Law Council
OF AUSTRALIA

Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth)

Senate Legal and Constitutional Affairs Legislation Committee

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Acknowledgements

The Law Council of Australia thanks its National Criminal Law Committee for their contribution to the preparation of this submission.

General comments

1. The Law Council welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Committee's (the **Committee**'s) review of the Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) (the **Bill**).

2. The Law Council has not been able to consider all aspects of the Bill in the limited time for consultation. We are concerned that omnibus amendment legislation—which makes a range of interventions in existing statutory frameworks—requires broader consultation in order to properly assess the impact of a wider range of changes to Australian law. Where changes are made to established legislative frameworks, compressed timelines for scrutiny increase the likelihood of poorer public policy outcomes and unintended consequences.

3. On account of this truncated review timeframe, the comments offered in this submission are the preliminary views of the Law Council, as we and our constituent bodies have not had sufficient time for appropriate consultation about the contents and likely effects of this legislation. To this end, our submission focuses on the following three aspects of the Bill:

    - the changes to account takeover warrants, data disruption warrants, and network activity warrants that purport to give effect to the recommendations of the Independent National Security Legislation Monitor (**INSLM**)'s, *Data Disruption, Network Activity and Account Takeover Powers: Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (**INSLM Review**);[1]
    - the proposal for an evidentiary certificate framework for continuity of evidence handling in proceedings for serious drug offences; and
    - methods for calculating the quantity of proscribed drugs and precursors in mixtures for the purposes of serious drugs offences under the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

[1] Jake Blight, *Data Disruption, Network Activity and Account Takeover Powers: Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021*, Independent National Security Legislation Monitor (Final Report, 2025).

Schedule 1, Part 3: Account takeover warrants, data disruption warrants and network activity powers

4. The Law Council supports Items 18, 20, 21, 25, 26, and 27 of Part 3 of Schedule 1 to the Bill, which remove the Australian Criminal Intelligence Commission's (**ACIC**'s) ability to access data disruption powers.[2]

5. We welcome steps towards the implementation of Recommendation 1 of the INSLM Review.[3] The Law Council has previously recommended that data disruption powers should not remain available to the ACIC.[4] More broadly, we continue to support measures designed to ensure that intrusive powers are tightly limited to those functions and agencies where necessity and proportionality can be demonstrated.

6. The INSLM Review recommended that data disruption, network activity and account takeover powers should sunset on 3 September 2026 if the Government had not implemented the recommended changes to those frameworks.[5] The Law Council is concerned by the extension of these powers in the absence of implementation of recommendations concerning additional safeguards for these warrants as proposed by the INSLM.

7. In his report, which was submitted to the Government on 31 July 2025, the INSLM commented that:

> *I have managed my review to ensure it is completed in time for the PJCIS to take my report into account in deciding whether it wishes to do another review and to consider any legislative response the government proposes before the provisions sunset on 4 September 2026.*[6]

8. We are disappointed that the Australian Government has indicated agreement to recommendations 1–3 of the INSLM Review but has not implemented reforms to these powers before the extension of the existing sunset clauses, as was envisaged by the INSLM.

9. Against this timeline (noting also our concerns about the limited opportunity for review of this Bill) we are concerned that the Government has elected to extend the sunset clauses relating to network activity warrants, data disruption warrants, account takeover warrants and the emergency authorisation procedures for accessing those powers until 4 September 2029, despite concerns being raised about the operation of

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2 Relevant powers with sunset provisions include *Crimes Act 1914* (Cth) ss 3ZZUMA (account takeover warrants), and 3ZZUMA (account takeover warrants, emergency authorisations); *Surveillance Devices Act 2004* (Cth) ss 27KAA (data disruption warrants), 27KKA (network activity warrants) and sub-ss 27KU(1)–(2) (emergency authorisation for data disruption).

3 Jake Blight, *Data Disruption, Network Activity and Account Takeover Powers: Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021*, Independent National Security Legislation Monitor (Final Report, 2025) 36.

4 Law Council of Australia, *Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021 (Cth)* (Submission to the Independent National Security Legislation Monitor, 28 January 2025) 32.

5 Jake Blight, *Data Disruption, Network Activity and Account Takeover Powers: Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021*, Independent National Security Legislation Monitor (Final Report, 2025) [5.26], [5.30] and [5.41].

6 Ibid [1.8].

those powers by the INSLM (and noted by the Government). We note that the Senate Standing Committee for the Scrutiny of Bills has observed that:

> *Where the existing warrant schemes in the [Crimes Act 1914 (Cth)] and the [Surveillance Devices Act 2004 (Cth)] have a significant and wide-ranging effect on individual's personal liberties and freedoms, the committee notes that an extension of the warrant scheme requires a robust and compelling justification. The committee has not previously considered deferral of sunsetting to align timeframes for statutory review to alone constitute a compelling justification to the extent the measure relates to coercive powers that risk undue trespass on rights and liberties.*[7]

10. We understand that comprehensive electronic surveillance legislation reform is underway by the Department of Home Affairs. However, where discrete aspects of the Commonwealth's electronic surveillance laws are due to sunset and consideration is already being given to the amendment of aspects of those provisions by the Parliament, we suggest that reforms to these powers ought to be brought forward and legislated, where possible. This approach would subject those aspects of the broader reform to early scrutiny by the Parliament and community. Improvements to the powers, procedures and oversight mechanisms recommended by the INSLM ought to be expedited and any feedback on the operation of such provisions might be utilised to improve the drafting of the comprehensive electronic surveillance reform legislation package.

11. While the Australian Government has indicated that it intends to address the majority of the INSLM's recommendations as part of the electronic surveillance legislation reform project,[8] given the significant delays in this project materialising, we consider it more appropriate to make relevant reforms to the operation of powers, warrant frameworks and oversight mechanisms incrementally.

Recommendations

- **The proposed extension of sunset dates for data disruption, network activity, and account takeover powers should not progress without substantive implementation of recommendations 6, 7 and 8 of the INSLM Review.**
- **If the proposed sunset provisions are extended, the Committee should seek assurances from the Government that the improvements to safeguards recommended in the INSLM Review are to be prioritised as part of the comprehensive electronic surveillance legislation reform.**

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7 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2026*, *Scrutiny Digest* (Digest No 5 of 2026, 25 March 2026) [1.14].

8 See Australian Government, *Australian Government response to the Independent National Security Legislation Monitor: Review of the Surveillance Legislation Amendment* (Identify and Disrupt) Act 2021 (November 2025), *in passim*.

Schedule 2, Part 1: Evidentiary certificates for serious drug offences.

12. Part 1 of Schedule 2 to the Bill proposes to insert an evidentiary certificate framework into Division 1 of Part 9.1 of the Criminal Code, which is concerned with serious drug offences.

13. The Explanatory Memorandum (**EM**) contends that the certificate framework is intended to "provide prima facie evidence of continuous possession of drug exhibits from the point of seizure through to forensic analysis".[9] The proposed framework seeks to enable an issuing officer[10] to issue a certificate that is to be received in proceedings for an offence against this Part as prima facie evidence of the acts or things specified in the certificate.[11]

14. In broad terms, the Law Council is concerned that the proposed framework has the effect of reversing the evidential burden of proof for matters concerning the actions and behaviour of law enforcement agencies relating to their handling of evidence and other matters in criminal trials relating to serious drug offences. Such an approach challenges rule of law principles whereby the state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence that is central to the question of culpability for the offence.[12]

15. The Attorney-General's Department's *Guide to Framing Commonwealth Offences* considers evidential certificates to be appropriate only in limited circumstances and offers the following principle to guide the Australian Government in assessing their suitability:

> *Evidentiary certificate provisions are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute but that would be difficult to prove under the normal evidential rules, and should be subject to safeguards.*[13]

16. The Law Council is concerned that, based on the way this proposal is described in the extrinsic material, the proposed framework does not meet the general suitability requirements as the scope of the subject matter capable of inclusion in an evidentiary certificate under Part 9.1 of the Criminal Code it exceeds the description of "formal or technical matters that are not likely to be in dispute". Instead, the EM claims that the evidentiary certificate framework is:

> *… designed to address evidence as to, broadly, every interaction that law enforcement agencies and personnel have with a substance from the moment of seizure to the moment that substance is taken out of law enforcement possession.*[14]

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9 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth).
10 Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 1, proposed section 300.2 definition; item 2, proposed section 300.7(1).
11 Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 2, proposed section 300.7(7).
12 Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011) [3].
13 Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) 52.
14 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [126].

17. This framework relates to evidence of the actions and conduct of law enforcement officers and those that assist them in their interactions with drugs exhibits and, therefore, does not appear to meet the description of relating to formal or technical matters. While the EM says that the proposed subject matter of the framework relates to evidence that is, "in most cases, unchallenged and uncontroversial",[15] no data is provided to support this claim. On this point the Senate Scrutiny of Bills Committee have commented that:

> *The explanatory material provide little evidence about why the basic facts contemplated by proposed subsection 300.7(2) would be difficult to prove under the rules of evidence law without an evidentiary certificate.*[16]

18. Finally, while it is clear that addressing continuity of handling evidence through an evidentiary certificate framework will produce efficiencies that "greatly alleviate administrative and resourcing demands on law enforcement officers",[17] the Senate Scrutiny of Bills Committee clarifies that this is not in itself a sufficient justification, and that "[t]he committee has not previously accepted a stated need for administrative flexibility alone as sufficient measures that impair a defendant's common law right to be presumed innocent".[18]

19. We note that, in the context of serious drug offences that involve a wide range of law enforcement and other actors, the imposition of rigorous continuity handling technologies and procedures concerning drug exhibits and the possibility of investigating officers being called as witnesses may be practices that assist in ensuring that such evidence is "[i]n most matters unchallenged and uncontroversial".[19]

Concerns regarding subject matter

20. Under proposed subsection 300.7(2), an evidentiary certificate "may specify one or more of the following acts or things in respect of a substance or object containing a substance":

> *(a) any detail or description relating to the seizure or detention of the substance or object;*
>
> *(b) a label or any other means that is used to identify the substance or object;*
>
> *(c) any detail relating to any seal that is used to secure the substance or object;*
>
> *(d) any detail related to any transfer of custody of the substance or object;*
>
> *(e) any detail related to storage of the substance or object;*
>
> *(f) anything done in connection with the substance or object by:*
>
> *(i) a law enforcement officer; or*
>
> *(ii) a person assisting or providing technical expertise to a law enforcement officer or an agency mentioned in subsection (3);*
>
> *(g) any other act or thing determined under subsection (4).*

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15 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [129].
16 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2026, 25 March 2026) [1.25].
17 Ibid [1.24].
18 Ibid [1.44].
19 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [116].

21. Although the EM's General Overview states that the framework relates to evidence of continuous possession of drug exhibits from the point of seizure through to forensic analysis,[20] the text of the provision suggests that the application of the framework is not limited to evidence of handling. Indeed, proposed paragraph 300.7(2)(g) enables "any other act or thing determined under subsection (4)" to form the subject matter of a certificate. This subsection enables the Minister for the Australian Federal Police (**AFP Minister**) to, "by legislative instrument, determine … acts or things for the purposes of paragraph (2)(g)".[21] The EM notes that:

> *In prescribing certain acts or things pursuant to paragraph 300.7(4)(c), the AFP Minister is not limiting the operation of the definitions in subsection 300.7(2) but rather extending the types of acts or things that can be specified in certificates where necessary and appropriate.*[22]

22. The Law Council is concerned that the subject matter of the framework is not restricted to matters of evidence handling. Instead, provision is made for the extension of such a framework by legislative instrument by the AFP Minister where they consider such an approach to be "necessary and appropriate".[23] We do not consider a wide discretion to extend the subject matter covered by the proposed evidentiary certificate framework—which is already challenging rule of law principles—to be an appropriate use of delegated legislation.

23. This approach makes testing the evidence of the state more difficult because the defence is provided with less information concerning the handling of evidence than would otherwise be the case.

Recommendations

- **The evidentiary certificate framework should not proceed in its current form.**
- **If the Committee endorses the proposed framework, subsection 300.7(2) should explicitly state that this framework only applies to continuity of handling evidence.**

Procedural concerns

24. Proposed section 300.9 requires that, in order to be admitted into evidence, a copy of a certificate must be provided to the person charged with the offence or their legal representative at least 42 days before the certificate is sought to be so admitted.[24] Additionally, the framework allows either the issuing officer or a person named in the certificate to be cross-examined, but does not require cross-examination without 28 days' notice of the defendant's intention to require the person to be so called or

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20 Ibid [9].
21 Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 2, proposed section 300.7(4)(c). NB such a legislative instrument remains disallowable.
22 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [138].
23 Ibid [138].
24 See Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 2, proposed section 300.9(2).

cross-examined,[25] and, the court, by order, allows the defendant to require the person to be so called or cross-examined.[26] The combined effect is that a defendant or their legal representative may have only 14 days in which to decide whether to request that the court order that a particular witness be called.[27]

25. If the Committee accepts that evidentiary certificates represent a concession to increasingly complex investigations across agencies and contractors, then consideration ought to be given to extending the period of time within which a defendant or legal representative can exercise their ability to request a court order for witness attendance.

Recommendation

- **If the Committee is to recommend the framework, consideration should be given to extending, from 14 days to at least 28 days, the minimum timeframe between a defendant or their legal representative receiving a certificate and requesting that a witness be called.**

Schedule 2, Part 2: Mixtures containing prohibited substances

26. Part 2 of Schedule 2 to the Bill proposes to repeal the existing purity-based method of determining drug quantities and replace it with a mixture–weight approach. The General Outline to the EM states that that the intention of this Part is to insert a:

> *… new approach [that] would allow threshold quantities to be established by reference to the total weight of any substance containing a prohibited drug or precursor, removing the need for purity testing.*[28]

Current approach to ascertaining quantity

27. Division 312 of the Criminal Code sets out the current method for proving the quantities of controlled drugs, plants or precursors contained in mixtures for the purpose of Part 9.1 of the Criminal Code. Currently, section 312.1 describes how the quantity of controlled drugs and precursors in mixtures are to be established. Drugs and precursors are treated slightly differently.

28. Schedules 1 and 2 to the Criminal Code Regulations 2019 (Cth) (**Regulations**) contain a list of substances that are proscribed as controlled drugs or border controlled drugs. These Schedules also contain the threshold weight of a pure quantity of a given substance that represent marketable,[29] commercial,[30] or trafficable quantities,[31] of that substance. Regulations 13 and 16 set out the substances proscribed as controlled or border controlled precursors.[32]

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[25] Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 2, proposed section 300.9(4)(a).
[26] Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 2, proposed section 300.9(4)(b).
[27] See Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [150].
[28] Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [9].
[29] See *Criminal Code Act 1995* (Cth) s 301.11.
[30] See *Criminal Code Act 1995* (Cth) s 301.10.
[31] See *Criminal Code Act 1995* (Cth) s 301.12.
[32] See *Criminal Code Regulations 2019* (Cth) rr 13 and 16.

29. If an offence under Part 9.1 of the Criminal Code concerns a quantity of controlled drugs or border controlled drugs contained in a mixture of substances, then there are two ways the prosecution can prove the quantity:[33]

    (a) by proving that the mixture contains that quantity of the pure form of the controlled drug or border controlled drug; or

    (b) if such a quantity is specified in the Regulations for the purposes of defining commercial quantities, marketable quantities, or trafficable quantities, for the controlled drug or border controlled drug in a mixture—by proving that quantity of the mixture.

30. If the offence involves an allegation that a controlled precursor or border controlled precursor is found in a mixture with other substances, then the prosecution must prove the quantity of the pure form of the controlled precursor or border controlled precursor.[34]

Proposed approach to ascertaining quantity

31. The Bill proposes to change the method for assessing quantities from the current approach to a simpler method that treats the total weight of the mixture as the drug or precursor in question when a proscribed drug or precursor has been detected in the mixture.

32. Proposed subsection 312.1(2) operates to insert this new method for ascertaining the quantity of a "prohibited substance",[35] by requiring that:

> *(2) For the purposes of proving the quantity of the prohibited substance, treat the mixture as consisting wholly of the prohibited substance.*

33. Subsection 312.1(3) is an avoidance of doubt provision that reads:

> *(3) To avoid doubt:*
>
> *(a) the mixture of substances may consist of:*
>
> *(i) the prohibited substance being in, mixed with or part of one or more other substances; or*
>
> *(ii) one or more other substances containing any amount of the prohibited substance; and*
>
> *(b) the mixture must not be used for the purposes of proving the quantity of more than one prohibited substance.*

34. These sections have the effect of removing the requirement to ascertain the quantity of a prohibited substance and treat the mixture weight as the relevant quantity of a given prohibited substance.

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33 *Criminal Code Act 1995* (Cth) sub-ss 121.1(1) and (3).

34 See *Criminal Code Act 1995* (Cth) sub-ss 121.1(2) and (4).

35 Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) sch 2 item 4, proposed section 312.1(1) introduces the term "prohibited substance" for the purposes of proposed section 312 to simplify references to a controlled drug, a border controlled drug, a controlled precursor (other than a growing plant), or a border controlled precursor (other than a growing plant).

35. The Law Council is concerned that this approach adopts a less accurate method for ascertaining the actual quantity of controlled substances and, while the EM highlights a move towards consistency with other jurisdictions, it fails to identify the practical reasons for maintaining a distinct approach under the Criminal Code. This change towards a less accurate method generates a range of downstream consequences.

36. The EM offers a number of reasons for the necessity of changing the method for ascertaining the quantity of a prohibited substance in a given mixture away from a purity-based approach to a mixture–weight approach.

Hazardous testing

37. One justification offered for these changes concerns the toxicity of chemicals—including their status as carcinogens—and solvents used in forensic testing, including concerns around airborne particulates.[36]

38. We are concerned that, although these justifications reflect real environmental and occupational health and safety considerations that ought to be managed by the Commonwealth, the approach described in this Schedule still considers purity testing to be relevant to certain aspects or stages of a criminal proceeding: see [64]–[71] below. It is unclear how the identified risks will be addressed under the proposed approach, where it appears purity testing will still take place in some circumstances.

39. We believe that the Commonwealth is best placed and resourced to ensure the occupational health and safety of forensic analysts, which should occur separately from reform measures relating to elements of established criminal offences.

Delay and resource intensity

40. The EM makes reference to the existing purity testing method as resource-intensive and contributes to investigative and prosecution delays".[37] While this might be the case, we are concerned that no evidence has been presented in the material accompanying the Bill that links purity testing to undue delays in proceedings.

Harmonisation

41. The EM makes reference to situations where the Commonwealth's purity-based approach is inconsistent with state and territory approaches or the practices of foreign partners, stating that:

> *… misalignment limits cooperation with domestic and foreign law enforcement, particularly where partners can only provide mixture-quantity evidence and has resulted in matters not proceeding because purity cannot be established.*[38]

42. In such a situation, the current law is working as intended, noting that importation offences (representing a significant proportion of Commonwealth prosecutions) often relate to drugs being concealed in other materials. As such, a weight over purity approach in many instances is unlikely to be appropriate when contrasted with state and territory offences.

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[36] Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [155].
[37] Ibid.
[38] Ibid [156].

43. The Law Council does not endorse lowering analytical accuracy in order to accommodate less accurate approaches adopted in other jurisdictions.

Market reality

44. The EM argues that Commonwealth criminal offences should be constructed in such a way that they reflect the norms of the illicit drug market, namely that the purity method should be replaced because:

> *… illicit drugs are typically imported and trafficked in mixed form, and purchase price and distribution quantities are determined by the whole weight of the mixture, not the pure drug content. Suppliers ordinarily do not extract pure substances prior to sale, meaning the purity-based model bears little relationship to how drug markets actually operate*.[39]

45. Commonwealth offences and standards of forensic analysis should prioritise accuracy in ascertaining the quantity of prohibited substances. A misalignment with illicit market practices is not a good reason to adopt a less accurate approach to quantification, particularly for importation offences and those offences concerned with large quantities of prohibited substances.

46. The EM also claims that "purchasers face heightened and often unknown risks from undisclosed adulterants".[40] The proposed quantity method is agnostic to the nature or safety considerations attached to any adulterants or substances utilised to dilute the quantity of a prohibited substance.

47. We suggest that the public health outcome of less dangerous adulterants might be better addressed through more direct measures.

Threshold quantities

48. The practical effect of this change is likely, in many cases, to increase the quantity of a prohibited substance proved to be in a given mixture. The EM describes this effect as one that "ensures that offenders cannot avoid higher penalty thresholds by diluting, adulterating or concealing the substance within other material".[41] We are concerned that, in the absence of other reforms, the proposed amendments operate to raise the objective seriousness of offending by simply re-categorising quantities of a prohibited substance. For example, without amending the Regulations that specify threshold quantities, this approach may have the effect of imposing higher penalties for the same pure weight quantity of a given substance. This has the potential to disproportionately affect lower-level offenders interacting with small quantities of prohibited substances.

49. The proposed change to the method of calculating the quantity of a prohibited substance in a mixture risks the introduction of arbitrariness into the serious drug offence framework where offences and penalties are currently calibrated to the nature and quantity proscribed substances. The proposed shift to a mixture–weight approach to quantity means that penalties for the same pure quantity of a prohibited

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39 Ibid [157]
40 Ibid.
41 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [164].

substance can vary dramatically based on the material qualities of the non-prohibited substance or material into which the prohibited substance is mixed or impregnated, as well as the rate of dilution (the ratio of drug to other substance or material). As the current approach focuses on the actual quantities of the prohibited substance, it avoids the possibility that proceedings and/or penalties for serious drug offences become disconnected from the nature and quantity of the prohibited substance.

50. Proposed section 2 of the Bill sets out when aspects of the Bill are to commence. It specifies that Part 2 of Schedule 2 to the Bill is to commence at a date fixed by Proclamation, not more than 12 months after the Act receives Royal Assent.[42] The EM explains that:

> *During this period, work will be undertaken to review the threshold quantities in the regulations to ensure they continue to be fit for purpose. The commencement period will also enable the Australian Federal Police and other relevant agencies to make the operational and administrative updates needed to support the transition. These updates are required to ensure the new approach is applied consistently across jurisdictions, supports charging certainty and maintains the integrity of investigative and forensic processes from commencement.*[43]

51. It is not clear that the updates in question refer to an attempt to harmonise threshold quantities, the number of gradations of quantity, and mechanisms for addressing trace quantities of prohibited substances. The phrasing of the EM could equally apply to harmonising procedural and administrative practices within police forces rather than harmonising quantity thresholds across jurisdictions.

52. Without certainty in the EM that a reconsideration of the appropriateness of the regulations is indeed forthcoming, and that attention is being paid to possibility of injustice that follows from implementing what is an empirically less accurate method for ascertaining the quantity of a prohibited substance, it is not possible to thoroughly assess the likely impact of this proposal.

53. We also observe that, while threshold quantities of particular proscribed substances found in regulations may require review in order to properly harmonise this approach with state and territory legislation, it is necessary that consideration be paid to increasing the number of gradations of quantity, noting this would require legislative amendment. For example, the Criminal Code currently scales penalties according to marketable, commercial, or trafficable quantities.[44] By contrast, NSW has threshold gradations for small, trafficable, indictable, commercial and large commercial quantities.[45]

Accuracy concerns regarding trace quantities

54. Because the proposed method does not address the proportion of a prohibited substance in a mixture, it is possible that trace quantities such as detectable residues from manufacturing would be assessed at the quantity of the material or vessel in which they were detected. For example, waste product containing traces of methamphetamine from a manufacturing process stored in a 250-litre barrel could,

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42 Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) cl 2.
43 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [6].
44 *Criminal Code Act 1995* (Cth) ss 301.10–12.
45 See *Drug Misuse and Trafficking Act 1985* (NSW) s 3(1) definitions; and Schedule 1.

under the proposed approach, be treated as approximately 250 kilograms of methamphetamine. Further, were such a barrel to be emptied and filled with water, leaving trace quantities of the drug, the water could be deemed to be 250kg of the methamphetamine. Despite containing an unusable quantity of the drug, the barrel in question would appear to meet the requirements for a commercial quantity of methamphetamine on the basis of the proposed method.[46]

55. While this example may be an instance where prosecutorial discretion ought to be exercised based on the full factual circumstances of the offending, it highlights a concern with an over-reliance on discretion that has the potential to create uncertainty in proceedings. A purity-based approach is unlikely to generate this uncertainty. A reliance on prosecutorial discretion in response to overly inclusive definitions found in criminal offences has the potential to create unintended consequences into the future. In the experience of many of our members, assurances that prosecutions would never occur in certain circumstances have sometimes proven unfounded in later years.

56. While the EM notes that this is intended to remove incentives to add large amounts of filler to frustrate purity analysis or reduce apparent offending,[47] we are concerned that this approach increases the likelihood of radically overestimating the quantity of a prohibited substance.

Absolute liability offences

57. The rules for mixtures containing prohibited substances inform the prosecution of a range of serious indictable offences under Part 9.1 of the Criminal Code.

58. At least 23 offences in Part 9.1 of the Criminal Code contain absolute liability elements which involve the quantity of a prohibited substance.[48] Under subsection 6.2(2) of the Criminal Code an absolute liability element is a physical element of an offence where:

> *(a) there are no fault elements for that physical element; and*
>
> *(b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.*

59. This means that the prosecution does not have to prove a mental element where the circumstance of the quantity of a prohibited substance meets the described threshold quantity. Critically, it also means that the defence of honest and reasonable mistake of fact would not be available, as might be relevant in the above circumstance involving the barrel containing trace elements of methamphetamine.

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46 *Criminal Code Regulations 2019* (Cth) sch 1 item 1, line 157: a commercial quantity of methamphetamine is currently 0.75 kilograms.

47 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) 166.

48 See, eg, *Criminal Code Act 1995* (Cth) ss 302.2, 302.3, 303.4, 303.5, 304.1, 304.2, 305.3, 305.4, 306.2, 306.3, 307.1, 307.2, 307.5, 307.6, 307.8, 307.9, 307.11, 307.12, 309.3, 309.7, 309.10, 309.12 and 309.14

60. The Attorney-General's Department's *Guide to Framing Commonwealth Offences* considers that absolute liability offences relating to particular elements may be justified where "[t]he element is a jurisdictional element rather than one going to the essence of the offence",[49] or where:

> *… proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.*[50]

61. We are concerned that this proposal may necessitate revisiting the suitability of absolute liability elements concerning the quantity of prohibited substances in Part 9.1 of the Criminal Code.

62. The Law Council advises caution where absolute liability (and strict liability[51]) elements are adopted. Our *Policy Statement on Rule of Law Principles* says that:[52]

> *The state should be required to prove that a person intended, or at the very least was reckless about, each physical element of an offence in order for a person to be found guilty of that offence. Strict and absolute liability should only be applied to less serious offences and where such an approach is necessary for the success of the relevant regulatory regime.*

63. We are concerned that, by changing the method for calculating the quantity of prohibited substance, consideration needs to be given to introducing a fault element to quantity elements or shifting these elements to strict liability elements, to admit of the possibility that mistakes of fact might be materially relevant to the conduct in question.

Prosecutorial discretion and sentencing considerations

64. The EM makes the following comment about the availability of prosecutorial discretion:

> *New subsection 312.1(2) would apply for the purposes of proving quantity and is intended to operate in a facilitative way. It would enable, but not compel, the prosecution to treat the total weight of a mixture containing a prohibited substance as the relevant quantity. In practice, where a seizure involves very large volumes with comparatively low drug concentration (for example, industrial quantities of impregnated material), prosecutorial discretion remains to proceed on the total mixture or to prove a lesser quantity by other admissible means (such as agreed facts or other evidence), including in the context of a plea to a lesser quantity where appropriate. Courts would also retain full sentencing discretion to impose a penalty that is proportionate to the circumstances of the offending, ensuring fairness even where the total-quantity rule applies. This preserves fairness in atypical cases while maintaining the general rule.*[53]

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49 Attorney General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (May 2024) 25.

50 Ibid.

51 See *Criminal Code Act 1995* (Cth) s 6.1.

52 Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011), 3(f).

53 Explanatory Memorandum, Crimes and Other Legislation (Omnibus No. 1) Bill 2026 (Cth) [167].

65. We observe that nothing in the drafting indicates that proposed subsection 312.1(2) is permissive of other approaches to assessing the quantity of a controlled substance in a mixture. We are concerned that operating in a "facilitative way" grants the prosecution leverage to treat quantities as more significant without needing to prove the actual quantity of the prohibited substance in question.

66. Such an approach, when combined with absolute liability elements for quantity, without the requirement to analyse and calculate the actual quantity of the prohibited substance, raises the likelihood of unfairness and undue prosecutorial discretion.

67. Further, the purity of a drug—especially one that can readily be diluted or mixed with inert substances—informs a number of relevant sentencing factors:

- the likely place in the supply chain (e.g. wholesale or retail);
- the potential number of individual "doses" or uses;
- the value of the drug in its current form; and
- the potential street value.

68. Depending of course on other factors, the objective seriousness of an offender importing or possessing 500 grams of powder containing heroin, cocaine or methamphetamine may be significantly different if the powder is 95 percent pure, compared with 5 percent.

69. Such is the importance of purity as a circumstance of the offending (both at trial and on sentence) that it is likely that, in most cases, at least some determination of purity will be undertaken.

70. Further, there is a vast body of case law based on the existing Commonwealth approach. Any perceived efficiencies or saving of agency resources through a proposal to change the approach to the quantification of prohibited substances will likely be eroded, to a significant extent, by the many years of litigation that inevitably follow major changes to the criminal law.

71. Additionally, we are concerned that this paragraph of the EM proceeds on the assumption that there is some quantification of the purity of the prohibited substance in the mixture in question. Without such analysis, it is not possible to proceed on the basis of a method other than the proposed method. Likewise, without this information it is also not possible to ascertain the objective seriousness of the offending of a conviction for a given quantity threshold. It is likely that this change would shift purity testing from an element of an offence (and thus regulated and performed to standards set by the Commonwealth) to evidence presented by offenders at sentencing seeking a sentencing mitigation in circumstances where purity can be ascertained through private testing, which may not be feasible or affordable.

Recommendations

- **The proposed changes to the existing purity-based approach to measuring the quantity of prohibited substances should not proceed.**
- **If the Committee endorses the method of measuring the quantity of prohibited substances proposed in the Bill, there should be a commitment to review the offences in Part 9.1 of the Criminal Code and the related Regulations and make necessary amendments before any proposed changes come into effect.**

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- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
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