

1. What are the relevant Commonwealth offence provisions, and how do State provisions interact with those offences?

A list of all relevant offences and defences under the Commonwealth Criminal Code is attached at **Tab A**. The Criminal Code provides that cannabis is a 'controlled drug' and a 'border controlled drug for the purpose of its offence provisions. Any plant of the genus cannabis is also a 'prohibited plant' under the Code. Also note discussion of the *Therapeutic Goods Act 1989* in the response to question 2, below.

Under s.313.1 of the Criminal Code, it is a defence to a prosecution for all drug offences other than import/export offences that the conduct was justified or excused by a law of a State or Territory.

2. What are the options available to NSW to provide medicinal cannabis or to authorise the use of medicinal cannabis without conflicting with Commonwealth law?

Option 1: Trial

As noted by the Australian Drug Law Reform Initiative in its submission to the Inquiry, s.10(2)(b) of the *Drug Misuse and Trafficking Act 1985 (DMTA)*, which creates the offence of possessing prohibited drugs, provides a defence where the person acts in accordance with an authority granted by the Secretary of the Department of Health where the Secretary is satisfied that the possession of the prohibited drug is for the purpose of scientific research, instruction, analysis or study.

It may therefore suffice for the purposes of a trial of medical cannabis for the Secretary of the Department of Health to issue authorisations to participants. The same defence applies to other offences under the Act, including offences relating to the cultivation and supply of prohibited plants or drugs (s.23 and 25, respectively). Consequently, no amendment of the DMTA would be necessary for a trial of medical cannabis authorised by the Secretary of the Department of Health.

Option 2: Amendments to the DMTA to provide a permanent defence for a class of persons

Amendments exempting persons from prosecution for the use or possession of cannabis for medical purposes would require only minor amendments to the DMTA, such as an addition to existing defences for use and possession in order to cover the authorised medical use of cannabis. It is noted that the DMTA includes provisions exempting people for drug offences committed at a licensed injecting centre as long as they are not in possession of more than a prescribed quantity of drugs. Legislative amendment creating the regime under which medical use of cannabis would be authorised will be only slightly more complex.

As noted by the Australian Drug Law Reform Initiative in their submission, 18 US states have medical cannabis schemes, and most favour a model based on prescription by legislation of conditions recognised by medical research literature as benefiting from cannabis use. A patient diagnosed with one of those conditions could be issued with an authorisation by a medical professional, which would enliven the new defence to use and possession offences. It may be necessary to further

regulate or oversee the authorisation by medical professionals. Advice on this issue should be sought from NSW Health.

The operation of the Cth Criminal Code in relation to Options 1 & 2

In relation to both options, it is noted that s.313.1 of the Cth Criminal Code provides that it is a defence to drug offences under the Code (excluding import/export offences) that the conduct giving rise to the offence was justified or excused by a law of a State or Territory. Section 313.1 is included in the attachment. Therefore the existence of a legitimate defence in NSW will provide a defence for those who possess and administer the cannabis, to Cth offences.

The operation of the Therapeutic Goods Act 1989 in relation to Options 1 & 2

The *Therapeutic Goods Act 1989* may impact on both Options 1 and 2. The Therapeutic Goods Act regulates all therapeutic goods, which include all goods used in connection with preventing, diagnosing, curing or alleviating a disease, ailment, defect or injury in persons. The definition of 'therapeutic goods' and the related definition of 'therapeutic use' are at **Tab B**. Under the Act, such goods must be registered on the Australian Register of Therapeutic Goods, and comply with standards developed for those goods or class of goods. It is an offence to supply therapeutic goods which do not comply with these requirements. However, it is not an offence to possess a therapeutic good which does not comply with such requirements.

In light of the above, the personal cultivation and use of cannabis for medical purposes could be permitted in NSW without Commonwealth involvement. However, patients growing their own cannabis for lawful medical use would need to obtain seeds, plants, and possibly equipment and instructions. The act of supplying those things may contravene the *Therapeutic Goods Act*. "Therapeutic goods" include goods which are used to manufacture therapeutic goods.

Where authorised medical users were to be lawfully provided cannabis by another (which may be necessary, as many patients who would benefit from the use of medical cannabis may not be in a physical condition to cultivate their own), the person supplying would be in breach of the *Therapeutic Goods Act*.

Option 3: Prescription through Commonwealth channels

Official prescription would need to be through Commonwealth channels. As noted in submissions to the Inquiry, substances cannot be prescribed by medical professionals until they are registered on the Australian Register of Therapeutic Goods. Applications for registration are usually brought by pharmaceutical companies. NSW Health and Commonwealth authorities are better positioned to provide information to the inquiry on this option.

3. How is the lawful cultivation of opium poppies for pharmaceutical use regulated in Tasmania?

Under s.52 of the *Poisons Act 1971* (Tas) a person is not to cultivate prohibited plants (which include opium poppies) except under and in accordance with a licence granted or deemed to have been granted by the Minister for Health and Human

Services, and in accordance with the conditions and restrictions specified in the licence.

Cultivation, possession or refining of opium poppies are all criminal offences under the *Misuse of Drugs Act 2001* (Tas) unless the activity (growing and processing) is licensed by the Minister for Health and Human Services (under the *Poisons Act*). Section 4 of the *Misuse of Drugs Act 2001* (Tas), states that nothing in the Act renders unlawful anything done in accordance with a provision of the *Poisons Act 1971*.

Under Commonwealth law, opium poppies are a scheduled substance under the *Therapeutic Goods Act 1989*, which is also referenced under Tasmania's *Poisons Act*. Licensing requirements for the importation and manufacture of poppy materials and products apply under Commonwealth law via the *Narcotic Drugs Act 1967* (for manufacturing) and *Customs (Prohibited Imports) Regulations 1956* (for importation). Requirements under this legislation must be met before importation or manufacturing can occur.

The Tasmanian Poppy Advisory and Control Board is responsible for the processing of applications for licences and advising the Minister for Health on those applications. The Minister for Health makes decisions under the *Poisons Act* in respect of licences to grow and manufacture scheduled substances, including poppies. The Department of Health and Human Services enforces licensing and administers the licensing of manufacturers and growers on behalf of the Minister for Health.

Before a farmer is issued a licence, he or she must first have been contracted to grow poppies on behalf of a licensed manufacturer, and have obtained a security clearance from Tasmanian Police. Contracts and licences are issued on an annual basis.

Responsibilities on growers include fencing requirements, and responsibility for taking steps within 7 days after harvesting of the crop to ensure that any poppy material remaining on the land on which the crop was grown is destroyed by burning, slashing or cultivating, or in any such manner as may be considered appropriate. A brochure detailing the legislative controls applicable to both industrial hemp and the poppy industry in Tasmania is attached.

4. Do you have any data on how often the cannabis cautioning scheme applies to terminally ill patients?

No, although this does not mean that cannabis cautions have never been issued to such people. The Cannabis Cautioning Scheme has a number of eligibility criteria, but there is no requirement for Police to enquire as to the reason for the possession of cannabis beyond being satisfied that the cannabis was for personal use.

A cannabis caution also encourages those cautioned to contact the cannabis information/referral phone line for information, advice, counselling, and treatment on alcohol and drug use. People with terminal illnesses who view cannabis as a form of treatment are unlikely to contact or benefit from such a phone line. Further, as noted

in the Auditor General's Performance Audit on the *Effectiveness of Cautioning for Minor Cannabis Offences*, Alcohol and Drug Services at St Vincent's Hospital, which runs the phone line, do not currently have the means to record the profile of people who contact them as a result of cautions.

"therapeutic goods" means goods:

(a) that are represented in any way to be, or that are, whether because of the way in which the goods are presented or for any other reason, likely to be taken to be:

(i) for therapeutic use; or

(ii) for use as an ingredient or component in the manufacture of therapeutic goods; or

(iii) for use as a container or part of a container for goods of the kind referred to in subparagraph (i) or (ii); or

(b) included in a class of goods the sole or principal use of which is, or ordinarily is, a therapeutic use or a use of a kind referred to in subparagraph (a)(ii) or (iii);

and includes biologicals, medical devices and goods declared to be therapeutic goods under an order in force under section 7, but does not include:

(c) goods declared not to be therapeutic goods under an order in force under section 7; or

(d) goods in respect of which such an order is in force, being an order that declares the goods not to be therapeutic goods when used, advertised, or presented for supply in the way specified in the order where the goods are used, advertised, or presented for supply in that way; or

(e) goods (other than goods declared to be therapeutic goods under an order in force under section 7) for which there is a standard (within the meaning of subsection 4(1) of the Food Standards Australia New Zealand Act 1991); or

(f) goods (other than goods declared to be therapeutic goods under an order in force under section 7) which, in Australia or New Zealand, have a tradition of use as foods for humans in the form in which they are presented.

"therapeutic use" means use in or in connection with:

(a) preventing, diagnosing, curing or alleviating a disease, ailment, defect or injury in persons; or

(b) influencing, inhibiting or modifying a physiological process in persons; or

(c) testing the susceptibility of persons to a disease or ailment; or

(d) influencing, controlling or preventing conception in persons; or

(e) testing for pregnancy in persons; or

(f) the replacement or modification of parts of the anatomy in persons.

Division 302 -- Trafficking controlled drugs

302.2 Trafficking commercial quantities of controlled drugs

- (1) A person commits an offence if:
 - (a) the person traffics in a substance; and
 - (b) the substance is a controlled drug; and
 - (c) the quantity trafficked is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

302.3 Trafficking marketable quantities of controlled drugs

- (1) A person commits an offence if:
 - (a) the person traffics in a substance; and
 - (b) the substance is a controlled drug; and
 - (c) the quantity trafficked is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

302.4 Trafficking controlled drugs

- (1) A person commits an offence if:
 - (a) the person traffics in a substance; and
 - (b) the substance is a controlled drug.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.

302.5 Presumption where trafficable quantities are involved

- (1) For the purposes of proving an offence against this Division, if a person has:

- (a) prepared a trafficable quantity of a substance for supply; or
- (b) transported a trafficable quantity of a substance; or
- (c) guarded or concealed a trafficable quantity of a substance; or
- (d) possessed a trafficable quantity of a substance;

the person is taken to have had the necessary intention or belief concerning the sale of the substance to have been trafficking in the substance.

(2) Subsection (1) does not apply if the person proves that he or she had neither that intention nor belief.

Note 1: A defendant bears a legal burden in relation to the matters in subsection (2) (see section 13.4).

Note 2: This section does not apply where quantities are combined for the purposes of section 311.2 (see subsection 311.2(3)).

302.6 Purchase of controlled drugs is not an ancillary offence

A person does not commit:

- (a) an offence against this Division because of the operation of section 11.2 or 11.2A; or
- (b) an offence against section 11.4 or 11.5 that relates to an offence against this Division;

merely because the person purchases, or intends to purchase, a controlled drug from another person.

Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).

Division 303 -- Commercial cultivation of controlled plants

303.1 Meanings of cultivate and cultivates a plant

(1) For the purposes of this Part, cultivate includes the following:

- (a) plant a seed, seedling or cutting;
- (b) transplant a plant;
- (c) nurture, tend or grow a plant;
- (d) guard or conceal a plant (including against interference or discovery by humans or natural predators);
- (e) harvest a plant, pick any part of a plant or separate any resin or other substance from a plant.

(2) For the purposes of this Part, a person cultivates a plant if the person:

- (a) engages in its cultivation; or
- (b) exercises control or direction over its cultivation; or
- (c) provides finance for its cultivation.

303.2 Meaning of product of a plant

For the purposes of this Part, the product of a plant includes the following:

- (a) a seed of the plant;
- (b) a part of the plant (whether alive or dead);
- (c) a substance separated from the plant.

303.3 Meaning of cultivates a plant for a commercial purpose

For the purposes of this Part, a person cultivates a plant for a commercial purpose if the person cultivates the plant:

- (a) with the intention of selling any of it or its products; or
- (b) believing that another person intends to sell any of it or its products.

303.4 Cultivating commercial quantities of controlled plants

(1) A person commits an offence if:

- (a) the person cultivates a plant for a commercial purpose; and
- (b) the plant is a controlled plant; and
- (c) the quantity cultivated is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

303.5 Cultivating marketable quantities of controlled plants

(1) A person commits an offence if:

(a) the person cultivates a plant for a commercial purpose; and

(b) the plant is a controlled plant; and

(c) the quantity cultivated is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

303.6 Cultivating controlled plants

(1) A person commits an offence if:

(a) the person cultivates a plant for a commercial purpose; and

(b) the plant is a controlled plant.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

303.7 Presumption where trafficable quantities are involved

(1) For the purposes of proving an offence against this Division, if a person has cultivated a trafficable quantity of a plant, the person is taken to have had the necessary intention or belief concerning the sale of the plant to have been cultivating the plant for a commercial purpose.

(2) Subsection (1) does not apply if the person proves that he or she had neither that intention nor belief.

Note: A defendant bears a legal burden in relation to the matters in subsection (2) (see section 13.4).

Division 304 -- Selling controlled plants

304.1 Selling commercial quantities of controlled plants

- (1) A person commits an offence if:
 - (a) the person sells a plant; and
 - (b) the plant is a controlled plant; and
 - (c) the quantity sold is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

304.2 Selling marketable quantities of controlled plants

- (1) A person commits an offence if:
 - (a) the person sells a plant; and
 - (b) the plant is a controlled plant; and
 - (c) the quantity sold is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

Note: Section 313.4 provides a partial defence in relation to the matter in paragraph (1)(c).

304.3 Selling controlled plants

- (1) A person commits an offence if:
 - (a) the person sells a plant; and
 - (b) the plant is a controlled plant.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.

Division 307 -- Import-export offences

Subdivision A--Importing and exporting border controlled drugs or border controlled plants

307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

- (1) A person commits an offence if:
 - (a) the person imports or exports a substance; and
 - (b) the substance is a border controlled drug or border controlled plant; and
 - (c) the quantity imported or exported is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

- (1) A person commits an offence if:
 - (a) the person imports or exports a substance; and
 - (b) the substance is a border controlled drug or border controlled plant; and
 - (c) the quantity imported or exported is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Absolute liability applies to paragraph (1)(c).

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

Note: A defendant bears a legal burden in relation to the matters in subsection (4) (see section 13.4).

307.3 Importing and exporting border controlled drugs or border controlled plants

- (1) A person commits an offence if:
 - (a) the person imports or exports a substance; and
 - (b) the substance is a border controlled drug or border controlled plant.

Penalty: Imprisonment for 10 years or 2,000 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

(3) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

Note: A defendant bears a legal burden in relation to the matters in subsection (3) (see section 13.4).

307.4 Importing and exporting border controlled drugs or border controlled plants--no defence relating to lack of commercial intent

(1) A person commits an offence if:

- (a) the person imports or exports a substance; and
- (b) the substance is a border controlled drug or border controlled plant.

Penalty: Imprisonment for 2 years, or 400 penalty units, or both.

(2) The fault element for paragraph (1)(b) is recklessness.

Subdivision B--Possessing unlawfully imported border controlled drugs or border controlled plants

307.5 Possessing commercial quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

- (a) the person possesses a substance; and
- (b) the substance was unlawfully imported; and
- (c) the substance is a border controlled drug or border controlled plant; and
- (d) the quantity possessed is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.6 Possessing marketable quantities of unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

- (a) the person possesses a substance; and
- (b) the substance was unlawfully imported; and
- (c) the substance is a border controlled drug or border controlled plant; and
- (d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

(5) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matters in subsections (4) and (5) (see section 13.4).

307.7 Possessing unlawfully imported border controlled drugs or border controlled plants

(1) A person commits an offence if:

- (a) the person possesses a substance; and
- (b) the substance was unlawfully imported; and
- (c) the substance is a border controlled drug or border controlled plant.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she did not know that the border controlled drug or border controlled plant was unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

Subdivision C--Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

307.8 Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

- (a) the person possesses a substance; and

and (b) the substance is reasonably suspected of having been unlawfully imported;

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a commercial quantity.

Penalty: Imprisonment for life or 7,500 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

307.9 Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

(a) the person possesses a substance; and

and (b) the substance is reasonably suspected of having been unlawfully imported;

(c) the substance is a border controlled drug or border controlled plant; and

(d) the quantity possessed is a marketable quantity.

Penalty: Imprisonment for 25 years or 5,000 penalty units, or both.

(2) Absolute liability applies to paragraphs (1)(b) and (d).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that he or she neither intended, nor believed that another person intended, to sell any of the border controlled drug or any of the border controlled plant or its products.

(5) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matters in subsections (4) and (5) (see section 13.4).

307.10 Possessing border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

(1) A person commits an offence if:

- (a) the person possesses a substance; and
 - (b) the substance is reasonably suspected of having been unlawfully imported;
- and
- (c) the substance is a border controlled drug or border controlled plant.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

(3) The fault element for paragraph (1)(c) is recklessness.

(4) Subsection (1) does not apply if the person proves that the border controlled drug or border controlled plant was not unlawfully imported.

Note: A defendant bears a legal burden in relation to the matter in subsection (4) (see section 13.4).

Division 308 -- Possession offences

308.1 Possessing controlled drugs

- (1) A person commits an offence if:
 - (a) the person possesses a substance; and
 - (b) the substance is a controlled drug.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

- (2) The fault element for paragraph (1)(b) is recklessness.

- (3) If:

- (a) a person is charged with, or convicted of, an offence against subsection (1); and

- (b) the offence is alleged to have been, or was, committed in a State or Territory;

the person may be tried, punished or otherwise dealt with as if the offence were an offence against the law of the State or Territory that involved the possession or use of a controlled drug (however described).

Note: Subsection (3) allows for drug users to be diverted from the criminal justice system to receive the same education, treatment and support that is available in relation to drug offences under State and Territory laws.

- (4) However, a person punished under subsection (3) must not be:

- (a) sentenced to a period of imprisonment that exceeds the period set out in subsection (1); or

- (b) fined an amount that exceeds the amount set out in subsection (1).

- (5) Subsection (3) does not limit:

- (a) Part 1B of the Crimes Act 1914 ; or

- (b) section 68 or 79 of the Judiciary Act 1903 ; or

- (c) any other law that provides for a law of a State or Territory to apply in relation to the exercise of federal jurisdiction.

Division 313 -- Defences and alternative verdicts

313.1 Defence--conduct justified or excused by or under a law of a State or Territory

This Part, other than Division 307, does not apply in relation to conduct if:

- (a) a person engages in the conduct in a State or Territory; and
- (b) the conduct is justified or excused by or under a law of that State or

Territory.

Note 1: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).

Note 2: A person is not criminally responsible for an offence against this Part if the person's conduct is justified or excused by or under another Commonwealth law (see section 10.5). In 2005, Commonwealth laws that authorised importation, possession or use of controlled drugs, controlled plants, controlled precursors, border controlled drugs, border controlled plants or border controlled precursors included the Customs Act 1901, the Narcotic Drugs Act 1967 and the Crimes Act 1914.

313.2 Defence--reasonable belief that conduct is justified or excused by or under a law

A person is not criminally responsible for an offence against this Part if:

(a) at the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory; and

(b) had the conduct been so justified or excused--the conduct would not have constituted the offence.

Note: A defendant bears an evidential burden in relation to the matter in paragraph (a) (see subsection 13.3(3)).

313.3 Alternative verdict--offence not proved

If:

(a) in a prosecution for an offence against this Part, the trier of fact:

(i) is not satisfied that the defendant is guilty of the alleged offence; but

(ii) is satisfied, beyond reasonable doubt, that the defendant is guilty of another offence against this Part; and

(b) the maximum penalty for the other offence is not greater than the maximum penalty for the alleged offence;

the trier of fact may find the defendant not guilty of the alleged offence but guilty of the other offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

313.4 Alternative verdict--mistake as to quantity of drug, plant or precursor

(1) This section applies if:

(a) an offence against this Part (other than Division 307) is prosecuted; and

(b) the offence involves a commercial quantity or a marketable quantity of a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor; and

(c) the trier of fact would, apart from this section, have found the defendant guilty of the offence.

(2) If:

(a) the defendant proves that, at the time of the alleged offence, he or she was under a mistaken belief about the quantity of the drug, plant or precursor; and

(b) if the mistaken belief had been correct, the defendant would have been guilty of another offence against this Part; and

(c) the maximum penalty for the other offence is less than the maximum penalty for the alleged offence;

the trier of fact may find the defendant:

(d) not guilty of the alleged offence; but

(e) guilty of the other offence.

Note: A defendant bears a legal burden in relation to the matter in paragraph (2)(a) (see section 13.4).

313.5 Alternative verdict--mistake as to identity of drug, plant or precursor

(1) This section applies if:

(a) an offence against this Part (other than Division 307) is prosecuted; and

(b) the offence involves a controlled drug, controlled plant, controlled precursor, border controlled drug, border controlled plant or border controlled precursor; and

(c) the trier of fact would, apart from this section, have found the defendant guilty of the offence.

(2) If:

(a) the defendant proves that, at the time of the alleged offence, he or she was under a mistaken belief about the identity of the drug, plant or precursor; and

(b) if the mistaken belief had been correct, the defendant would have been guilty of another offence against this Part; and

(c) the maximum penalty for the other offence is less than the maximum penalty for the alleged offence;

the trier of fact may find the defendant:

(d) not guilty of the alleged offence; but

(e) guilty of the other offence.

Note: A defendant bears a legal burden in relation to the matter in paragraph (2)(a) (see section 13.4).