or both. This is five years less than the maximum penalty that applies for the supply of drugs (other than cannabis) to a child under the DDA (see subsections 164(2)(c) and 164(3)(c)). However, the maximum penalty of 25 years imprisonment in the DDA is intended to cover the worst cases of supplying drugs to children, which would generally be those cases where a person supplies drugs to children to involve them in trafficking. Since this is already covered in clauses 622 and 624, the slight reduction of the maximum penalty for this offence is considered appropriate.

The offence in subclause 625(2) applies where a person supplies a 'trafficable quantity' of cannabis to a child or possesses a 'trafficable quantity' of cannabis for supply to a child. Again, what amounts to a 'trafficable quantity' of cannabis will be set out in the regulations to chapter 6. Also, the offence applies whether the cannabis is sold or given as a gift to a child. The maximum penalty is 10 years imprisonment, 1000 penalty units ($100,000) or both, which is the same as the maximum penalty that applies for supplying a trafficable quantity of cannabis under paragraph 165(1)(b) of the DDA. The offence in subclause 625(4) is the same except that it applies to the supply (or intended supply) of any amount of cannabis to a child and imposes a lesser maximum penalty of five years imprisonment, 500 penalty units ($50,000) or both, which is the same as the maximum prison penalty that applies in the DDA for supplying (and intending to supply) less than a trafficable quantity of cannabis to a child (paragraph 165(1)(c) of the DDA).

Subclauses 625(3) and 625(5) are similar to subclause 622(2) above, in that they apply absolute liability to two elements of the offences in this clause. Namely, they apply absolute liability to the circumstance that the quantity of cannabis supplied to a child is a 'trafficable quantity' (relevant to subclause 625(2)) and the circumstance that the person procured is a child (relevant to all the offences in this clause). Subclauses 625(5) and 625(6) are also related to these matters and correspond to subclauses 622(4) and 622(5). These provisions are discussed in detail in the commentary to clause 622.

Clause 626 Children not criminally responsible for offences against pt 6.5

This clause excludes children from liability for the offences of this part. The part is directed at adults who exploit children for the purpose of trafficking. While a child who supplies to another child or who procures another child to engage in trafficking is not liable to conviction for these offences, those above the age of criminal responsibility (10 years of age) remain liable for the offences in other parts. For example, a child who sells to another, or who engages in other trafficking activities will be liable for trafficking under clause 603. However, dealing between children does not attract the exceptional penalties that the offences in this part will impose.

Part 6.6 General provisions for drug offences
Clause 627 Application of pt 6.6

This clause explains that the provisions in this part apply to all the offences in chapter 6, except the offences in part 6.7 (offences relating to property derived from drug offences). This part provides for the aggregation of drug quantities for the respective offences in the chapter; a provision to clarify what the prosecution must establish about the defendant's awareness of the identity of the substance or plant involved in an offence; and alternative verdict provisions.

Clause 628 Carrying on business of trafficking

Although the seizure of a large quantity of drugs is cogent evidence that the offender is a major dealer in the drug trade, the seizure of a small quantity does not necessarily mean that the offender is a minor player. Often dealers will conduct a series of transactions, each involving relatively small amounts of drugs. However, depending on the extent of the offender's activities, the total amount of drugs traded over a short space of time can be very large. Accordingly, the purpose of this clause and clauses 629, 630 and 631 (the aggregation provisions) is to allow prosecutions for the more serious offences based on evidence of a course of conduct that, in total, involves a large amount of drugs.

This clause only operates with respect to the offences specified in subclause 628(1). That is, the offences in subclauses 603(1) and 603(3), which concern trafficking in 'a large commercial quantity' and 'a commercial quantity' of controlled drugs; subclause 603(5), which concerns trafficking in 'a trafficable quantity' of cannabis and subclause 622(1), which concerns supplying 'a commercial quantity' of controlled drugs to a child for selling.

Subclause 628(3) is the central provision in this clause. Essentially, it provides that if the prosecution establishes that a person carried on a trafficking business in controlled drugs, the quantity of drugs required for the offences specified in subclause 628(1) can be proved by totaling the amount of drugs trafficked over a series of transactions during the course of the business. That is, rather than proving that the required quantity was trafficked on a particular occasion, this clause allows the series of conduct to be alleged as one offence and the quantity for that offence to be proved by adding the amounts of drugs trafficked over the course of the alleged trafficking business. Further, it is not necessary for the prosecution to establish the exact date of each transaction or the quantity of drugs involved in each transaction (628(5)(a)), though, the total quantity must equal or exceed the amount required for the offence. However, it is important to note that (subject to the restrictions set out in subclauses 628(7) and 628(5)(b) – see below) aggregating the conduct and quantities in this way is optional, at the discretion of the prosecution and that the prosecution can choose instead to charge the defendant with separate offences for each alleged transaction (subclause 628(8)).

To prove that the accused was carrying on a trafficking business the prosecution must satisfy the trier of fact, beyond a reasonable doubt, that the defendant's conduct establishes that he or she was engaged in an organised commercial activity involving repeated transactions (subclause 628(4)). Essentially this will involve a consideration of the scale of the defendant's operations, the repetition of his or her transactions, the degree of organisation and all the other similar hallmarks of a business that common sense suggests.

The clause includes some important safeguards. First, if the prosecution relies on this clause, the presumptions as to quantity in clauses 604 and 623 do not apply ((628(5)(c)). Also the prosecution must give the defence fair warning of its intention to rely on this clause by saying so in the charge. The prosecution must also provide the defendant with a description (either in the charge or within a reasonable time before the trial) of the conduct that it alleges establishes under this clause that the defendant trafficked in the relevant quantity of drugs required for the offence charged (subclause 628(6)). Further, as there are possible double jeopardy implications, paragraph 628(5)(b) makes it clear that the prosecution cannot include a transaction in the calculation for which the accused has already been tried and found guilty or acquitted. Conversely, if the accused has been put on trial and found guilty or acquitted in proceedings in which this clause was relied on he or she cannot be charged with another chapter 6 offence allegedly committed in connection with any of the aggregated transactions relied on in those proceedings (subclause 628(7)).

Clause 629 Single offence for trafficking etc on different occasions

This clause operates as an alternative to clause 628 above. Both clauses allow for the aggregation of a series of transactions (on different occasions) into a single offence, however, this clause is designed for the frequent small transactions conducted over a short period of time, whereas clause 628 is aimed at discernible patterns of business activities conducted over a period that could extend to years of commercial dealing. Although it is not necessary for this provision to establish that the accused was conducting a trafficking business, each transaction that is relied upon must be proved beyond a reasonable doubt. By contrast, liability for engaging in the business of trafficking in clause 628 does not require proof of any particular transaction.

This clause only operates with respect to offences that involve trafficking in controlled drugs and supplying controlled drugs to a child on different occasions (629(1)). Subclauses 629(2) and 629(3) are the central provisions in this clause. Together they provide that a person may be charged with a single offence for trafficking etc on a number of occasions and the relevant quantity of drugs for the alleged single offence is the total quantity of drugs trafficked on each occasion. Although there is no restriction on the number of transactions or total period of time over which the transactions can be aggregated, the clause is limited by the requirement that no more than seven days can elapse between successive transactions (see subclauses 629(3)). The provision allows for the aggregation of the same or different kinds of drugs (subclause 629(1)), however, the same parcel of controlled drugs cannot be counted more than once (subclause 629(4)) and also clause 631 applies (see below). If the prosecution intends to rely on this clause, the charge must specify particulars of all the occasions relied on to establish the single offence (subclause 629(5)). Like the previous clause, subclause 629(6) makes it clear that the prosecution is not obliged to use this provision and that it can choose instead to charge the defendant with separate offences for each alleged transaction.

Clause 630 Single offence for different parcels trafficked etc on the same occasion

Clause 629 allows for a single offence to be charged (and for the quantity of drugs involved to be aggregated) in cases where the trafficking or supply occurs on different occasions. This clause, on the other hand, allows for a single offence to be charged where different parcels of controlled drugs, precursors or plants are involved in conduct that occurs on the same occasion. For example, where a dealer or courier is found in possession of a number of separate parcels of drugs etc with the intention of trafficking in the drug or where separate parcels are sold on a particular occasion to one or more buyers.

This clause applies to the wide range of chapter 6 offences outlined in subclause 630(1), including offences of trafficking, manufacturing, cultivating or supplying etc different parcels of controlled drugs, precursors, or plants on the same occasion.

Subclauses 630(2) and 630(3) are the central provisions in this clause. Together they provide that a person may be charged with a single offence in relation to two or more different parcels of controlled drugs, precursors or plants and the relevant quantity of drugs, etc for the alleged single offence is the total quantity in the different parcels. Like clause 629, this clause allows for the aggregation of the same or different kinds of drugs (subclause 630(1)), however, if there are different kinds of drugs etc in the parcels, clause 631 applies (see below). If the prosecution intends to rely on this clause, the charge must specify particulars of each parcel of controlled drugs etc relied on to establish the single offence (subclause 630(5)). Also subclause 630(6) makes it clear that the prosecution is not obliged to use this provision and that it can choose instead to charge the defendant with separate offences for each parcel of controlled drug, precursor or plant.

Clause 631 Single offence – working out quantities if different kinds of drug etc involved

Clause 630 allows aggregation of different parcels of drugs sold on the same occasion so as to make one offence. This clause is similar, except that it deals with mixtures, rather than separate parcels. A "single offence... consisting of ...trafficking in two or more kinds of controlled drug" occurs, when for example, an offender is caught in possession of a mixture of cocaine and heroin with intent to sell. As in clause 629, the provision allows the different drugs to be totalled in order to determine whether the more serious grades of offence can be charged.

The formula that this clause provides for aggregating the drug etc content in a mixture applies to the wide range of chapter 6 offences specified in subclause 631(1), including offences of trafficking, manufacturing and cultivating, controlled drugs, precursors and plants. Effectively, this clause allows the prosecution an alternative method for establishing that a seized substance etc amounted to a 'trafficable', 'commercial' or 'large commercial quantity'. It may opt to present its case according to the measure that results in the highest or most serious grade of the offence concerned.

Subclauses 631(2) to (3) set out the rules for aggregating different substances and plants under this clause. They provide that the quantity of controlled drug, plant or precursor is a trafficable, commercial or large commercial quantity if the total of the required fractions of trafficable quantity etc of each of the drugs etc is one or more. The required fraction is the trafficable quantity etc of the actual quantity of drug etc divided by the smallest trafficable quantity etc of the drug, plant or precursor (subclause (3)). However, the required fraction of a controlled drug must be worked out according to the pure form of the quantities of drug (subclause (4)). The required fraction is zero if the regulations do not prescribe the quantity of the controlled drug, do not prescribe for the controlled drug in its pure form, or prescribe different forms of the controlled drug by reference to the percentage of a particular substance in the drug (subclause (4)). The effect of this clause and the aggregation provisions generally is well explained by MCCOC in the following passage taken from its chapter 6 report:-

> [T]his chapter provides alternative methods of determining whether the offence involves trafficable or commercial quantities. The prosecution is entitled to present its case on the measure, which will result in the highest or most serious classification of the crime committed by the defendant.

- It is open to the prosecution to proceed on exactly the same basis as it would if there was a single prohibited drug mixed with a harmless diluent. In that case, trafficable and commercial quantities are determined by reference to [the quantities specified in] the Regulations.

- In the alternative, the component drugs in the sample are aggregated in accordance with the [clause 626] formula.

Suppose the question is whether the accused has sold a commercial quantity of a substance consisting of heroin amphetamines and a diluent such as lactose. Suppose further that there is not a commercial quantity of diluted heroin or diluted amphetamines, considered separately. The next step is to determine the pure quantities of each of the drugs in the mixture. Suppose, once again, that there is not a commercial quantity of either drug, considered separately. At this point the investigator can invoke the aggregation formula.

Though the quantity of each of the component drugs amounts to no more than a fraction of the commercial quantity for that drug, the formula allows the fractions to be totalled. If the total of the fractions is 1.0 or more, it follows that the offender has dealt with a commercial quantity of a controlled drug. The method is consistent with the practice, throughout the Chapter, of defining offences by reference to the generic term, 'controlled drug' or 'controlled substance', rather than by reference to particular drugs. Trafficking in a commercial quantity of a controlled drug will accordingly cover the case of an individual who traffics in half a commercial quantity of heroin mixed with half a commercial quantity of amphetamines. The same formula can be employed to determine whether or not the offender was engaged in an offence involving a large commercial quantity.

Recourse to the aggregation formula will only be necessary when the accused is suspected of trafficking in drug mixtures containing a relatively high proportion of the controlled drug. When the pure drug content of the sample is low, the weight of diluents in the sample will usually take the sample into the commercial quantity categories without recourse to aggregation. (p. 203)

Clause 632 Knowledge or recklessness about identity of drugs, plants and precursors

This clause applies to all the offences in chapter 6. It provides that where a person is prosecuted under this chapter for conduct relating to a controlled drug (including cannabis), a controlled plant (including a cannabis plant) or controlled precursor, the prosecution must prove that the defendant knew or was reckless about whether the substance or plant was a controlled drug, plant or precursor of some kind. However, it does not have to prove that the defendant knew or was reckless about the particular drug, plant or precursor involved.

Often offenders will know that they are dealing with a controlled drug, plant or precursor of some kind but have no idea of the actual drug or substance involved. A courier, for instance, may not care what the particular drug is that he or she is transporting or may have been deliberately misled about its true identity. If applied strictly section 22 of the Criminal Code could be taken to mean that for all the offences in chapter 6 the prosecution must prove that the defendant knew or was reckless about the fact that he or she was dealing in the particular substance or plant involved in the offence. However, this clause ensures that offenders who know that they are dealing with a controlled substance or plant, or take the risk that they are doing so, cannot escape liability on the ground that they did not know or suspect that they were dealing with the particular drug involved in the offence. In other words, ignorance of the particular identity of the drug etc is no excuse. It is important, however, to read this clause with clause 633, which allows the accused a

qualified defence in cases where he or she made a genuine mistake about the identity of the drug etc involved in his or her offence.

Clause 633 Alternative verdicts – mistake about identity of controlled plant, drug or precursor

This clause applies to all the offences in chapter 6 and allows the accused a qualified defence that will permit the court to convict him or her of a lesser offence if the accused proves on the balance of probabilities that he or she had a mistaken belief about the identity of the actual substance or plant involved. As indicated in the discussion on clause 632, a situation will commonly arise where the offender is aware that he or she is dealing with a controlled substance or plant but is mistaken about the identity of the actual drug involved. This can happen for a number of reasons but in some cases it may be because the offender was deliberately misled about the true identity of the drug. In such cases if the substance involved was heroin, for example and the offender genuinely believed it was cannabis or a cannabis product, the possible difference in penalty is understandably significant. Accordingly it is considered appropriate to allow a qualified defence in cases where there is a genuine mistake, however, it is important to bear in mind the following passage from the chapter 6 report on this issue:

> [clause 633] has the effect of a confession and partial avoidance or mitigation, of guilt. It is of little, if any, use to an offender who denies liability for a serious drug crime. The offender has to concede guilt to take advantage of the provisions. Moreover the accused bears the burden of satisfying the trier of fact that a mistake was made. When it applies, the effect of the provision is to reduce liability to a lesser grade of the same offence. The offender cannot escape liability altogether by relying on [clause 633] (p. 211)

In order for the defence to apply the trier of fact must be satisifed that at the time of the relevant conduct the defendant considered the identity of the drug involved but was under a mistaken belief about its true identity and if the defendant's mistaken belief had been correct, he or she would have committed another (alternative) offence under chapter 6 or part 10 of the DDA for which the maximum penalty is the same or less than the maximum penalty for the offence for which the defendant was charged (subclause 633(1). If the trier of fact is satisified of those matters and that the defendant committed the alternative offence, it may return a verdict of guilty for the alternative offence, provided that the defendant is given procedural fairness with respect to that offence (subclause 633(2)).

As indicated above, the defendant bears the burden of proving the elements of the defence enumerated in subclause 633(1) on the balance of probabilities (the legal burden – see subclause 633(3)). As MCCOC explained in the chapter 6 report, the reason for requiring the accused to prove innocence in this context is that the existence of a mistake as to the identity of the drug will almost always be a matter peculiarly within the knowledge of the accused (pp. 213-15).

Clause 634 Alternative verdicts – mistake about quantity of controlled plant or drug

This clause has been added in accordance with MCCOC's revised chapter 6 recommendations delivered to and endorsed by SCAG in November 2003. The clause is similar to clause 633 except that it applies where the accused makes a genuine mistake about the quantity of the drugs involved in his or her offence. That is, the clause allows the defendant a qualified defence that will permit the court to convict him or her of a lesser offence if the accused proves on the balance of probabilities that at the time of the relevant

conduct the defendant considered the quantity of the substance or plant involved in the offence but was under a mistaken belief about the true quantity. See the commentary on clauses 603 and 633 for further discussion relevant to this provision.

Clause 635 Alternative verdicts – different quantities

This clause will operate in cases where the prosecution establishes that the accused was involved in trafficking or commercial cultivation or manufacture etc, but cannot prove that the quantities involved reached the particular quantity for the offence charged. For example, where the accused is charged with manufacturing a 'large commercial quantity' of a controlled drug for sale (that is, an offence against subclause 607(1)) but at trial the prosecution is only able to establish that the defendant manufactured a 'commercial quantity' of a controlled drug (an offence against subclause 607(2)). In such cases if the trier of fact is satisfied beyond a reasonable doubt that the accused committed an offence against this chapter or part 10 of the DDA, involving a lesser quantity of a controlled drug, precursor or plant, it can return a guilty verdict for that lesser offence (in this case, an offence against subclause 607(2)) provided that the accused has been given procedural fairness in relation to that offence. This clause applies to all the offences in chapter 6.

Clause 636 Alternative verdicts – trafficking and obtaining property by deception

This clause only applies to prosecutions for an offence against clause 603 (trafficking in controlled drug) and is intended for those who contract to sell controlled drugs to someone else but have no intention of supplying it. Although it is arguable that the vendor would still be caught by the trafficking offences in clause 603 (since he or she contracted or agreed to sell the controlled drug) no court has construed the prohibition of sale so broadly as to apply to fraudulent sales. MCCOC agrees that fraudulent conduct of this kind should not be caught by the trafficking offence but considers that in such cases it is necessary to provide the court with the possibility of an alternative conviction for fraud because genuine transactions may resemble fraudulent transactions. Accordingly this provision has been included to allow the court to return an alternative verdict in such cases for an offence against section 326 of the Criminal Code of obtaining property by deception.

Essentially this clause provides that if, in the trial for an offence against clause 603, the accused is given procedural fairness to defend the case against him or her for an alternative offence against section 326, the court must find the accused guilty of that offence if (a) the trier of fact is satisfied beyond reasonable doubt that the accused committed the trafficking offence charged or an offence against clause 326, but cannot decide which, or (b) the trier of fact is not satisfied beyond reasonable doubt that the accused committed the trafficking offence charged but is satisfied beyond reasonable doubt that the accused committed an offence against clause 326.

Part 6.7 Offences relating to property derived from drug offences

This part contains two offences directed at those who launder or receive the profits of a 'drug offence'. The laundering offence appears in clause 639 and essentially applies to those who conceal, convert or transport property derived from a drug offence to avoid punishment for the crime or confiscation of the proceeds. The other offence, in clause 640, applies to those who knowingly receive property derived from 'a drug offence' without any legal entitlement to it. Unlike the other offences in chapter 6, the offences in this part are not divided into grades. The maximum prison terms that apply for the money laundering and receiving offences is 20 years and seven years respectively.

Clause 637 Meaning of drug offence

This clause defines a drug offence for the purposes of the offences in this part. It provides that a 'drug offence' means an offence against this chapter (but not an offence against this part); conduct in another jurisdiction that is an offence in that jusrisdiction and would be an offence against chapter 6 if it occurred in the ACT; and conduct that occured prior to the commencement of chapter 6 that would be an offence against the chapter (but not an offence against this part) if it operated at the time. The inclusion of comparable offences in other jurisdictions ensures that the money laundering and receiving offences in this part are not constrained by State or Territory borders.

Clause 638 Property directly or indirectly derived from drug offence

An important distinguishing feature between the money laundering offence in clause 639 and the receiving offence in clause 640 is that the laundering offence applies to property that is both directly and indirectly derived from a drug offence, whereas the receiving offence only applies to property directly derived from a drug offence.

Chapter 6 does not define 'property', however, that term is widely defined in the dictionaries of the Criminal Code and the *Legislation Act 2001* to mean any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes a thing in action. A thing in action is an intangible personal property right recognised and protected by the law. Examples include debts, money held in a bank, shares, rights under a trust, copyright and right to sue for breach of contract.

What amounts to property 'directly derived from a drug offence' is defined in subclause 638(1) as 'property' that is all or part of 'the proceeds' of a drug offence or property that is completely or partly acquired by disposing of, or using, the proceeds of a drug offence. The 'proceeds' of a drug offence, is in turn defined in subclause 638(2) to include the proceeds of any sale involved in committing the offence or any remuneration or other reward for committing the offence. Thus (except for the items referred to in subclause 603(4)) any 'proceeds' that fall within the definition of property that are derived from a drug offence (eg money, a house, a car, shares and an equitable or future interest in such things) or that are acquired by disposing or using the property derived from the drug offence will amount to property 'directly derived from a drug offence' for this part.

Subclause 638(3) gives a very wide ambit to the notion of property 'indirectly derived from a drug offence' and therefore, a very wide ambit to the money laundering offence in clause 639. Given that money laundering is essentially about concealing the proceeds of crime, it is appropriate to define this element in wide terms. Accordingly, subclause 638(3) defines property 'indirectly derived from a drug offence' as property that (a) is completely or partly acquired by disposing of, or using, property directly derived from a drug offence; or (b) is wholly or partly acquired by disposing of, or using, property indirectly derived from a drug offence (including property indirectly so derived because of a previous operation or operations of paragraph (a)). So long as the property can be identified as the proceeds of a chapter 6 offence (or comparable offence), property derived from a drug offence can be traced through an indefinite series of successive substitutions.

Subclause 638(4) inserts an important exception for both definition of property directly and indirectly derived from a drug offence. It makes it clear that property directly or indirectly derived from a drug offence does not include a controlled drug, controlled plant or controlled precursor. As MCCOC explains in the chapter 6 report:

> The intended target of the prohibition is money laundering and allied activities. Taken literally, however, a prohibition against concealing property derived from drug crime would include as well, concealment of the controlled drug itself for the purpose of evading detection and prosecution prior to consumption or resale of the drug. If the drug was intended for resale, the individual who receives or conceals it is liable to prosecution for trafficking. If it was intended for use, it will be the subject of liability for a regulatory offence. Activity of this nature is distinguishable from the evils of money laundering and it is, accordingly, excluded from the scope of this prohibition. (p. 223)

Subclause 638(5) provides that property directly or indirectly derived from a drug offence does not lose its identity as such merely because it is deposited with a financial institution or other person for credit to an account or for investment. Although this is inherent in the definition of 'property' (which includes intangible property – see above), the inclusion of subclause 638(5) avoids any doubt on the issue.

Clause 639 Concealing etc property derived from drug offence

The object of the offence in this clause is to penalise individuals who launder property derived from a drug offence to frustrate prosecution of the drug laws or to evade confiscation or forfeiture of the proceeds of drug crime. This clause provides that a person commits an offence if the person conceals, transfers, converts or removes property from the ACT that the person knows to be property directly or indirectly derived from a drug offence and with the intention of evading or assisting another to evade prosecution for a drug offence, imposition or enforcement of a pecuniary penalty for a drug offence or confiscation or forfeiture of the proceeds of a drug offence. The maximum penalty for the offence is 20 years imprisonment, 2000 penalty units ($200,000) or both. This is considered appropriate given that the offence targets conduct involving the provision of sophisticated services to individuals who are highly placed in the illicit distribution hierarchy. However, since money launderers are ancillary figures, whose activities are indirectly rather than directly involved in the sale or manufacture of controlled drugs or substances, the maximum penalty is less than the maximum penalties for trafficking in or manufacturing large commercial quantities of drugs.

It is important to note that this offence not only applies to the offender who seeks to conceal the proceeds of his or her own drug crime but also to those who provide their expert services to conceal the proceeds of the drug crimes of others. The physical and fault elements of this offence are the same, whether the conduct is undertaken to protect the offender's own illicit interests or the interests of another offender.

Clause 640 Receiving property directly derived from drug offence

This offence is aimed at individuals who seek to derive profit or personal benefit from the offences of trafficking, manufacture or cultivation committed by others. It supplements the operation of sections 45 (complicity) and 48 (conspiracy) of the Criminal Code in their application to drug offences. Essentially the clause makes it an offence for a person to receive property knowing that the property is directly derived from a drug offence committed by someone else and without any legal entitlement to the property. The object of the offence is to prohibit individuals from deriving profit from drug crimes committed by others. That is, it supplements the prohibitions against trafficking, manufacture and cultivation and accordingly has no application to individuals who derive property from their own involvement as a principal in the drug offence.

Like the offence in clause 639, 'property' for this offence does not include a controlled drug, plant or precursor. However, in contrast to the previous offence this provision

requires the property received to be directly derived from a drug offence. While it may be possible to trace property through several transactions, the direct correlation between the drug offence and the receipt is limited to the proceeds of the offence and the proceeds of the first substitution. MCCOC considered that clause 640 ought to be restricted in this way because mere receivers have no involvement in the original offence or concealment of it.

As noted above, the offence only applies if the property is received 'without any legal entitlement' to it. Subclause 640(2)(b) explains that property to which a person is legally entitled includes property received under a will or as reasonable payment for the legal supply of goods or services or in repayment of a debt. However the concept does not extend to gifts. In other words, if the property is received as a gift or in return for nugatory consideration, there is no impediment to conviction. A person who receives a gift of property that he or she knows to have been derived from drug trafficking is simply sharing in the proceeds of the crime and therefore it is appropriate that the person should be liable for the offence under this clause.

The maximum penalty for this offence is seven years imprisonment, 700 penalty units ($70,000) or both. The penalty for this offence is lower than most other offences in Chapter 6. As MCCOC explains:

> Though receivers are prepared to profit from the major offences, they play no role in their instigation, commission or concealment. Nor do these receivers of profit or benefit from drug crime play an essential structural role in the illicit drug economy. In this sense, they are unlike the receivers of stolen goods, who do play an essential role in the stolen goods economy, by exchanging the products of theft for cash.
> The penalty is accordingly less than the penalties for the major offences. Grading to distinguish serious from less serious offenders is impracticable and unnecessary. The effects of criminal penalties will be supplemented, of course, by confiscation and forfeiture legislation. (p. 247)

Schedule 1 Consequential amendments

This schedule amends the DDA and other Acts. The amendments will repeal some offences (sections 163 and 165) and reduce some penalties in the DDA to make the offences and penalties more suitable for a regime regulating the legal manufacture and trade in drugs. Section 162 of the DDA is amended to reduce the number of cannabis plants covered by SCONS. Growing any cannabis plants by hydroponic or artificial methods will be covered by the offence in clause 618 and not form part of the SCONS scheme.

Some adjustments are made to the DDA's enforcement powers to bring the provisions more generally into line with part 10, *Crimes Act 1900*, including expanding who may be an issuing officer of a warrant to include the registrars of both courts and judges of the Supreme Court.

Amendments are made to the *Bail Act 1992* to provide for a presumption against bail for those offences where the quantity of the substance and plants are of a large commercial quantity (and where life imprisonment applies) and indicate the possibility of organised criminal activity (clauses 603(1), 607(1), 616(1), 619(1), 622(1) and 624(1)). Other offences have a neutral presumption for bail, excluding clauses where the penalty is 10 years imprisonment or less. The *Children and Young People Act 1999*, *Listening Devices Act 1992*, *Prostitution Act 1992*, *Rehabilitation of Offenders (Interim) Act 2001* and the *Victims of Crime (Financial Assistance) Act 1983* are amended to substitute references to the DDA as appropriate.