



Charging guidelines for serious drug offences under Part 9.1 of the Criminal Code

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Legislative Background

1. Prior to 2005 federal illicit drug offences were primarily focused on preventing drugs from crossing Australia's borders. The *Customs Act 1901* contained a relatively small number of offences which prohibited the import, export or possession of a range of drugs which were declared to be "prohibited imports" for the purposes of the Act. There was no federal drug trafficking offence in the *Customs Act*. Trafficking illicit drugs was a State or Territory crime only.
2. In 2005 "serious drug offences" were inserted into Part 9.1 of the *Criminal Code*¹. These offences commenced operation on 6 December 2005.

Division Description	Division Number
Trafficking controlled drugs	(Division 302)
Commercial cultivation of controlled plants	(Division 303)
Selling controlled plants	(Division 304)
Commercial manufacturer of controlled drugs	(Division 305)
Pre-trafficking controlled precursors	(Division 306)
Importing, exporting and possessing controlled drugs or border controlled plants or pre-cursors	(Division 307)
Possession offences	(Division 308)
Drug offences involving children	(Division 309)
Harm and danger to children under 14 from serious drug offences	(Division 310)

3. The Criminal Code serious drug offences were modelled on recommendations made by the *Model Criminal Code Officers Committee* in its Report entitled "Serious Drug Offences". The import and export offences contained in Division 307 largely followed the form of the *Customs Act* offences they replaced.

Overlap with State and Territory Offences

4. The *Criminal Code* serious drug offences overlap with relevant State and Territory laws which also prohibit the possession, sale, cultivation and manufacture of illicit drugs. The import and export of such drugs remain federal crimes.
5. At the time that the serious drug offences were inserted into the *Criminal Code*, the Explanatory Memorandum (EM) which accompanied the legislation said that it was intended that drug offences

¹ *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*.

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would continue to be investigated in accordance with the established division of responsibility between federal and State and Territory police. In this regard the EM said as follows:

“Overlapping State and Territory drug offences will also continue to operate alongside the offences in Part 9.1 of the *Criminal Code*. This approach is consistent with the approach taken in other areas of criminal law, such as terrorism, fraud, computer crime, money laundering and sexual servitude. *It is intended that drug offences will continue to be investigated in accordance with the established division of responsibility between federal and State and Territory law enforcement agencies* [emphasis added]. The Bill preserves the existing powers of law enforcement officers, including Customs officials and the Australian Federal Police, in relation to serious drugs offences.”²

6. The *Criminal Code* serious drug offences were also said to be “principally targeted at organised illicit drug traders and commercially motivated drug crime.”³

Drug offending investigated by State and Territory Police

7. Drug offending investigated by State or Territory Police should generally be the subject of State or Territory criminal charges. Such matters should be referred to the relevant State or Territory police or DPP for prosecution.
8. In some cases the Commonwealth Director of Public Prosecutions (CDPP) will accept and prosecute *Criminal Code* serious drug offences referred to it by State or Territory police where:
- no equivalent State or Territory offence is available (e.g. an importation offence);
 - the matter involves other serious federal offending which should properly be prosecuted in a single trial or by a single prosecution agency;
 - there is a significant connection to import or export activity; or
 - the matter is of particular interest to a Commonwealth agency.
9. The mere fact that a Commonwealth offence may carry a higher penalty is not, of itself, a sufficient reason for preferring Commonwealth offences to State or Territory offences.

Drug offending investigated by the AFP

10. Drug offending investigated by the Australian Federal Police (AFP) should generally be the subject of federal criminal charges. Such matters should be referred to the CDPP for prosecution.
11. Where an AFP investigation results in only State or Territory drug charges, such matters should generally be referred to the relevant State or Territory police or DPP for prosecution.
12. In some cases the CDPP will accept and prosecute State or Territory drug offences referred to it by the AFP where:
- the matter involves other serious federal offending which should properly be prosecuted in a single trial or by a single prosecution agency;

² Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 – House of Representatives Explanatory Memorandum at page 2.

³ Ibid page 1.

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- there is a significant connection to import or export activity; or
 - the matter is of particular interest to a Commonwealth agency.

Drug offending at Australian domestic airports

13. The AFP has responsibility for policing at Australian domestic airports. Where drug offending occurs at a domestic airport which is a “Commonwealth place” for the purposes of the *Commonwealth Places (Application of Laws) Act 1970* (COPAL Act), police will generally have the option of pursuing either *Criminal Code* serious drug offence or a relevant State or Territory drug offences applied by the COPAL Act.
14. One would normally expect most drug offending committed at a domestic airport would be the subject of State or Territory charges applied by the COPAL Act. For example, a person arrested at a domestic airport for possession of a small quantity of an illicit drug should be charged with a State or Territory offence. Any sale of drugs within the confines of the airport could be expected to be treated similarly. Such matters should be referred to the relevant State or Territory police or DPP for prosecution.
15. However some drug offending committed at a domestic airport may properly be the subject of a *Criminal Code* serious drug offence. Such matters should be referred to the CDPP for prosecution. Typically these cases would involve much larger quantities of drugs where:
 - the offender is suspected of trafficking the drugs between States or Territories for a commercial purpose;
 - the matter involves other serious federal offending which should properly be prosecuted in a single trial or by a single prosecution agency;
 - there is significant connection to importation or exportation activity; or
 - the matter is of particular interest to a Commonwealth agency.

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