UNDCP MODEL DRUG ABUSE BILL, 2000

1. The model Drug Abuse Bill has been designed for use in legal systems based in whole or in part on the common law tradition. There are other models developed for civil law jurisdictions. The model has been developed to provide a guide and a tool for states wanting to put in place a comprehensive drug control regime in their country, and to thereby ensure full and effective implementation of their obligations under the international drug control conventions in this regard (1961, 1971 and 1988).[1] It is designed to complement the other model drafts (Money Laundering and Proceeds of Crime Bill, Foreign Evidence Bill, Mutual Legal Assistance in Criminal Matters Bill, Extradition (Amendment) Bill and Witness Protection Bill) to form a coherent whole.

2. It is for the state in question to adapt the proposed provisions to bring them, where necessary, into line with its constitutional principles and basic concepts of its legal system, and to ensure that they fit with its existing legal structure and the enforcement arrangements it already has in place. In various of its provisions the Bill sets out options for enacting states to flag up choices. A state may also supplement the model provisions in whatever ways it considers necessary to best achieve its drug control goals. The model does in itself constitute a coherent whole, so caution needs to be exercised if a state wishes to substantially modify the content of these provisions, or to omit them altogether. The model is deliberately drafted to include detail normally left to subordinate legislation, in order to make the Bill as self-sufficient as possible, and to reduce the normally heavy burden associated with drug control regulation.

3. The objectives of the Bill can be summarised as follows. Firstly, it prescribes a regime to

---

[1] Another good guide for such a state would be to examine the experiences of a large number of countries that have already taken this step (states must furnish the UN Secretary-General with texts of the laws and regulations enacted by parties to the conventions, along with any subsequent amendments).

ensure that certain drugs are available only for medical, scientific and related purposes, and are not abused. In this regard it contains provision designed to prevent the diversion from lawful trade of controlled chemicals, equipment and materials for use in the unlawful manufacture of drugs. Secondly it establishes drug trafficking and related conduct as serious criminal offences. Thirdly it establishes certain conduct by drug users as criminal offences. Fourthly it provides for the treatment and rehabilitation of drug abusing or dependent offenders.

PART I - Preliminary

Clause 2 -Extended application of Act

4. In accordance with clause 2(1), the Act extends throughout the territory of the enacting state. If the State is a Federation of states, or includes self-governing territories, it will be a matter for that state to implement the Conventions according to its own internal constitutional arrangements.

5. "*Free trade zone*", as referred to in clause 2(1) would comprise an area of a state (such as a "free port") where taxes and tariffs or any other kind of charge imposed on goods and services, if they exist at all, are lower than in the rest of the state, and where control procedures and documentation are reduced to a minimum. A particular feature of such zones is that they are regarded for certain purposes as being outside the national customs territory and not subject to normal customs control. However, provisions in the international drug control conventions make it clear that the legitimate concessions granted in these geographic areas are not to be abused by those involved in the illegal activities involving drugs, and the model law accordingly extends all of the provisions of the Act to free trade zones. [(2)]

[(2)] Article 31(2) of the 1961 Convention, Article 12(3)(a) of the 1971 Convention and Article 18 of the 1988 Convention.

6. Clause 2(2) provides for an extension of jurisdiction of Part III of the Act (trafficking and related serious offences). The ambit of the Act is wider in relation to this part than its other parts, given the nature of the offences it deals with. Clause (2)(b)(i) refers to persons "*ordinarily resident*" in that state, covering those persons who are *de facto* resident in a state according to its laws. In some states a person can be "*ordinarily resident*" even though s/he does not own a residence in that state, or spends substantial amounts of time away from the state. The reference to "*a person in [name of State]*" in clause 2(2)(b)(iii) would include a person who is not resident in that state. The reference to "*relating to...the possible supply*" in clause 2(2)(b)(iii) would cover the attempt to supply.

7. A "*convention State*" as referred to in clause 2(2)(c) is defined in clause 3(1)(k).

Clause 3 - Definitions

8. "*Acquire*" is defined broadly in clause 3(1)(a) to cover a wide variety of arrangements by which ownership or control of something is transferred to a person, whether it be permanently or temporarily, and thus includes things transferred by lease or hire, as well as straightforward purchase.

9. In extending the Bill to analogues through clause 3(1)(b), the enacting state ensures that its ambit is not restricted to those drugs identified and listed in its schedules. The aim of this provision is that the control regime imposed by the Bill cannot be evaded by eg. "copy cat" drugs, which are not themselves listed but have essentially the same effect as those drugs which are. Given that their chemical structure is slightly different from that of the substances whose effects they mimic, such substances would otherwise evade all forms of control.

10. Different countries have adopted different approaches to bring analogues under their drug control regime. One approach has been to use a generic model, whereby analogues within a family of substances are covered if their chemical structures have been manipulated using a

particular defined chemical process. Another has been to use a substitution model, where a substantially similar analogue is one that is chemically structured in a specified way. There are problems with both approaches - the former may not be fully comprehensive, and the latter risks the rapidly changing market leaving it behind. Whichever one is adopted, given a vigilant Minister of Health, informed of the latest developments in this field (eg. through the Commission on Narcotic Drugs[3]), and Schedules which can be quickly updated, the effectiveness of the control regime in this regard will be maximised. To improve certainty in this area of analogue law, and to limit in time the work to be done by the generic or substitution components of the definition, each problem analogue should be listed as specifically as possible (usually in Schedule 1) as soon as possible after it has been identified as such.

11. For administrative convenience and practicality, the definition of "*authorised officer*" in clause 3(1)(d) enables the Minister of Justice or other appropriate Minister to designate a class of persons.

12. The word "*document*" (used *inter alia* in clauses 68, 69 and 90) is defined broadly in clause 3(1)(o), and includes anything from which sounds, images or writings can be produced, with or without the aid of anything else. This definition would encompass videos, tapes and encrypted electronic records for example, and writings subject to the evasive technique of steganography.[4] The presence of actual "*writings*" is unnecessary - maps, plans, drawings or photographs are included too.

13. The definition of "*drug abuser*" in clause 3(1)(p) excludes persons taking drugs on the

---

[3] The Commission on Narcotic Drugs (CND), a functional commission of the Economic and Social Council (ECOSOC), is the central policy-making body within the United Nations system for dealing with alldrug-related matters. It analyzes the world drug abuse situation and develops proposals to strengthen international drug control.

[4] Steganography is a technique developed to ensure the security of electronic communications, and involves the burying of electronic information within one pixel, ie the so called picture element of electronic data, represented by the number of dots on the screen - the more dots, the sharper the image, of an otherwise innocuous image or noise.

prescription of a doctor, or as part of an authorised medical or scientific trial (see clause 17). A drug abuser may or may not be drug dependent within the meaning of clause 3(1)(q).

14. The definition of "*drug dependent person*" in clause 3(1)(q) utilises the concept of "*impaired control*" and "*drug-seeking behaviour suggesting such impaired control*". "*Impaired control*" can cover a broad range of behaviour and may not necessarily be apparent to a lay person. It would be sufficient for an expert, eg. a doctor, to believe that the person had impaired control, for this description to apply.

15. "*Foreign state*" is defined in clause 3(1)(t) to include every constituent part of the country concerned, including a territory, dependency or protectorate, which administers its own laws relating to drugs of abuse, analogues, etc. The latter is the determinative criteria, rather than the description/label of the area.

16. "*Manufacture*" is defined widely in clause 3(1)(y) to cover a broad range of activities leading up to the end product, and includes the processing and adaptation of drugs of abuse, analogues, controlled chemicals or materials, and their package, and their transformation into other drugs, analogues or chemicals.

17. "*Person*", as used throughout the Bill, is defined in clause 3(1)(ff) as meaning "*any natural or legal person*", and so would cover a corporation (ie a body of persons having in law an existence and rights and duties distinct from those of the individual persons who from time to time form it) as well as individuals themselves.

18. The definition of "*practitioner*" in clause 3(1)(ii) is wide enough to include other persons in addition to dentists, medical practitioners or veterinary surgeons, provided that they are entitled under the enacting State´s laws to practice any other profession whose members may lawfully prescribe, dispense or administer any drug of abuse.

19. "*Property*" is given a broad definition in clause 3(1)(oo), and covers real (ie immoveable property such as a land or building) or personal property of every description, whether situated in the enacting State or elsewhere, and whether tangible or intangible, and it includes an interest in any such real or personal property. "*Interest*" is not defined in the Bill, but the definition in the UNDCP model Mutual Legal Assistance Bill is relevant here as guidance, clause 3(1)(g) of which states that "*interest*," *in relation to property, means a legal or equitable estate or interest in the property; or right, power or privilege in connection with the property, whether present or future and whether vested or contingent*". Under this definition, even where there is no legal interest in the property, there would be an interest for the purposes of the Bill where there are rights, powers and privileges in connection with the property, eg powers over property by virtue of a familial relationship.

20. The definition of "*property derived from an offence*" in clause 3(1)(pp) can extend either to property derived from a serious offence (defined in clause 3(1)(ss)), or more widely, to other criminal offences under other statutes. The ambit of provisions in the Bill such as clause 73(2) (activities pursuant to undercover and controlled delivery operations) and clause 76(1)(c) and 3(c) (search warrants) will be affected by this.

21. "*Record*" is defined in clause 3(1)(qq), and would include electronic records, whether or not they are subject to security techniques such as encryption.

22. "*Serious offence*" is defined in clause 3(1)(ss). It covers an offence against a provision of any law of the enacting state for which the maximum penalty is imprisonment or other deprivation of liberty for a defined period (a year is suggested in the draft and this is a choice for the enacting State) or more severe penalty. Offences which are purely fiscal in nature, ie purely financial and not involving any aggravating circumstances such as use of violence, can be excluded according to the discretion of the enacting State.

23. "*Serious offence*" also covers an offence against a provision of a law of a foreign State, in relation to acts or omissions, which had they occurred in the enacting State, would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a defined period (again a year is suggested), or more severe penalty if the enacting State so chooses. Again, fiscal offences can be excluded.

24. Although the definition of "*serious offence*" does not specify that the offence must be criminal, offences are synonymous with crime, and it is clear from the ambit of the Bill as set out in its Title and preamble, and from the references in the Bill to criminal matters, that it would not extend to civil proceedings unconnected to a criminal offence.

Part II - Regulation of Drugs of Abuse, And Controlled Chemicals, Equipment And Materials Used to Make Them

Division 1 - Classification and Scheduling of Drugs of Abuse and Controlled Chemicals

Clause 4 - Classification of drugs of abuse and controlled chemicals

25. Under this clause, different measures of control are specified in the Act for different drugs of abuse, with the strictest measures being applied to drugs of abuse listed in Schedule I, less strict measures in relation to those listed in Schedule II, and the least strict in relation to those listed in Schedule III (clause 4(2)). "*Drugs of abuse*" are defined in clause 3(1)(r) to mean "*a prohibited drug, a high-risk drug, or a risk drug, and includes a preparation*". Prohibited drugs are listed in Schedule I, high risk drugs of abuse in Schedule II, and risk drugs of abuse in Schedule III. "*Preparations*" are given a wide definition in clause 3(1)(ll), intended to cover the wide variety of forms in which a drug of abuse or controlled chemical can exist. Liquids, gases, and compounds containing either a drug of abuse or a controlled chemical would be caught under this definition, as would materials such as paper impregnated with drugs. Controlled chemicals are listed in Schedule V of the Act, and refer to Tables I and II of the

1988 Convention.[5]

26. Rather than reproducing the separate Schedules to the 1961, 1971 and 1988 Conventions, Schedules I, II and III of the model law list drugs from all three Conventions according to whether they are prohibited, high risk or risk, and without distinguishing which Convention Schedule they come from.

27. One reason for this approach is that the international classification into narcotic drugs and psychotropic substances according to whether the substance is governed by the 1961 Convention or by the 1971 Convention has no conceptual basis. The legal definition of many psychotropic substances is entirely applicable to narcotic drugs, and in many cases, the reverse is true. Even more important, the international classification is not dependent on the risk that the substance poses for health and welfare. Substances which cause a low level of dependence are classified together with narcotic drugs, and highly addictive substances are classified together with psychotropic substances. A preferable approach is therefore to subject licit operations involving a drug to control measures whose severity depends on the degree of potential risk posed by the substance to public health, and on whether or not it has a medical use. Scientific knowledge as to medical use can mean that substances which were at one time considered to have no such use are now recognised as having one; this is one of the reasons why the model law gives the Minister of Health or other designated person a wide degree of flexibility under clause 6 to amend the Schedules as expertise changes.

---

[5] The term "*precursor*" is commonly used to indicate any of the substances in Table I or II of the 1988 Convention (another common term, depending on their chemical properties, is "*essential chemical*"). The plenipotentiary conference that adopted the 1988 Convention did not use any one term to describe such substances. Instead, the expression "*substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances*" was introduced in the Convention, but it has become common practice to refer to all such substances simply as "*precursors*".

Clause 5 - Preparations

28. A control regime which did not cover preparations (defined in clause 3(1)(ll)), containing a drug of abuse or a controlled chemical would omit a crucial potential area of abuse, hence the need for the regulation contained in clause 5(1). "*Measures of control*" would include all those referred to in clause 4(4).

29. Clause 5(2) allows for speedy action by a designated Minister to make regulations to exempt certain preparations, avoiding the need for lengthy and cumbersome primary legislation. The Minister must be satisfied that the preparations satisfy the stated criteria. Should scientific technology change so that the criteria are no longer met, for example where it had been difficult to recover a drug of abuse in a sufficient quantity to present a risk of abuse from a particular substance but it had become easy to do so using new techniques, the relevant provisions of the exempting regulations can be quickly revoked, so that the preparation would once again be subject to the control regime of this Part.

30. Clause 5(3) sets out limits to the Minister´s power of exemption under clause 5(2). The Minister must not exempt any preparation under that provision insofar as it relates to the manufacture, import or export of preparations containing high risk drugs or risk drugs, or the making and keeping of records relating to such activities (see division 4 for the latter) nor exempt any preparation otherwise than in accordance with clause 5(2), except to the extent if any to which it may be exempted under any international drug control convention applicable to the particular preparation or class of preparation. "*International drug control convention*" is defined in clause 3(1)(x). Examples of preparations which could be appropriately exempted could include any preparations listed in Schedule III of the 1961 Schedule, where concentration and relative mass/volume are prescribed.[(6)]

[(6)] See further the List of Narcotic Drugs under International Control ("the yellow list") and the List of Psychotropic Substances under International Control ("the green list") prepared by the International Narcotics Control Board (the INCB). The frequent introduction by the pharmaceutical industry of new preparations of narcotic

Clause 6 - Amendment of Schedules

31. Clause 6(1) is designed to give the designated Minister a large degree of flexibility in the operation of the legislation, empowering him or her to adapt it quickly to changing circumstances by making regulations under clause 126 to amend any schedule to the Act, by adding or deleting a drug of abuse, controlled chemical or item of controlled equipment or controlled material to or from the relevant Schedule, or in the case of a drug of abuse, by transferring it from one Schedule to another. For the avoidance of doubt, clause 6(3) makes it clear that this power includes transfers from Schedule I to Schedules II and III and vice versa, with the safeguard that the Minister´s powers should not be exercised in relation to any drug of abuse if this would reduce controls below the minimum regulatory or control requirements for that substance established under the conventions.

32. Clause 6(2) sets out the factors the Minister must consider before exercising these powers. The factors are not determinative one way or the other, but must be taken into account in the exercise of this discretion.

33. Clause 6 enables a state, at its discretion, to regulate under this Act substances which are not controlled by the conventions but that pose the same dangers as the substances which the conventions cover. Under the Conventions, states are allowed to adopt stricter or more severe provisions which they deem necessary for the protection of public health or welfare or for the

---

drugs and psychotropic substances under international control, and the withdrawal of old ones, makes a regular updating of the two lists necessary for the effectiveness of controls, and in pursuit of this objective the INCB has established a database containing a list of such preparations. Commonly exempted substances included in Schedule III of the 1961 Convention include for example "*preparations of cocaine containing not more than 0.1 per cent of cocaine calculated as cocaine base*", and "*preparations of opium or morphine containing not more than 0.2 per cent of morphine calculated as anhydrous morphine base and compounded with one or more other ingredients and in such a way that the drug cannot be recovered by readily applicable means or in a yield which would constitute a risk to public health*".

prevention or suppression of illicit trafficking. [7]

34. The provision would enable states to place under control new addictive substances which are dangerous to public health without awaiting the outcome of the lengthy procedure required for the inclusion of a new substance by the International Narcotics Control Board (Article 3 of the 1961 Convention, and Article 2(1) of the 1971 Convention), and so subject to rapid control new drugs which may not be caught by the definition of "*analogue*" (clause 3(1)(b)) once they are discovered to be in circulation.

Division 2 - Registration, Licencing and Permit System

Clause 7 - Requirement for registration, licensing etc, of controlled chemical, equipment and materials operators

35. In order to prevent diversion from licit to illicit trade, some form of control is required in relation to any operator or class of operators in respect of controlled chemicals, equipment and materials (listed in Schedules V and VI). The source of these provisions is found in Articles 12 and 13 of the 1988 Convention, the aim of which is that the denial of these substances and articles to producers and manufacturers of illicit drugs will lead to a reduction in illicit drug manufacture. Clause 7(1) empowers a designated Minister to decide which control measure or measures as set out in clause 7(2) should apply, in relation to any operator or class of operators (eg. operators carrying out the same activity in respect of the same substances).
The precursor framework in the model law is designed to be able to subject operators to whom the provisions apply to as light or as heavy a control regime as thought justified by the Minister of Health, given his/her assessment of the risks of diversion to unlawful use, ranging from registration only, to full licencing. This ensures a highly flexible system to ensure that regulation imposes no higher a control regime than is justified in cost terms.

[7] Article 39 of the 1961 Convention, Article 23 of the 1971 Convention and Article 24 of the 1988 Convention.

36. "*Operator*" is defined in clause 3(1)(cc), and excludes persons carrying on a business of customs agent, warehouse depositor or carrier of a drug of abuse or controlled chemical or equipment intended for lawful use, when acting solely in that capacity. Clause 7(3) lists those matters which the Minister must take into account in deciding which control measures should apply in which cases. Looking at those factors, the greater the quantities of chemicals, equipment or materials involved, or the more likely it is that the substances are destined for countries or regions where drugs of abuse or the raw materials for making them are believed to be illicitly produced, the more likely it is that the Minister will exercise his discretion to impose a stricter control regime. Likewise the less commercial experience the operators have, or where there are question marks over their or their staff´s integrity. *"Any other relevant matter*" under Clause 7(3)(d) could include for example the types of chemicals, equipment or materials involved, or any intelligence or police information a state might have as to where the controlled chemicals etc. are destined, or as to the profile of the operators and their staff.

37. Clause 7(4) prohibits operators undertaking the specified activities unless it is in accordance with the control measures determined by the Minister. *"Acquire*" is defined in clause 3(1)(a).

38. Clause 7(6) provides for a choice in respect of the exemption of operators or classes of operators as to whether manufacturers, or only importers and exporters of the relevant substances, are included in the category of operators or classes of operators who may not be exempted.

Clause 8 - Registration of controlled chemical, equipment and material operators

39. This clause prescribes the requirements for registration of operators engaged in the business of manufacture, import, export, acquisition, supply or possession of any controlled chemical, equipment or material. The requirement to notify the Minister of Health of the specified particulars can be triggered within a specified number of working days after the entry into force of the Act, as the enacting state deems appropriate.

Clause 9 - Requirements of licences and permits for drugs of abuse operators

40. Clause 9(1) prohibits operators from the cultivation of cannabis plant, coca bush or opium poppy, and from manufacture, acquisition or supply of drugs of abuse, except under a license granted by the Minister of Health under section 11. This prohibition does not apply to the professional supply of drugs of abuse by pharmacists acting in the ordinary course of business, dentists, medical practitioners and vets administering or supplying the drug to a patient or animal in the ordinary course treatment, or to persons licensed by the Minister of Health to supply a drug of abuse provided that such supply takes place under the immediate supervision of a pharmacist (clause 28). *"Acquire"* as used in clause 9(1)(b) is defined in clause 3(1)(a).

41. Operators are prohibited from importing, exporting or bringing into the enacting state in transit, or redirecting out of the state in transit, any drug of abuse, except if licensed to do so by the Minister of Health, and pursuant to a permit authorising the specific activity. *"Transit"* is defined in clause 3(1)(ww).

Clause 10 - Application for operators licence

42. Under clause 10, an operator who is required by the Act to be licensed must apply in writing to the Minister of Health or other designated person, specifying the details prescribed in clause 10(1). Looking at clause 10(1)(f), the requirement to specify the address of each place where the proposed activity would be carried out, and the premises of storage does not mean that a licence has to be granted in respect of each place (clauses 11(c) and 12(d)). *"Premises"* are not limited to buildings - the term is defined widely in clause 3(1)(jj) as including "*the whole or any part of a structure, building, aircraft or vessel*".

43. Clause 10(1)(g) reflects the obligations on states under the 1971 Convention, Article 8(2)(c) of which requires states to provide that security measures be taken with regard to

establishments and premises subject to licence in order to prevent theft or other diversion of stocks. The 1961 Convention does not contain such provision, but the commentary to it stresses that the purpose of the licensing requirement applicable under the convention to buildings and premises is to ensure that they conform to the conditions required to facilitate control, particularly to prevent theft or other diversions of drugs. Clause 10(2)(a) further requires that an application for a licence is to be accompanied by a plan of each of the relevant premises indicating where the drug of abuse or controlled chemical, item of equipment or material would be stored, and the location and nature of any security devices. This information will assist in the Minister´s decision as to whether or not to grant a licence, and if so, whether or not to subject it to conditions relating to security arrangements under clause 12(1)(e)(iv).

44. Looking at clause 10(1)(h), the Conventions require States to control all persons carrying on or engaged in an operation involving drugs. The competent authorities cannot exercise such control, even summarily and on a spot-check basis, unless they know the relevant persons´ names and addresses. The official commentary to the 1961 Convention indicates that the term "*persons*" covers all physical persons engaged in the activity, not only the owners or managers, but also technical personnel, office workers and manual labourers. Clause 10(1)(i) enables the Minister to prescribe other particulars, and the model law gives examples.

Clause 11 - Grant of licence

45. Clause 11 requires the submission of the application for a licence to the Minister of Health for verification of information and a criminal records check, the latter both in the enacting state and elsewhere (clause 11(a)(i)). In the absence of international data bases containing such information (which are developing in some regions but are non-existent in others), it would be sufficient for officials to check with the relevant prosecution authorities of the other state. The integrity of the person applying for the licence is an important part of the "*fit and proper*" test referred to in Clause 11(a)(ii), in particular whether it is considered they might be susceptible to bribery. The professional competence of the person is also highly relevant to the Minister´s

decision.

46. The licence may be granted where the Minister is satisfied that the applicant proposes to engage in the activity, and, *inter alia*, that the activity will be carried out under the supervision of a fit and proper person, that the places, premises and security arrangements concerned are in fit condition and appropriate, the security arrangements and devices proposed at each relevant place and premises are appropriate and sufficient, and where drugs of abuse are involved, that the activity will be carried out only for recognised medical or scientific purposes.

Clause 12 - Contents and conditions of licences

47. Clause 12(1) prescribes the contents of an operators´ license to authorise a particular person to engage in a specific activity connected with one or more specified substances and carried on under fixed conditions, including name and address, activity and drug of abuse/controlled chemical/equipment/material to which license relates, address of premises and places where the activity is to be carried out and where controlled items will be stored, and other terms, conditions and particulars to ensure proper activity, record-keeping and reporting and security.

48. Clause 20 makes provision for the duration of a licence. A licence can be amended or withdrawn after its grant (clause 22).

49. Looking at clause 12(1)(b), the licence would cover the right to engage in all operations which normally fall within the scope of the manufacturer´s business, but not to trade in drugs which he is not authorised to make and which he does not need for manufacture, nor the right to engage in retail trade in the drugs which he makes. The licence authorizes a particular person to engage in a specific activity connected with one or more specified substances and carried on under fixed conditions, with the aim, in the case of a manufacturing licence, of producing substances whose composition has been determined. Any change in one of these components will be subject to prior authorisation by the authority which issued the document.

50. Looking at clause 12(1)(ii), "*record*" is defined in clause 3(1)(qq). Clause 12(1)(e)(iv) refers to security of places and premises. "*Premises*" are defined widely in clause 3(1)(jj) as including "*the whole or any part of a structure, building, aircraft or vessel*".

Clause 13 - applications for imports, export or transit permits

51. The term "*international non-proprietary name*" ("INN") refers to internationally recognised pharmacological names for substances, also known as approved, official or generic names. It is one of a number of different ways of naming drug substances, and provides a relatively simple and internationally acceptable standard for identifying drug substances, without the complexity of long chemical names, and independent of proprietary brand names.[8]

52. Clause 13 prescribes the requirements for import, export and transit permit applications. An application must be made in writing to the Minister of Health, and must specify, inter alia, the full name and address of the importer, exporter or consignee, the quantity, mass and volume of any drug of abuse, controlled chemical or controlled material, and the date or period within which the planned import, export or transit is to take place. A "*bonded warehouse*" as referred to in clause 13(1)(i) refers to a secure place approved by the relevant tax and duty authorities in the state for the deposit of goods in respect of which duty is liable to be paid.

Clause 14 - Grant of import, export or transit permits

53. This clause authorises the granting of import/export/transit permits (in one or more

---

[8] INN come in two forms, proposed (Proposed INN) and recommended (Recommended INN). The World Health Organisation (WHO) selects Proposed INN's, publishes the selected names as proposals, and then lists the names as Recommended INNs (unless objections have been made). While INN are names officially designated by WHO, and therefore may be the most appropriate for use in connection with nomenclature for the international drug control conventions, alternate nonproprietary names for the same substance may exist, designated by national bodies.

consignments) for drugs of abuse or controlled chemicals/materials/equipment, provided the application complies with section 13 requirements, where such permit is to be issued to a registered/licensed exporter. The clause prohibits the Minister of Health from granting an export permit for any consignment of a drug of abuse to a bonded warehouse without the certified approval of the relevant foreign state authority on the import permit.

Clause 15 - Redirection permits

54. Clause 15 authorises the Secretary of Health to issue redirection permits for drugs of abuse or controlled chemicals or equipment or materials in transit, where a valid foreign State import authorisation is produced by a licensed operator, but only if satisfied that such redirection is to be done lawfully and for proper purpose. The clause goes on to prescribe requirements for redirection permits.

Clause 16 - Permits in relation to first-aid kits

55. This authorises the Minister of Health to grant a permit to include drugs of abuse in first-aid kits for medical use during international flights or voyages, on written application to the Minister. The clause is based on Article 32(1) of the 1961 Convention and Article 14(1) of the 1971 Convention. The latter covers all forms of international transport whereas the 1961 Convention covers only ships and flights. In referring to "*international flights or voyages*", on a narrow construction clause 16 would be limited to journeys by aeroplane or ship, but this reflects the common practice that first aid kits are not carried on trains or coaches.

56. Where the enacting state is the country of registry of conveyance, it would have the responsibility of taking the appropriate measures to prevent the improper use of the substances contained in the first-aid kit.

57. "*Any other particulars as may be prescribed*" as referred to in clause 16(2)(d) would include

for example that the State be entitled to satisfy itself that any preparations have been lawfully obtained.

Clause 17 - Permits in relation to programmes for medical and scientific purposes

58. This provision authorises the Minister of Health or other designated person to grant a permit for the conduct of a programme for scientific or medical purposes, where that programme requires the import, possession or use of a drug of abuse or analogue, on written application. Clause 17(2) sets out the required contents of the application, and clause 17(3) the information which must accompany it. The Minister may authorise the programme if he is satisfied as to the matters listed in clause 17(4). Looking at clause 17(4)(b) and the requirement that the programme be "*scientifically viable*", a project which raises substantial doubts as to whether it can achieve its stated goals is likely to fail on this hurdle. The reference to *"any relevant protocol*" is to either a research protocol ((17(3)(b)) or a clinical trial protocol (clause 17(3)(c)). Clause 17(5) sets out the required information a permit is to specify, with provision that it may contain such other particulars as may be prescribed (clause 17(5)(i)). Looking at clause 17(5)(g)(ii), "*record*" is defined in clause 3(1)(qq).

Clause 18 - Open individual authorization for certain exports of controlled chemicals, etc

59. In respect of those operators to whom the Minister of Health or other designated person has determined that control measures must apply, clause 18 makes provision as to open individual authorisations for certain exports of controlled chemicals, equipment or materials. An "*open individual authorisation*" is defined in clause 3(1)(bb) as an authorisation permitting an operator to export from the enacting State such quantities of controlled chemicals, equipment or materials to such countries or regions during such periods as may be specified in the authorisation. Clause 18(1) lists the information an operator must supply in writing to the Minister of Health in order for an authorisation to be granted. The Minister of Health may grant an open individual authorisation either with or without subjecting it to terms and conditions

(clause 18(2)). Clause 18(3) states the grounds on which the Minister can refuse an authorisation, but these grounds are not exhaustive. An operator is not entitled to an authorisation even if clause 18(3) grounds have not been made out; its grant is subject to the discretion of the Minister. Even if the grounds are made out, the Minister is not compelled to refuse the authorisation; this is again left to his discretion.

Clause 19 - Extended authorization for related activities

60. Clause 19 makes it clear that persons who are licensed, registered or who hold permits or authorisations under Part II of the Act for a particular activity are entitled to possess the relevant drug of abuse or analogue, or controlled equipment or material for the purpose of the activity. So long as that purpose is related to the activity, the possession is lawful.

Clause 20 - Duration of registration, licences, permits and open individual authorizations

61. Clause 20(1) makes provision for the duration of registrations and licences, and clause 20(2) for permits and open individual authorisations. The time limit to be specified is for the enacting state to decide, in the light of its administrative practices and procedures.

Clause 21 - Duty of authorized persons to notify material changes, etc

62. Clause 21 imposes a duty on authorised persons to notify the Minister of Health or other designated person in writing of any material changes, as specified in clause 21(1), in relation to any licence or permit. These factors are all material to the grant of the licence or permit, and may lead the Minister to suspend or revoke the licence or permit, or to impose or vary existing conditions (clause 22). The person is obliged to return his licence or permit to the Minister along with the written notification of material changes within a specified time. Clause 21(2) imposes a duty on persons to notify the Minister of Health in writing of material changes in relation to any registration or open individual authorisation.

Clause 22 - Variation, suspension or revocation of registration, licences, permits or authorizations

63. Clause 22 gives the Minister of Health or other designated person a wide range of options in the event of the circumstances specified in clause 22(1). The Minister is empowered to suspend or revoke the registration, licence, permit or authorisation, or impose or vary conditions specified in the licence, permit or authorisation. S/he is not compelled to do any of these things, but rather may exercise his/her discretion as to what is considered necessary and reasonable in all the circumstances to prevent the risk of diversion of controlled chemicals, equipment and materials, drugs of abuse or analogues from lawful to unlawful uses. Clause 22(2) obliges persons whose licence, permit or authorisation is suspended or revoked to return it to the Minister of Health within a time limit to be specified by the enacting state. Where the person has notified the Minister of a material chance affecting a licence or permit granted to him/her, he is obliged to return the licence or permit under clause 21(1).

Clause 23 - Duty of operators to check and notify suspicious orders and transactions

64. Clause 23 imposes a duty on operators who are registered, licenced, permitted or authorised under Part II, to check and notify the Minister of Health or other designated person where the operator has "*reasonable grounds to suspect*" that information that it has concerning an order or transaction involving a drug of abuse, controlled chemical or item of controlled equipment or materials might be relevant to an offence or a possible offence against Part III of the Act (trafficking and related serious offences). The test for suspicion is an objective one, and will be judged by what would trigger suspicion in the minds of most people. Thus if it is considered that the average person would have had reasonable grounds for suspicion, but the operator in question did not, that operator may be held to have failed to fulfil his duty to inform the Minister, and thus to have committed an offence (clause 23(2)).

Clause 24 - Offence for licensed operators to deal with unlicenced operator

65. Clause 24 makes it an offence for an operator licenced under Part II of the Act in relation to any drug of abuse to supply to or acquire from another operator in the enacting State any drug of abuse, unless that operator is also licenced under Part II.

Clause 25 - Offences in relation to drugs of abuse in lawful transit

66. Clause 25(1) makes it an offence for a person to subject a drug of abuse lawfully in transit to any process which could alter its nature, or, without instructions from either the Minister of Health or Comptroller of Customs or other designated person, open or break any package or container containing a drug of abuse in transit. Clause 25(2) makes it an offence for a licenced operator to redirect any drug of abuse or controlled chemical, equipment or material in transit unless under the authority of a redirection permit issued under Part II of the Act.

Clause 26 - Power to limit licensee's stocks

67. Article 29(3) and Article 30(2)(a) of the 1961 Convention require that States prevent the accumulation, in the possession of operators, of quantities of drugs in excess of those required for the normal conduct of business, having regard to the prevailing market conditions. The 1971 Convention does not refer to this requirement in relation to psychotropic substances, but as they are subject to the same risks of diversion to illicit channels as are narcotic drugs, it is logical that this requirement should also apply in respect of them. Article 12(8)(b)(iv) of the 1988 Convention provides that States may impose this requirement in relation to controlled chemicals, but does not oblige them to do so (hence the choice in clause 26(1) as to the application of the provision to controlled chemicals).

68. The model law recognises that the amounts "*required for the normal conduct of its business*" will vary from one operator to another in accordance with the different conditions

under which business is carried on, and that they will be different in the case of different drugs. For this reason, clause 26(1) provides that the Minister of Health is to determine the maximum quantities of each drug of abuse and/or controlled chemical for each operator. The Minister has a considerable degree of flexibility, in that he can amend at any time any quota (clause 26(2)). Clause 26(3) makes provision for where the Minister is satisfied that a person authorised to stock a drug of abuse holds a quantity in excess of the person´s annual quota.

Division 3 - Professional Supply of Drugs of Abuse

Clause 27 - Meaning of "authorized person"and "professional supply"

69. Clause 27 sets out the meaning of "*authorised person*" and "*professional supply*", defining the latter widely.

Clause 28 - Persons authorized to engage in professional supply of drugs of abuse

70. Clause 28(1) provides that no one shall engage in conduct constituting the professional supply of any drug of abuse except a pharmacist, a person licenced under subsection 9(1)(b) under the supervision of a pharmacist, defined in clause 3(1)(gg), and a practitioner, defined in clause 3(1)(ii). Practitioners would need to prescribe a drug of abuse before administering or supplying it. The references to "*norms and standards*" of pharmacists and practitioners would include any professional rules of conduct and ethics applicable to pharmacists, doctors, dentists and veterinaries in the enacting state. Clause 28(1)(c)(ii) makes allowance for the fact that people or animals may need treatment in localities which are remote from the practices of doctors, dentists or veterinaries and so where direct administration of the drug to the patient or animal is not practicable. Clause 28(2) sets out a very narrow exception to the rules set out in section clause 28(1) where access to a practitioner is not reasonably possible on account of distance. Breach of this provision is subject to a penalty to be specified.

Clause 29 - Prescriptions

71. Clause 29 is designed to prevent the improper prescription and use of medicines containing controlled substances. "*Prescription*" is defined in clause 3(1)(kk) as meaning a written direction by a practitioner (defined in clause 3(1)(ii)) that a stated amount of a drug of abuse be dispensed for the person named in that prescription. Medical practitioners, dentists and veterinary surgeons may prescribe drugs of abuse, provided this is "*in the ordinary course of treatment*", which will be determined by the current applicable standards of treatment in the profession. The only other category of persons covered are those authorised by the Minister of Health or other designated person to prescribe specified drugs of abuse in places where access to a practitioner is "*not reasonably possible*". What is not reasonably possible will be a matter for the Minister or other designated person to decide on.

72. Clause 29(2) makes provision that drugs of abuse are only supplied to persons who might be drug dependent, in certain tightly defined circumstances, namely a medical emergency, or in the ordinary course of treatment in accordance with a treatment and rehabilitation programme under Division 2 of Part IV. A drug dependent person is defined in section 3(1)(q). "*A medical emergency*" should be interpreted narrowly, as either involving a life threatening situation, or where there is risk of serious injury, or if the person suffering considerable pain, which could be prevented with such treatment. It is irrelevant for the purposes of this section whether the person´s drug dependency gave rise to the medical emergency.

73. Clause 29(3) reflects the official commentaries to the 1961 and 1971 Conventions, which considered, despite the silence of the conventions on this point, that apart from exceptional circumstances, a medical prescription should be in written form, should contain information identifying the prescribing practitioner as well as the patient or the keeper of the animal for which the medicine is intended, should be dated and indicate the exact name and the quantity of the pharmaceutical preparation to be supplied on a single occasion. This enables enforcement authorities to keep track of the distribution of such drugs and to help ensure the

controls put in place by the Bill are not evaded.

74. Clause 29(4) provides that where the need for treatment is urgent, a prescription may be given orally, (ie an authorisation given by a medical practitioner by telephone to a pharmacist to supply an indicated quantity of a given drug) provided it is confirmed by a written prescription within a time to be specified. States may consider it necessary to require that the pharmacist dispensing the drug should accept oral prescriptions only from persons specified in clause 29(1) who are known to him/her.

Clause 30 - Requisitions

75. Under clause 30, the issue of a requisition for a drug of abuse is an offence unless the person concerned is a pharmacist in a dispensary in an institution, any practitioner practicing in an institution, or a person in charge of a ward in an institution. The requisition must be in a prescribed form (clause 30(3)).

Division 4 - Commercial Documentation and Labelling, Records and Security

76. Division 4 imposes various reporting and recording requirements and duties on persons authorised to handle drugs, the observance of which are vital in enabling the supervisory authorities to exercise control of the activities of such persons, and relevant enterprises or institutions, with a view to discovering any diversion of drugs into illicit channels, or any illegal use of them.

Clause 31 - Commercial documents

77. Clause 31 requires operators to keep records of their transactions involving a drug of abuse, controlled chemical or item of controlled equipment, by imposing a duty on them to include the information specified in the clause in any commercial document relating to such a transaction.

Clause 32 - Forwarding of import permit in advance to proposed foreign exporter

78. Clause 32 provides that where the Minister of Health or other designated person issues an import permit under Part II to an operator, the operator is to forward the permit itself, and not a copy, to the exporter named in it, (in accordance with clause 14(4)(c)) within a time to be specified. The foreign exporter is thereby provided with a means of determining the legality of the import.

Clause 33 - Export permits to be attached to consignments

79. In parallel provision with clause 32, clause 33 requires operators to attach an authenticated copy of any export permit to each consignment on export.

Clause 34 - Endorsement and return of export permits following import

80. Clause 34 makes provision for the endorsement and return of foreign issued export permits to be returned to the relevant foreign authority after the import consignment has entered the enacting state, or when the import permit has expired without the consignment entering that state, with an endorsement specifying the quantity of each drug of abuse, or controlled chemical, material or equipment actually imported.

Clause 35 - Forwarding of redirection permits, etc

81. In respect of redirection permits issued by the Minister of Health or other designated person in the enacting State, clause 35 requires that a copy of the permit shall accompany the drug of abuse, or controlled chemical, material or equipment at the time it is exported from the enacting state, and the Minister is to ensure that another copy of the redirection permit is sent to the foreign authority where the consignment is redirected.

82. On the issue of a redirection permit in the enacting state, persons holding an export or redirection permit accompanying the consignment entering the enacting state are required to give that permit to the Minister of Health, who must then return it to the foreign authority that issued that permit together with the name of the foreign country to which the consignment has been redirected, (through the redirection permit issued in the enacting state), and an endorsement specifying the quantity of drug of abuse or controlled chemical, material or equipment actually imported.

Clause 36 - Liability to forfeiture of improperly or undocumented consignments

83. Clause 36 makes provision for the forfeiture of consignments of drugs of abuse, controlled chemicals, materials or equipment where there is reason to believe that the export or redirection permit is false, fraudulent or obtained through wilful misrepresentation of a material particular, the import permit is false, or where the drug of abuse is not accompanied by any import, export or redirection permit. Enacting states will not need to include this provision if existing non-specific forfeiture provisions which would provide for this are already in place. The provision is restricted by the duty on the Minister of Health, if he is satisfied as to the legitimacy of the consignment, to release it to the person lawfully entitled to it.

Clause 37 - Drugs of abuse registers

84. This clause lays down detailed requirements for the keeping of a register by the persons listed in clause 37(1), of the transactions and accompanying details listed in clause 37(2). Clause 37(1) provides that the register must be kept in accordance with the form prescribed from time to time by the Minister of Health. This could include whether it is kept in manual form only, or in electronic form as well. It could not be held solely in electronic form on account of the obligation to sign entries (clause 37(3) and (4)) unless electronic signature was deemed to be acceptable by the Minister.

85. "*Disposal*" as referred to in clause 37(2)(h) would include the use of drugs for research, or in the case of manufacture, the use of the drug for the manufacture of other drugs.

86. Clause 37(6) imposes a requirement on the persons who have a duty to keep a drugs of abuse register to keep it, and all prescriptions, requisitions and commercial documents relating to entries in it, for a time to be specified (the model law suggests 3 years) after the date of the last entry in the register, subject to any written direction by the Minister of Health. A time period of less than a year would not seem appropriate and in the case of persons within clause 37(1)(a) could be contrary to the Conventions if it were less than 2 years (Article 34 of the 1961 Convention and Article 11 of the 1971 Convention).

Clause 38 - Controlled chemicals, equipment and materials registers

87. Clause 38 imposes similar record keeping requirements on persons granted registration, licence, permit or open individual authorisation under Part II in respect of any controlled chemical, equipment or material.

Clause 39 - False or misleading entries in registers and records

88. Clause 39 makes it an offence to make or allow to be made false or misleading entries in registers and records, with a penalty to be specified. "*Record*" is defined in clause 3(1)(qq) as "*any material on which data are recorded or marked and which is capable of being read or understood by a person, computer system or other device*".

Clause 40 - Duty to notify loss, destruction or discrepancies in registers

89. Clause 40 imposes a duty on register keepers to notify the loss, destruction or discrepancies in registers, which is immediate on discovery.

Clause 41 - Safe keeping of drugs of abuse

90. Clause 41 makes provision for the safe keeping of drugs of abuse. Without such practical requirements, the control regime would be deprived of much of its force. The Minister of Health or other designated person is to prescribe what amounts to "*secure storage*" within the meaning of Article 41(1)(b).

Clause 42 - Duties where there is loss or theft of a drug of abuse or controlled chemical

91. Clause 42 imposes a requirement on the persons referred to in (a) and (b) to immediately on becoming aware of it to report the loss or theft of a drug of abuse or controlled chemical. This duty applies to *"any quantity*" of the drug, and thus there is no *de minimis* threshold below which the duty will not apply.

PART III TRAFFICKING AND RELATED SERIOUS OFFENCES

92. It should be noted that the reach of this Part of the Bill is wider than its other parts, given the jurisdictional provisions set out in clause 2(2). In the case of offences under Part III committed outside the enacting state, in practice the conduct concerned will very likely amount to an offence in the other state as well. If the person in question has returned to the enacting state, the enacting state may refuse to extradite an offender to the foreign state on the grounds that he is a national, or a resident of the country. [(9)] This provision ensures that the enacting state will

[(9)] See further the UNDCP model Extradition (Amendment) Bill.

have jurisdiction to prosecute the person for Part III offences committed in the territory of another state.

93. As regards a conviction or acquittal for a Part III offence in the foreign state, nearly all jurisdictions have developed the double jeopardy rule in varying forms, but the basic principle is that no-one may be tried a second time for an offence of which he or she has already been either convicted or acquitted, and this applies to acquittals or convictions in another jurisdiction. If there is a prosecution and either an acquittal or conviction in the other state, any relevant international instruments in place between the enacting state has with the other state regarding recognition of judgments will apply.[(10)]

Division 1 - Trafficking in Drugs of Abuse, Analogues, or Controlled Chemicals, Equipment or Materials

94. Clause 98 sets out a factual presumption relating to the liability of corporations in respect of an offence against this Division.

Clause 43 - Unlawful cultivation

95. Clause 43(1) makes it an offence to "*knowingly cultivate*" a cannabis plant, coca bush or opium poppy, unless permitted or authorised under the Act. "*Cannabis*" is defined in section 3(1)(e), "*coca bush*" in section 3(1)(f), and "*opium poppy*" in section 3(1)(dd). The term "*cultivate*" is given a wide definition in section 3(1)(l) of the Act, and includes "*planting, sowing, scattering the seed, growing, nurturing, tending or harvesting, and also includes the separating of opium, coca leaves, cannabis and cannabis resin from the plant from which they are obtained*".

[(10)]For example, for some European countries this will be the Schengen Convention, which requires member states to recognise "final judgments"in each other's jurisdictions for double jeopardy purposes.

96. The element of intention to cultivate is a necessary component for the offence to be proved. Acts of negligence are not criminalized under this provision. The court or tribunal must be satisfied that the person did knowingly cultivate the specified plants, and in practice defendants will often deny the requisite degree of knowledge. Issues such as wilful blindness, where the person closes his eyes to the obvious, or takes an obvious risk, or there were circumstances in which on an objective test a person in the defendant´s position would have had the requisite knowledge, will all be relevant in determining if the requisite intention existed.

97. The purpose of cultivation is not referred to in this clause. Where a person has cultivated a cannabis plant, coca bush or opium poppy for personal use, clause 56 would be the appropriate basis for a prosecution, rather than clause 43.

98. The penalty can either take the form of imprisonment or a fine, or both. Table 1 sets out a sliding scale of the maximum penalties of imprisonment or fine, increasing in severity according to the type of plant involved, and how many of them were cultivated, on the basis of the perceived degree of harm of the substance.

99. The enacting state can choose to impose a lesser penalty where the offence involves the separation of cannabis or cannabis resin from the cannabis plant. Under clause 43(2) the state can decide that the maximum penalty in this instance is not to exceed a specified amount of the relevant maximum.

Clause 44 - Unlawful import, export, possession for, etc

100. Clause 44 penalises the import, export, bringing into the State in transit or the acquisition or possession for such purpose of any drugs of abuse, analogues, controlled chemicals, equipment or materials except as permitted or authorised under the Act.

101. As with clause 43, the element of intention to import, export etc. is a necessary component for the offence under clause 44(1) to be proved. Drug traffickers frequently use others to move drugs across borders, and those persons sometimes do not know that they are carrying drugs. Lack of knowledge would be a defence, although issues such as wilful blindness, where the person closes his eyes to the obvious, or takes an obvious risk, or there were circumstances in which any person in the defendant´s position would have had the requisite knowledge, will all be relevant in determining if the requisite intention existed. Thus if a person suspected he or she were being used to carry drugs but made no efforts to make any further checks, or if the circumstances were such that a reasonable person would have been suspicious about whether he/she was being used to carry drugs, a court may decide that lack of knowledge will not be a defence.

102. Clause 99 of the Bill sets out factual presumptions relating to the possession of drugs of abuse or analogues.

103. Table 2 sets out the scale of maximum penalties in respect of drugs of abuse and analogues, increasing in severity with the nature of the substance involved, and with import or export for the purposes of supply attracting the most severe penalties. Table 3 sets out maximum penalties in respect of controlled chemicals, equipment or material, with offences involving controlled chemicals as set out in Division 1 of Schedule V attracting the most severe penalties.

Clause 45 - Unlawful manufacture, possession for, etc

104. Clause 45(1) makes it a criminal offence to knowingly manufacture a drug of abuse or analogue, or to acquire or possess the same for the purpose of such manufacture, except as permitted under the Act. *"Manufacture"* is defined broadly in clause 3(1)(y). Clause 45(2) also makes it a criminal offence to knowingly manufacture a controlled chemical, controlled equipment or controlled material, or to acquire or possess the same for the purpose of such manufacture if the person knows or has reasonable grounds to believe that it is to be used in

the enacting state or elsewhere for the unlawful manufacture of a drug of abuse or analogue, or in unlawful cultivation of a cannabis plant, coca bush or opium poppy, or other plant which is a drug of abuse, except as permitted or authorised under the Act. Table 4 sets out the maximum applicable penalties.

Clause 46 - Unlawful sale, supply, administration, possession for, etc

105. Clause 46(1) makes it an offence to knowingly supply or administer to another a drug of abuse or analogue, or to acquire or possess the same for such purpose, except as permitted or authorised under the Act. Table 5 sets out the maximum penalties applicable for these offences. The notes to the table highlight the options available to enacting states to differentiate between maximum penalties on the basis of the quantity of the substance involved in the offence, distinguishing between a commercial, a trafficable and a less than trafficable quantity. Even if this approach is not adopted, the quantity schedules can still informally provide guidance for post-conviction address on penalty.

106. "*Supply*" is defined in clause 3(1)(tt) to cover a wide range of activities which could be involved in supply.

107. Clause 46(2) makes it an offence to knowingly supply a controlled chemical, equipment or material, or to acquire or possess the same for the purpose of such supply, if the person knows or has reasonable grounds to believe that it is to be used in the enacting state or elsewhere for the unlawful manufacture of a drug of abuse or analogue, or in unlawful cultivation of a cannabis plant, coca bush or opium poppy, or other plant which is a drug of abuse, except as permitted or authorised under the Act, with Table 6 setting out the maximum applicable penalties.

108. It is for the enacting state to decide exactly what the prosecution needs to prove in relation to possession for the purposes of supply. Enacting states may prefer that the prosecution does not have to prove an intention to supply the particular controlled drug found as opposed to any

controlled drug (otherwise it might be possible for the defendant to claim that if he was mistaken as to the true nature of the drug, it is impossible to prove the intention to supply it).

Clause 47 - facilitating personal use by others

109. Clause 47 deals with facilitation, clause 47(1) providing that except as permitted by or authorized under the Act, no person shall publish or display, or cause or permit to be published or displayed anything promoting or encouraging the use of any drug of abuse or analogue for any purpose other than a medical or scientific one. Any curtailment of rights of freedom of expression and thought by this provision is justifiable on public policy grounds. [(11)] The term "*publish*" can be interpreted in many ways according to context (whether it be criminal or intellectual property law for example), and should be construed in accordance with the jurisprudence of the enacting state. It is for the enacting state to ensure that its ambit is appropriate; however it is submitted that as used in this provision, "*publish*" should have a wide meaning, so that is not restricted to information which is made available to the public at large, or an indeterminate number of persons. The provision is wide enough to cover all forms of publishing, for example on a computerised data network, but clause 49 would be the appropriate basis for a prosecution for facilitation to use a drug of abuse or analogue via such a network.

110. Likewise "*display*" is to be interpreted widely and would cover for example a poster promoting the use of drugs attached to a door in an office or apartment building, as well as in a club or a bar, where a third person may see it. The fact that no other person did see it is not determinative of whether this offence has been committed.

111. Clause 47(2) provides that no owner, occupier or person in charge of any place used by or accessible to the public shall cause or permit there the unlawful use of any drug of abuse or

---

(11) See eg. Article 9 of the European Convention on Human Rights.

analogue. "*Place*" is defined in clause 3(1)(hh) as including any land, (whether vacant, enclosed or built upon, or not), and any premises. The term "*used by or accessible to the public*" sets the scope for this provision. Not only will it apply to areas such as public parks and recreational facilities, and places such as cinemas, restaurants, bars and clubs, but also to private land or a private place which is not lawfully accessible by the public, but is in fact used by members of the public in contravention of the owner or occupier´s rights, to use drugs unlawfully there.

112. If drugs are being used unlawfully in such a place, the person in charge, if different from the owner or occupier, is under a duty to prevent, or take all reasonable measures to prevent, such use.

113. Clause 47(3) makes it an offence to knowingly and unlawfully add to the food or drink of another person any drug of abuse or analogue without the knowledge of the consumer.

114. Clause 47(4) should be read in conjunction with clause 29(2), which provides that drugs of abuse are only supplied to persons who might be drug dependent in certain tightly defined circumstances, namely by persons referred to in clause 29(1) (except veterinaries who would not prescribe drugs for people) in a medical emergency, or in the ordinary course of treatment under a treatment and rehabilitation programme under Division 2 of Part IV. "*Drug abuser*" is defined in section 3(1)(p) and "*drug dependent person*" in section 3(1)(q).

115. Clause 47(5) makes provision to prevent the supply of any drug of abuse on presentation of a prescription if the supplier knows or has reason to believe that the prescription is forged, unlawfully altered or cancelled, or issued more than a time to be specified before presentation.

116. The enacting state is to decide what the appropriate penalty would be in relation to offences under this section.

Clause 48 - Supply of toxic chemical inhalants [to young persons]

117. Clause 48 prohibits the supply of toxic chemical inhalants to persons (the enacting state can choose whether to limit this provision to young persons, eg. those under 16, or 18, or 21, or persons generally) if the supplier knows or has reasonable grounds to suspect that the person is acquiring it for the purposes of abuse.

Clause 49 - Facilitation via computerized data networks

118. This provision, in prohibiting the facilitation or promotion of the unlawful cultivation, manufacture, supply or use of any drug of abuse, analogue or controlled chemical through any computerised data exchange network, recognises that new methods of facilitation have emerged through computer networks such as the Internet. The latter is available to anyone with access to a computer and modem, and its content is subject to little if any regulation. By using search engines and some carefully chosen keywords, and then pursuing some of the links returned after the search, it is very quick and easy to find web pages with content that promotes and incites criminal activities, such as promoting the use of drugs of abuse and giving detailed advice on how these substances can be manufactured. Further, these sites can easily be created.

119. Given clause 2(2), the clause can apply to a citizen of the enacting state, or someone ordinarily resident there, who seeks to facilitate drug use etc., from anywhere else in the world, provided that (as would be the case with a network such as the Internet) the network involved is accessible in the enacting state.

120. "*Data*" is defined in clause 3(1)(m) as meaning "*representations, in any form of information or concepts*".

121. Clause 49(2) makes it an offence for a server supplier, defined in clause 49(1), to supply any

online server facility which allows access to a data network such as the Internet for the purpose of enabling another person to offer through such a network accessible in the enacting state, any data whose purpose or effect is, *inter alia*, to facilitate the use of drugs. On its face this provision is extremely wide, in that it would catch employers who allow their employees to use a network such as the Internet in the normal course of their employment, and whose employees then go on to use it for such a purpose; the provision does not require knowledge on the part of the employer, but would cover an employer who is recklessly indifferent as to the use employees made of it. However, it must be read in conjunction with clause 47(3) which would normally ensure minimal risk of abuse because of appropriate exercise of prosecution discretion. The risk of misuse would be further safeguarded by appropriate industry standards.

122. Clause 49(2) would cover data put on the system which enabled users to discover the location of other data whose purpose or effect was to permit, incite, facilitate or promote the activities specified in that provision.

123. What amounts to "*reasonable steps*" within the meaning of clause 49(3) will vary according to the circumstances, eg. in the case of companies, the number of employees, the nature of the company´s business, what measures (if any) are in place for the control or monitoring of data network use by employees etc. In the case of "cybercafés" a notice on display prohibiting this activity may be deemed sufficient.

124. Clause 49(4) prohibits the inputting of any data into such a network accessible in the enacting state data whose effect would be to permit, incite, facilitate or promote the activities specified.

Clause 50 - Conspiracy, attempt, aiding and abetting, etc

125. This provision reflects Article 3(1)(c)(iv) of the 1988 Convention, and expressly provides that a person committing an offence against this section is liable to be punished on conviction by the

same penalty as would be applicable if the person were convicted of the primary offence.

126. The various ways in which individuals may involve themselves in criminal activity are classified differently in different national legal systems, and so the clause employs a wide variety of terms such as conspiring, aiding, abetting and procuring, in order to cover as wide a range of the possible permutations of involvement in a secondary offence as possible.

127. Secondary parties may have a degree of actual participation in the criminal activity (eg. by being present), they may provide some degree of assistance by aiding, abetting, counselling or procuring conduct which constitutes an offence against the Act, they may join in the devising and planning of the crime in association, conspiracy or attempt, they may encourage its commission or provide technical advice by inciting, urging or encouraging, or they may actually join in an attempt to carry out the prohibited conduct.

128. "*Agreement*" for the purposes of section 50(2)(a) is to be interpreted very widely, to cover any form of agreement including oral agreement, however informal.

129. In clause 50(2)(b), the withdrawal of the agreement can cover any form, but the tribunal or court must be satisfied as to the intention at the relevant time of the individual concerned to no longer be any part of the agreement. Looking at clause 50(2)(b)(ii), in the first drafting alternative, "*a reasonable effort to prevent the commission of the agreed offence*" does not necessarily involve reporting it to the authorities, in contrast to the second alternative which imposes this as a requirement for a "not guilty" finding.

130. Clause 50(2)(c) closes a possible loophole for conviction, in that this provision ensures that it is no defence against a charge of conspiracy for a person to claim that the commission of the principal offence was impossible.

Clause 51 - Assisting etc., in the commission of an offence abroad

131. Clause 51 is an optional clause for enacting states, under which a person could be prosecuted for assisting in or inducing in the enacting state the commission of an offence in any place outside that state, which is punishable under the law of the foreign state, and which relates in whole/in part to the control of any drug of abuse, analogue, controlled chemical, equipment or material. It may risk double jeopardy, in that the person may be liable to prosecution under the law of the foreign state also, for assisting or inducing the commission of an offence in the foreign state, depending on the jurisdictional reach of its legislation (see commentary at start of Part III).

Division 2 - Further Provisions on Penalties and Sanctions

Clause 52 - Grounds for aggravation

132. Clause 52, which sets out the grounds for aggravation of offences against Part III, reflects the provisions of Article 3(5) of 1988 Convention, in setting out a list of relevant factual circumstances as guidance to the seriousness of an offence. Specific legislation will not be required if the practice of the courts in the enacting state already meets this condition through existing sentencing guidelines, whether legislative or otherwise. The provision is mandatory in that the courts must take into account the specified factors in determining the nature and extent of any penalty to be ordered in relation to any person convicted of an offence under Part III, but the legislation does not go on to state the effect that those circumstances should have on the sanction imposed which is a matter left to the discretion of the court.

133. "*Organised criminal syndicate*" would cover any arrangement, however informal, of a group of three or more persons existing for a period of time and having the aim of committing a serious crime in order to, directly or indirectly, obtain a financial or other material benefit ***(use the latest definition in draft Convention against transnational organised crime)*.**

134. The "*other illegal activities*" referred to in clause 82(a)(ii) would not necessarily be serious offences themselves.

135. "*In a state of recidivism"* would include cases where offenders had committed one other offence prior to the conviction under the Act. The offence need not be drug related, but its nature may be relevant in determining the penalty for the conviction under the Act.

136. Section 52(b) identifies circumstances surrounding the offence which render it more serious, either in terms of who committed the offence, or the environment in which it was committed. Section 52(c) focuses on the person to whom drugs were supplied or offered to, identifying circumstances where he/she is particularly vulnerable. Section 52(d) looks at the effect of the drugs supplied on the person who took them.

Clause 53 - Alternate sanctions

137. Clause 53(1) makes provision for alternate sanctions other than imprisonment in respect of offences committed under Part III of the Act, an approach which is in line with Article 3(4)(a) of 1988 Convention, which provides that "*each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation."* "*Other forms of deprivation of liberty*" would include sentences such as penal servitude, or confinement in a labour camp provided for under some legal systems, and some non-custodial measures, such as house arrest or curfews, which may be combined with other forms of supervision such as electronic monitoring.

138. Clause 53(2) reflects the terms of Article 3(4)(c) of the 1988 Convention. Cases of "*a minor nature*" would not include those where there are aggravating circumstances as set out in clause 52. Relevant factors will include the nature of the substance and amount of it involved in the

offence.

Clause 54 - Optional additional sanctions

139. Clause 54(1) provides that a court in the enacting State can, in addition to ordering any penalty specified in relation to that offence, or any alternate sanction under clause 53, make a treatment order pursuant to section 61. Clause 54(2) sets out an optional provision in the case of foreign nationals convicted of an offence against Part III of the Act (or the Act as a whole or any other Part), for the court to order the withdrawal of the person´s visa, deportation or prohibition on reentry to the enacting State.

Clause 55 - Suspension and revocation of suspension of sentences

140. Clause 55 provides for the suspension and revocation of sentences in the case of young offenders (age to be specified) or first offenders in cases where the court considers that it is in "*the interests of justice*" and "*not contrary to the broader public interest*" to make such an order. What is meant by these terms is to be determined by the jurisprudence of the enacting state rather than international principles.

PART IV - DRUG ABUSE

Division 1 - Personal Use-related Offences

141. Article 3(2) of the 1988 Convention provides that parties are to adopt such measures to establish as a criminal offence under their domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs of psychotropic substances for personal consumption contrary to the provisions of the 1961 and 1971 Conventions. Although the definition of illicit traffic in Article 1 of the 1988 Convention extends to personal use offences, there are significant differences in the treatment afforded to the former in the framework of the Convention as a whole, for example in respect of sanctions, to reflect the more serious nature

of offences not involving personal use, and these differences are reflected in the model law.

Clause 56 - Cultivation or possession for personal use

142. Clause 43 would also cover cultivation for personal use, but clause 56 would be the appropriate basis for prosecution of an offence involving cultivation for personal use. Possession for the purposes referred to in clauses 44, 45 and 46 is to be distinguished from possession for personal use under this provision.

143. To facilitate this distinction, enacting states may wish to insert provision along the lines of clause 56(2). This clause sets out provision for enacting states who wish to build in to the legislation a presumption in relation to cannabis that the cultivation or possession of more than the prescribed quantity or prescribed weight of it shall be presumed not to be cultivation or possession for personal use, unless the person concerned satisfies the specified court to the contrary. As the notes to the model law caution, the state would need to link but differentiate between the offence and penalty in this clause, and for the cultivation of cannabis offence in clause 43, and the possession of cannabis for the purposes specified in clauses 44, 45, and 46.[(12)]

144. Clause 56(1)(ii) enables states to insert the name of drugs of abuse which are not yet under international control, but which the enacting state wishes to list to protect against its introduction into the state, such as the khat plant.

145. The 1961, 1971 and 1988 Conventions do not require that actual drug consumption be established as a punishable offence, and nor does the model law does contain such provision.

[(12)] Further, although the prescribed quantities and weights in the Bill are broadly accepted international standards that would assist in such an approach, enacting states should be aware that there are practical problems in implementing them, for example should the weight be taken as that of a young crop, just the leaves of the crop, dried weight etc.

As with the Conventions, the issue of non medical consumption is referred to indirectly by reference to the intentional possession or cultivation of controlled substances for personal consumption.

146. Clause 56(3) provides that possession for personal use of analogues, and other drugs of abuse apart from cannabis, coca bush or opium poppy, is an offence, unless the circumstances specified in clause 56(3)(a) apply.

147. The penalty applicable in respect of offences against clause 56(1) and (3) is dependent on the substance involved, and in the case of cannabis, if clause 56(2) is adopted, the prescribed quantity or weight. If the amount involved is less than the prescribed quantity or weight, this provision will apply. If it is more, clauses 43, 44, 45 and 46 would be relevant. Which one of those clauses would apply would depend on the circumstances.

148. Clause 56(4) provides that sections 52 and 54 are to apply to offences against clause 56(1), and thus not to offences under clause 56 involving analogues or other drugs of abuse.

149. "*Animal*" as referred to in clause 56(3)(ii) is defined in clause 3(1)(c).

Clause 57 - Carrying of drugs of abuse by international travellers

150. Clause 57 makes provision for the carrying of drugs of abuse by international travelers undergoing treatment of a medical condition. Unlike clause 16, the means of travel is not specified (clause 16 would appear to be limited to flights and journeys by ship).

Division 2 - Treatment and Rehabilitation

151. It is now widely recognised that drug abuse is a serious debilitating disorder, and that drug abusers need professional help to overcome their addiction and to reintegrate into the community. This need is reflected in this division, which makes provision for treatment and rehabiliation of a specified category of drug abusers at the discretion of the court or other adjudicating body, in conjunction with a treatment assessment panel. In providing treatment as an alternative measure to penal sanctions, the aim is to take into account the medical condition of the person and to keep that person away from an environment where the opportunities to abuse drugs again are great. However, enacting states should be aware of the constitutional implications such provisions raise, such as the interference with the rights of freedom of the individual.[13]

Clause 58 - Meaning of "treatment"and "approved treatment centre"

152. Clause 58 defines the meaning of "*treatment*" and "*approved treatment centre*" for the purposes of the Act in wide, non-exhaustive terms. "*Treatment*" could for example include phamacological treatment (such as prescribing methadone), but would typically include counselling, therapy and drug education. A rehabilitation programme could include the provision of further education, job placement and skill training. The provisions focus on drug abusers (defined in clause 3(1)(p)) and drug dependent persons (defined in clause 3(1)(q)).

[13] For example, in 1997, the German Federal Constitutional Court (the Bundesvertassungsgericht) declared that forced treatment for substance abusers which involved incarceration in a drug treatment centre regardless of whether there was any possibility of effective treatment, was unconstitutional. The Court based its attack on provisions in the constitution dealing with the right of freedom of the person. The court held that this right protected individuals from such incarceration unless there is a greater public safety interest in continuing with it. The court considered that this public safety interest would be served only if the patient had a realistic possibility of rehabilitation.

Clause 59 - Treatment panels

153. Clause 59 makes provision for treatment panels, to consist of a specified number of persons who are appointed by the Minister for Health, and who are judged to be "*fit and proper*" for the purpose. This will depend on their qualifications, experience and judgment. The requirement for one member to have legal qualifications and experience, and the others knowledge of the psychological, physical and social problems connected with abuse of drugs and analogues is designed to ensure the panel is balanced and well informed to take decisions on the most appropriate action for the individual concerned.

Clause 60 - Persons who voluntarily submit for treatment

154. Clause 60 provides that those persons who have committed an offence against clause 56 of the Act only, that is cultivation or possession of cannabis, coca bush or opium poppy for personal use, and who before being arrested or charged for that offence voluntarily present themselves to an approved treatment centre for treatment, and undertake and successfully complete the treatment without committing any further offence, either shall or may not be prosecuted for that offence or be identified to the public, depending on the policy choice of the enacting state. The assessment of whether the treatment has been successfully completed will be undertaken by the training centre.

Clause 61 - Treatment orders

155. Assessment under a treatment panel for offenders who have committed an offence either under the influence of drugs or in order to use drugs or obtain resources to use them, can be limited under Clause 61(1)(a) to offences under the Bill, or can be extended to offences under any other Act or specified Acts. The court or other adjudicating body has a discretion to order that the offender submit to an assessment by a treatment assessment panel. An obvious example of where a court could decide such an assessment is not appropriate is if the offender has

previously (and thus unsuccessfully) undergone treatment. It is for the panel to decide whether the person is to undergo treatment, rather than the court. Where the panel does so decide, clause 61(2) provides that it is for the court to order the person to submit to treatment, and to impose conditions relating to the supervision of the person in relation to such treatment. Under clause 61(2)(a), the treatment can either be specified by the court at the time it makes the order, or, to take account of changing circumstances, can be proscribed from time to time by an assessment panel.

Clause 62 - Suspension of penal sanctions

156. When the court orders the offender to submit him/herself to specified treatment, it has the power to order that any or all of the penalties and sanctions under Part III or section 56 (or where clause 61 has been extended to other legislation, provisions of such legislation) be suspended. Thus the penalties or sanctions will not take effect immediately, but could be activated where the person does not complete the course of treatment (clause 64), or breaches specified conditions applying to it.

Clause 63 - Discharge of penal sanctions

157. Orders made under Part III or section 56 are to be deemed to be fully served and discharged in relation to the offence in respect of which they were made, if firstly the person completes treatment ordered under clause 61(2)(a) to the satisfaction of the treatment assessment panel, and secondly commits no further offence of any description within a specified time from the conviction. In respect of any other offence, the court has a public interest discretion to discharge any orders, having taken into account a report of a treatment assessment panel.

Clause 64 - Revocation of suspension orders

158. If a suspension order under clause 62 is revoked, time spent in treatment counts as time towards the discharge of any relevant orders made under Part III or section 56, or any other Act.

Clause 65 - Offences in relation to treatment orders

159. Clause 65 specifies offences in relation to treatment orders, with a defence of "*a reasonable excuse*".

PART V ADMINISTRATION, COMPLIANCE AND ENFORCEMENT

Division 1 - Inspection for Compliance

Clause 66 - Appointment of inspectors

160. Clause 66 makes provision for the appointment of inspectors. The duties of such inspectors are to be prescribed by the Minister.

Clause 67 - Inspection of authorized premises and operations

161. Clause 67 links with the registration, licencing and permit system established under Part II of the Bill, making it mandatory for certain information to be provided to the inspector by persons registered, or holding a licence or permit under Part II, failing which an offence will have been committed.

Clause 68 - Powers of inspectors

162. Clause 68 confers wide powers on inspectors to enter premises or any place specified in that provision, and to take action once they have so entered. "*Premises*" is defined widely in

section 3(1)(jj), and includes the whole or part of a structure, building, aircraft or vessel. Unlike the inspection of approved treatment centres (clause 69), inspection cannot be carried out at night, or outside "*ordinary business or professional hours*", the meaning of which may vary from country to country. Inspectors could be assisted by members of the police. They are limited to using "*necessary and reasonable force*." There is no precondition before the exercise of the powers that a breach of the Bill´s provisions be suspected, allowing spot/random checks. Clause 68(2) lists the wide powers of inspectors once they have entered in accordance with clause 68(1). Clause 68(5) places a duty on an inspector to immediately report to the Commissioner of Police or other specified person where s/he becomes aware of a possible offence against Part III of the Bill.

Clause 69 - Inspection of approved treatment centres

163. Clause 69 ensures that treatment centres are also subject to an inspection regime, in order that any breaches of the provisions of the Bill can be monitored and dealt with. The clause confers powers on inspectors to inspect approved treatment centres "*at any reasonable hour of the day or night*" and sets out the widely drawn powers available to them.

Clause 70 - Inspectors to produce authority

164. In view of the wide powers conferred on inspectors by clauses 68 and 69 of the Bill, it was considered necessary to impose some checks on their exercise. Thus clause 70 requires an inspector to produce an identity card to the person in charge of the place entered. If the inspector does not do so, he has no authority to remain, or to impose requirements in exercise of his powers on persons in the premises. "*Place*" is defined in clause 3(1)(hh) as including any land, (whether vacant, enclosed or built upon, or not), and any premises.

Clause 71 - Obstruction of inspectors, etc

165. Clause 71 imposes a duty not to obstruct or hinder an inspector, and to comply with his/her reasonable requirements. Clause 114 establishes such obstruction as an offence.

Division 2 - Investigation of Offences Against Part III

166. This Division makes provision for the methods which can be used to investigate offences against Part III of the Bill. The extent of some of the powers will be controversial, in that investigative techniques such as controlled delivery operations, or use of covert monitoring devices clearly have implications for the rights of privacy for individuals, and raise data protection issues. The constitutional requirements of the enacting state in respect of such rights should be borne in mind when the adoption of these clauses is considered.

Clause 72 - Use of covert monitoring devices

167. As important rights of privacy of individuals are at stake when hidden monitoring devices are used, the person specified in clause 72(1) who is empowered to make an application to a court must be sufficiently senior, hence the suggestions in square brackets in the draft. For the same reason it is important to impose a time limit on the powers granted (clause 72(2)). Under clause 72(3), evidence obtained under a clause 72(1) order is admissible in any proceedings "*relating to*" an offence against Part III of the Bill (the use of this language means that this phrase goes wider than the offences themselves and could include ancillary proceedings to an offence governed by Part III). This provision applies "*notwithstanding any law to the contrary*", whether it be statute or principle of common law. The "*suspicion on reasonable grounds*" test in clause 72 is a less burdensome test than requiring there to be an actual belief, on reasonable grounds. The application to the court or other judicial body can be made in person, or by telephone or fax (clause 80), subject to the relevant rules of procedure.

Clause 73 - Undercover and controlled delivery operations

168. Clause 73 deals with undercover and controlled delivery operations. Article 11 of the 1988 Convention was the first international text to endorse the practice of controlled delivery, as a weapon to facilitate the identification, arrest and prosecution of the principals, organisers and financiers of the offence, rather than just those involved at a lower level, although it recognised that such a procedure might not be possible in some states due to the existence of certain principles of domestic law. Clause 73 is drafted on the basis that the procedure is permissible in the enacting state, albeit with safeguards. While Article 11 envisages the use of controlled delivery at the international level only, clause 73 allows this technique to be used on the national level.

169. Controlled delivery operations run the risk of entrapment (see clause 73(4)(b)(ii)). Entrapment can be seen as falling into two categories. Firstly, when the relevant enforcement authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that the person is already engaged in criminal activity or pursuant to a *bona fide* inquiry, and secondly where although the authorities have such a reasonable suspicion or are acting in the course of a *bona fide* authority, they go beyond providing an opportunity, and induce the commission of an offence. To avoid entrapment, the clause uses a test of "*reasonable grounds of suspicion*" that the person concerned has committed or is about to commit an offence against the Act. If such grounds do not exist, the enforcement officers are acting outside the ambit of this clause, and the protection offered by clause 73(8) will not apply. In most jurisdictions, public interest immunity rules would not exempt the officers.[14]

170. "*Controlled delivery*" is defined in clause 3(1)(i), which draws on the definition set out in Article 1(g) of the 1988 Convention. The use of controlled delivery is allowed only for the

---

[14] See eg. *R v Campbell*, (decision of the Supreme Court of Canada of April 22 1999) where in the context of a "reverse sting" operation by the police involving the sale of cannabis, the Court took the view that there was no blanket immunity for illegal acts by the police.

purpose of identifying the offenders involved. Given that controlled deliveries are dangerous and delicate operations, putting at risk the officers involved, they should only be authorised by a senior person who is capable of assessing the advisability of taking such action, hence the high level of suggested persons specified clause 73(1). Also, a decision at this level is designed to prevent an investigation or prosecution against the suspected offenders by officials without lack of knowledge of the planned controlled delivery.

171. The senior official named in clause 73(1) has a discretion as to whether he or she gives approval for a controlled delivery, acting on evidence put before him, but must in every case have reasonable grounds of suspicion. The reference to "*classes of persons*" in clause 73(1)(b) is designed to avoid any logistical difficulties that might arise if a specified person was unable to participate.

172. The activities specified in clause 73(2) are not exhaustive, so as not to restrict the application of the clause, and for the same reason other applicable law is not allowed to interfere with these activities ("*notwithstanding any law to the contrary...*"). Looking at clause 73(2)(b)(ii), the enacting State could choose to restrict this to any serious offence, as defined in clause 3(1)(ss), depending on whether clause 3(1)(pp) refers to an offence or a serious offence. Clause 73(3) refers to "*undercover operations*", which are defined in clause 3(1)(zz). Again, the test is one of suspicion of reasonable grounds.

173. Clause 73(4) sets out the criteria which must be fulfilled in order for the specified person to give an approval for underground operations, which is designed to provide checks on the use of this procedure to ensure that it is only utilised where there is a good chance of results being obtained, and that it is not abused to launch undercover operations which have not been thought through or are simply speculative.

174. The wording of clause 73(4)(a) reflects the fact that the name and profile of the person suspected might not be known. Clause 73(4)(b)(ii) is designed to guard against the risk of

enticing a person to commit a criminal offence. The inducement by law enforcement officers or their agents of another person to commit a crime, for the purposes of bringing charges for the commission of that artificially provoked crime, involves abetting the commission of a crime. This is itself a crime, and is severely curtailed under the constitutional law of many states, hence this provision.

175. Clause 73(4) allows for the renewal of approval for specified periods of time, with an additional requirement in clause 73(6) that the instrument of approval or renewal should be given to the Attorney General, or other specified senior figure.

176. Clause 73(8) needs to be included given that the law enforcement officers or their agents, in abetting the commission of a crime, or indeed taking part themselves in the commission of a crime, would but for this provision have committed an offence punishable in accordance with the provisions of the Bill. Clause 73(9) is a transitional provision, in providing for the operation of this clause before the commencement of the Bill, provided subsection 4(a) and (b) requirements are met.

Clause 74 - Monitoring of the mails

177. Article 19 of the 1988 Convention makes provision dealing with the use of the mails for the purpose of illicit traffic in drugs and psychotropic substances. As the commentary to that provision states, the real difficulty is in reconciling law enforcement needs with the well established principle of freedom of transit, which prevents the opening of mail in a transit State. What is meant by "*the mails*", as referred to in the heading of clause 74, could be subject to different interpretations, given the growth in commercial express and courier services to supplement those of the public postal administration. The commentary to Article 19 of the Convention suggests that a reasonable interpretation of "*the mails*" in that Convention, in the light of the object and purpose of Article 19, would be to consider that it covers the public postal services and private operations which offer a comparable service, and this interpretation

seems appropriate here.

178. The criteria to be fulfilled for the detention of a consignment is that the specified official, who should be a very senior police or customs official given the nature of the powers to be exercised, is that the mail consignment "*may contain evidence of the commission of a serious offence*." Thus it is not necessary that it is suspected that the consignment actually contains drugs of abuse or psychotropic substances - it would be sufficient for example if it were suspected on reasonable grounds that the consignment contained a document which implicated a person in the commission of a Part III offence.

179. In view of the principle of freedom of transit, as a further check on the exercise of powers interfering with that freedom, the drafters of the Bill suggest that the power to open a detained consignment is given to a judicial body, rather than to the Commissioner of Police or Customs Collector, and on the basis of information on oath. The test is one of reasonable grounds for belief, which is a higher burden than reasonable grounds to suspect. The application to the court or other judicial body can be made in person, or by telephone or fax (clause 80), subject to the relevant rules of procedure.

Clause 75 - Access to computer systems

180. The number of people communicating by computer, particularly in news groups and by e-mail, is growing. Techniques such as encryption, (which encodes the message electronically by means of a "key" which is not a physical object, but rather a mathematical formula - an algorithm) have developed to keep such communications secure. Unfortunately these techniques are being used to conceal from enforcement authorities the exchange of material connected with criminal activities. It is therefore essential that the term "*access to data*" in this provision must be interpreted widely, given that an encrypted document is useless to enforcement officials if they cannot reverse the encryption procedure and read or see what it contains. Thus "*access*" should mean not just access to the document or communication, but

also the means to decipher it, unless there is other legislation in place to ensure the encryption problem is dealt with.[15]

181. Inevitably this is an area where law will inevitably lag behind technology. Already the use of encryption keys can be circumvented technologically by techniques such as steganography, ie the burying of information within one pixel of an otherwise innocuous image or noise. This is becoming ever more commonplace and, when done properly, cannot be detected or proven. Again "*access*" should be interpreted to cover such techniques.

182. For the same reason, other terms in the provision should be interpreted widely. A "*computer system"* would include any computer which is part of a local network system. The provision applies to any person who has "*custody or control*" of such a system, and could include an employee who has *de facto* control over his employer´s system.

183. The application to the court or other judicial body can be made in person, or by telephone or fax (clause 80), subject to the relevant rules of procedure. Such force as is reasonably necessary in the circumstances can be used by the police officer or other designated official (clause 81).

---

[15]There is currently a public policy debate in many countries about the need to legislation to deal with encryption, which centres around the balance to be drawn between the need for privacy and protection of free speech, and the need to prevent and detect criminal and other harmful activity. In the UK the Electronic Communications Bill, published in draft on July 23 1999, deals with issues arising out of electronic media. Part III, Investigation of Protected Electronic Data, attempts to deal with the policing problem. It gives authorities such as the police, Customs and Excise, and the security services, the power to obtain the key to decode encrypted material already seized under existing statutory powers. When encrypted data is lawfully seized, a notice can be served pursuant to the proposed statute under a warrant or authorisation issued by a judge or the Secretary of State. This notice can be served on any third party whom it appears may have the key to decipher it. The sanction for refusal to comply is up to two years' jail and this is compounded by an additional offence carrying up to five years' jail where the notice contains a secrecy provision and the person served makes unauthorised disclosure to any other person.

Clause 76 - Search warrants

184. Clause 76 makes provision for the issue of search warrants empowering a police officer or other specified official to enter a place specified in clause 76(1) to search for the items specified in that provision. Such force as is reasonable or necessary could be used to enforce the power of entry. The test is one of having reasonable grounds to believe, higher than that of reasonable grounds to suspect. Where a warrant has been issued, the police officer or other specified person can search any person found at the place, or any person whom he or she reasonably believes to be about to enter or to have recently left the place. *"Recently"* is open to a number of interpretations, but in this context a reasonable interpretation would mean the time elapsed would ordinarily be a few hours or less, and in any event would not stretch beyond a day. The application to the court or other judicial body can be made in person, or by telephone or fax (clause 80), subject to the relevant rules of procedure. Such force as is reasonably necessary in the circumstances can be used by the police officer or other designated official (clause 81).

185. Clause 76(3) sets out wide powers of seizure additional to those set out in the warrant.

186. Looking at clause 76(1)(c) and 76(3)(c), *"property derived from an offence"* is defined in clause 3(1)(pp). *"Property"* is defined widely in clause 3(1)(oo), using the same definition as the Mutual Assistance model law, so that it covers real or personal property of every description, whether situated in the enacting State or elsewhere, and whether tangible or intangible, and includes an interest in any such real (ie immoveable property such as a land or building) or personal property. It is for the enacting state to decide how widely clause 3(1)(pp) should extend, that is whether it should extend only to property derived from a serious offence (defined in clause 3(1)(ss)), or more widely to other criminal offences under other statutes. The width of this definition will affect the ambit of these provisions.

Clause 77 - Search and seizure without warrant in emergencies

187. Clause 77 confers emergency powers where the specified person believes on reasonable grounds that if those powers are not exercised, evidence could be concealed or destroyed. The scope of clause 76 will determine the scope of clause 77, in that if clause 76 only extends to property derived from a serious offence, then clause 77 will be similarly limited. The emergency powers are drawn quite widely, recognising that there is a need for prompt action in certain circumstances in which a delay in authorisation could lead to the loss of evidence. Such force as is reasonably necessary in the circumstances can be used by the police officer or other designated official (clause 81).

188. Clause 77(1)(a) refers to "*any thing connected with an offence*", which would cover things used to commit an offence, or to facilitate the commission of an offence. Clause 77(4) empowers the police officer in question or other specified official to stop any vehicle, vessel or aircraft where he believes on reasonable grounds that anything connected with an offence is on or in the vehicle, vessel or aircraft. Because of the extensive nature of these powers, and the fact that because of their very nature a checking process cannot be applied at the time, the drafters of the Bill have inserted sub clauses (5) and (6), by which a person aggrieved by the seizure of some thing under this provision can apply to a named court or other judicial body for judicial review of the action which led to the seizure.

Clause 78 - Searching a person and clothing

189. Clause 78 provides for a same sex search of persons. Such force as is reasonably necessary in the circumstances can be used by the police officer or other designated official (clause 81).

Clause 79 - Internal body cavity searches

190. Clause 79 makes provision for intimate body searches, and for an order to be made by a court or other judicial body in the event of non cooperation. Non cooperation without a reasonable excuse is made an offence. The application to the court or other judicial body can be made in person, or by telephone or fax (clause 80), subject to the relevant rules of procedure.

Clause 80 - Applications made by use of telecommunications

191. An application to a court or other judicial body for the use of a covert monitoring device, for monitoring the mails, granting access to a computer system, searching premises or for an intimate body search, can be made by telephone or fax, subject to the relevant rules of procedure.

Clause 81 - Use of force

192. Clause 81 provides for the use of as much force "*as is reasonably necessary in the circumstances*" by a police officer or other designated person for the exercise of the powers conferred under clause 75 (access to computer systems), clause 76 (search warrants), clause 77 (emergency search warrants) and clause 78 (searching a person, and clothing). Such a test is frequently utilised in regulating the operational powers of police officers and other law enforcement officials, and so a body of jurisprudence will have been developed.

Clause 82 - Temporary detention of certain suspects

193. Clause 82 provides for the temporary detention of certain suspects for questioning. Extensions up to a suggested maximum of 96 hours to be granted either by a court or DPP/AG or other specified person, only where it is in the interests of justice to do so and not contrary to the broader public interest.

Clause 83 - Power to destroy cannabis and other unlawful crops

194. Clause 83 confers a power to destroy cannabis and other unlawful crops which are growing in the wild. Provision can also be inserted in respect of crops which are being cultivated unlawfully, whether or not for personal use. Because the power can be exercised without warrant, with such assistance and force "*as is reasonable*", and further that it enables the police officer not just to seize samples but to actually destroy the crops, it must appear to the officer on reasonable grounds that the crops are growing in the wild or being cultivated unlawfully, and it is suggested that in the latter case, there are further checks as set out in clause 83(2). Because of the logistical difficulties which might be expected in fulfilling the criteria set out in clause 83(2), states may not wish to include these provisions, and rely instead on the search powers set out in clauses 76 and 77.

Division 3 - Post seizure Procedures

Clause 84 - Collection and processing of evidence at seizures

195. As it is important to ensure for evidential purposes that material which is collected is properly catalogued, clause 84 makes provision for the collection and processing of evidence at seizures. Clause 84(5) is designed to ensure that the evidence is safeguarded.

Division 4 - Scientific Analysis

Clause 85 - Designation of analysts

196. Clause 85 provides for the designation of analysts for the purpose of the Act and any regulations made under it, who can reside and/or practice outside the enacting state.

Clause 86 - Sampling and analysis of bulk seizures of prohibited plants, drugs of abuse, analogues, precursors, etc

197. Clause 86 provides for the sampling and analysis of seizures, within a time limit to be specified[16].

Division 5 - Disposal of Seized Drugs of Abuse, Analogues and Precursors

Clause 87 - Early disposal of seized drugs, chemicals and analogues

198. Clause 87(2) makes provision for the DPP or other specified official to apply to a magistrate or other specified person or body for the disposal of drugs, analogues or chemicals which have been seized, where proceedings are likely to be brought against any person (known or unknown), it is unnecessary to preserve all the substances, and the criteria in clause 87(2) is fulfilled. Clause 82(3) lays down the conditions the magistrate or other specified person must be satisfied as to before a disposal order can be made. Clause 82(3)(d) is designed to safeguard the position of the accused or suspect, in that they must be given an opportunity to have samples independently analysed (at their own expense).

199. Clause 87(4) deals with the position where it is unlikely that no suspect has been identified or located. Clause 87(5) deals with the mechanics of disposal. Clauses 87(6) and (7) make provision for the admissibility of evidence as to disposal.

Division 6 - Special Enforcement Powers at Sea

200. This Division makes provision for special enforcement powers to be given to the enacting state in respect of a ship which is either registered in or has the nationality of a convention State other than the enacting state, is not registered in any State, or is of no nationality, including a

---

[16] See footnote to clause 4 for meaning of "*precursors*".

ship assimilated under the international law of the sea to a ship of no nationality. The exercise of the powers conferred by Division 6 can be sensitive, given that they empower states to exercise enforcement powers beyond the outer limits of their territorial sea, which in some circumstances could mean that the powers are exercised in the exclusive economic zone, or even the territorial waters, of another state. The provisions have been framed to take account of this sensitivity (see eg. Clauses 88(3) and 88(6)).[17]

Clause 88 - Conditions and limitations on the exercise of special enforcement powers

201. Clause 88(2) provides that the powers set out in the Division are not to be exercised "*outside the seaward limits of the territorial sea*" of the enacting State, except with the authority of the head of Customs, or the Minister of Defence, or other specified individual. The seniority of the suggested persons reflects the fact that the exercise of enforcement powers beyond the outer limits of the territorial sea is controversial in that not only does it interfere with the principle of freedom of navigation of the seas, it could also entail law enforcement officials of one state exercising powers in the territorial waters of another state.

202. The "*territorial sea*" comprises those waters adjacent to the coast of a country as are deemed by international law to be within the territorial sovereignty of that country. In addition, under international law[18] a coastal State can establish a contiguous zone (known as an exclusive economic zone) extending to a maximum limit of 24 miles from the baselines from which the breadth of the territorial sea is measured, in which it may exercise the control necessary to prevent infringement of, *inter alia*, its customs laws and regulations. However clause 88 envisages the exercise of powers beyond these limits, provided that the conditions set out in either clause 88(2)(a) and (b) are met.

---

[17] In September 1999 UNDCP published a training guide on maritime drug law enforcement, setting out guidance for national competent authorities wishing or requested to board and search vessels suspected of illicit trafficking.

[18] Article 33 of the 1982 Convention on the Law of the Sea

203. Looking at clause 88(2)(a), the Convention state is not obliged to grant an authorisiation, and even if it chooses to do so, can subject that authorisation to such conditions or limitations as it sees fit. Clause 88(3) provides that the Customs Collector or Minister of Defence must impose such conditions or limitations in respect of a ship of a Convention state as are necessary to give effect to any conditions or limitations imposed by that State. *"A Convention State"* is defined in clause 3(1)(k).

204. The Collector of Customs or Minister of Defence has more freedom to act in relation to a ship of no nationality or a ship assimilated to a ship of no nationality, in that no authorisation is required from any other state before powers under the Division are exercised (clause 88(2)(b)), but must still consider whether it is appropriate to impose any conditions or limitations on their exercise (clause 88(3)(b)).

205. Clause 88(4) provides the reverse power to a convention State, which is without prejudice to any agreement made or which might be made on behalf of the enacting state with another Convention State over the exercise of powers (clause 88(5)).

206. Clause 88(6) ensures that the powers cannot be exercised by the enacting state in the territorial waters of another state (and note this does not have to be a Convention state), without the consent of that state.

Clause 89 - Power to stop, board, divert and detain

207. Clause 89 outlines the powers of an authorised official in respect of a ship falling within the ambit of clause 88, which includes the power of detention. Clause 89(5) makes provision for the bringing into the enacting state of any thing seized under the powers set out in the Division, notwithstanding any law to the contrary, and the dealing with it in accordance with the Bill, or the Money Laundering and Proceeds of Crime legislation.

208. It is to be implied that where action is taken pursuant to this provision, the authorised officer must consider the need not to endanger the safety of life at sea, and the security of the vessel and the cargo.

Clause 90 - Power to search and obtain information

209. Clause 90 empowers an authorised official to search the ship, and anyone or anything on it.

Clause 91 - Powers in respect of suspected offence

210. Clause 91 provides for a warrantless arrest where the authorised officer has reasonable grounds to suspect that a serious offence relating to Part III of the Act has been committed, and the officer has reasonable grounds to suspect that the person is guilty of the offence.

Clause 92 - Assistance

211. Drug traffickers can be expected to be hostile to the exercise of any enforcement measures under this Division, hence clause 92 allows for assistance for the authorised officer. *"Other equipment"* could include arms.

Clause 93 - Use of reasonable force

212. Clause 93 provides that reasonable force may be used. What is reasonable will vary in the circumstances, eg. if those on board have arms and seem about to use them, armed action will be appropriate.

Clause 94 - Evidence of authority

213. Clause 94 provides that the authorised officer should produce evidence of his/her authority.

Clause 95 - Protection of officers

214. Clause 95 protects officers exercising their powers under Division 6 from any civil or criminal liability, provided that they acted with due diligence, in good faith and on reasonable grounds.

Clause 96 - Offences

215. Clause 96 sets out a regime of offences in respect of non compliance or cooperation with the authorised officer.

Division 7 - Evidentiary Matters

216. This Division sets out detail on evidentiary matters to facilitate the operation of the Act.

Clause 97 - Burden of proof

217. Exceptions, exemptions, excuses and qualifications prescribed by law are not required to be set out, pleaded or refuted in pleadings or any other process for proceedings under the Act as applicable in the enacting state. Prosecutors are not required to prove that a certificate, licence, permit or qualification does not operate in favour of the accused, except by way of rebuttal.

Clause 98 - Factual presumption relating to liability of corporations

218. The "*actual or apparent authority*" referred to in clause 98(1) relates to the director, servant or agent. To be *"apparent"* for the purposes of this test, the authority would need to be apparent to a reasonable person. "*Servant"* would cover employees of the company, *"agent"* would cover those persons employed or contracted to act on behalf of the corporation. The concept of a "*state of mind*" for the purposes of clause 98(1) is to be construed broadly - under clause 98(3) it includes a reference to the knowledge, intention, opinion, belief, suspicion or purpose of the person, and that person´s reasons for his intention, opinion, etc. Clause 98(2)(b) extends the factual presumption, which of course can be rebutted, to persons who are not directors, servants or agents of a corporation. Clause 98(4) provides that where a corporation commits an offence with the consent or collaboration of an individual, or because of neglect by an individual, that individual also commits an offence if such a person is a director, manager, secretary or other similar officer of the corporation, or is purporting to act as such, or the corporation is managed by its shareholders and the person is such a shareholder.

Clause 99 - Factual presumptions relating to possession of drugs of abuse or analogues

219. This clause sets out factual presumptions relating to the possession of drugs of abuse or analogues, and is drafted in wide terms. Taken in isolation this could be seen as a controversial provision, in that even though the accused was not found with drugs on his person, in certain circumstances he is deemed to be in possession of them unless he can prove otherwise. This could be seen as tantamount to a reversal of the burden of proof. However, in order for an offence to be proved, the accused must have *knowingly* possessed the drugs of abuse or analogues for various purposes (clauses 44, 45, 46) or in relation to certain drugs, possessed them for personal use (clause 56). "*Animal*" is defined in clause 3(1)(c).

220. "*Immediate vicinity*" as used in clause 99(a) implies very close proximity to the person. Thus for example drugs found in the same room as a person could be argued to be in the immediate

vicinity of that person, although it would be harder to show this connection if they were found in a different part of the house.

Clause 100 - Factual presumption relating to a particular purpose

221. Clause 100 ensures that it is no defence for a person to claim that because he was acting for a purpose not regulated by the Act, he was not engaged in conduct regulated by the Act, if that purpose included a purpose regulated by the act, and that purpose was a substantial one.

Clause 101 - Factual presumptions relating to purpose of supply of drugs of abuse or analogues

222. Clause 101 creates a rebuttable presumption that possession of a drug of abuse or analogue in/on school grounds or within a specified distance (100 metres is suggested), or possession of such a quantity that exceeds the quantity the accused could have had for medical or scientific purposes, was for the purposes of supply. "*School*" and "*school grounds*" are defined in clause 101(1). Clause 101(3) is only relevant if quantity based schedules have been used in the Schedules to the Bill (see clause 46). Caution needs to be exercised here; similar provisions have been successfully challenged in courts as being unconstitutional in that they reverses the burden of proof (many constitutions protect the right of an accused person to be presumed innocent). [19]

[19] See eg. decision of the Constitutional Court of South Africa in *The State v Bhulwana and Gwadiso*, judgment of 29 November 1995, where a law stating that if the accused has been found in possession of more than a certain amount of a drug, he or she will be presumed to have been dealing in the drug and convicted of that offence, unless he or she can prove otherwise, was successfully challenged as being unconstitutional. In that case it was found that the relevant provision was an infringement of the constitutionally protected right of an accused person to be presumed innocent, and further that the provision was not justifiable on the grounds that the presumption substantially furthered the aim of combating the trafficking of illegal drugs. One factor in the decision seems to have been that the required amount had not been altered for over forty years, and was conceded by the prosecution to be "*not an unreasonable amount*" for a person to possess for his own use. The quantities specified in the Schedule take into account the amounts a person can reasonably be expected to possess for his/her own use.

Clause 102 - Proof of street or market value of drug of abuse etc.

223. Clause 102 is designed to ensure that the court has before it an accurate and up to date assessment of the street or market value in the enacting State of any drug of abuse, analogue or controlled chemical, and the prevailing conditions of demand and supply in relation to it. It is for the court to give whatever probative weight to that evidence it considers appropriate.

Clause 103 - Factual presumption relating to samples

224. Clause 103 creates a rebuttable presumption in respect of prosecutions for offences under the Act that where samples of a substance possess particular properties (eg.a sample contains traces of a drug of abuse), the substance possesses the same properties as the sample.

Clause 104 - Proof of continuity of possession of exhibits

225. Clause 104 provides that the chain of custody of exhibits can be proved by testimony under oath or sworn affidavit of the person claiming to have had it in possession. If proof is made by affidavit, a court may require the deponent to appear for examination or cross examination on the continuity of possession.

Clause 105 - Admissibility of official records

226. Clause 105 makes provision as to the admissibility of official records in prosecutions under the Act or its regulations.

Clause 106 - Proof of certificate or report of scientific analysis

227. Clause 106 makes provision as to the admissibility in evidence of certificates or reports of scientific analysis in prosecutions under the Act or its regulations. Under clause 106(2), unless

there is evidence to the contrary, such a certificate or report is proof of the statements it contains, without the need to prove the signature, expertise or official character of the person appearing to have signed it. Clause 106(3) sets out a number of types of statement which the certificate or report might make, without being exhaustive. A wide range of potential disputes about the analysis could arise, eg. the credentials of the analyst, or validity of a particular method of analysis, particularly where the drug of abuse, analogue or controlled chemical has been mixed with another substance, or where the testing has been conducted outside the enacting state (because eg. the accused is being prosecuted for aiding an offence outside the enacting state, and the drugs of abuse were seized and analysed in that other state). Clause 106(4) therefore provides for the cross examination of the analyst, on the request of the defendant, but only with the leave of the court. The court will take into account factors such as the place of analysis before taking a decision as to whether or not to grant this leave. Further clause 106(5) provides for another important safeguard for the party against whom the certificate or report is produced, namely the right to see the certificate or report before trial, although a contrary order of the Court can remove this right.

Clause 107 - Proof that [name of state] is a party to a drug control convention

228. Clause 107 provides that the Attorney-General may certify that the enacting state is party to a drug control convention, which is *prima facie* evidence of those facts in proceedings under the Act (or regulations under it).

Clause 108 - Proof of prohibited import or export of a drug of abuse etc., under foreign law

229. Certificates of a foreign State stating that an import or export of a drug of abuse, controlled chemical, controlled equipment or material is prohibited by the law of that State is *prima facie* evidence of that fact in proceedings under the Act (or regulations under it).

Clause 109 - Offence of interfering etc., with evidence

230. Clause 109 makes it an offence to unlawfully interfere with, use, take or dispose of any seized substance or sample, or to unlawfully interfere with or falsify results of analysis with the intention of interfering with the proper course of justice.

Division 8 - General

Clause 110 - Designation of authorised officers

231. Clause 110 empowers the Minister of Justice or other Minister as may be appropriate to designate in writing any police officer, customs officer or other law enforcement official or class of officials (in practice the latter will be the most flexible and practical designation the Minister could make), "*for purposes relating to the exercise of powers*" under Divisions 2 and 6 of Part V of the Act (investigation of offences against Part III and special enforcement powers at sea). What amounts to a purpose relating to the exercise of a power could be the subject of judicial review.

Clause 111 - Delegation

232. Clause 111 provides for the delegation by the Attorney-General, Minister of Health, and any other person on whom power is conferred by the Act, of powers under it, either in particular or more generally, to any officer of his or her department. Powers which cannot be delegated are specified in clause 111(1)(a). Powers under Part V, except the power to authorize the boarding of ships under clause 89, may be delegated to any authorised officer or other named class of law enforcement official. Clause 111(2) provides that persons on whom powers or functions are confirmed by a provision of the Act can delegate the whole or any part of that function by notice in the Gazette or other specified publication, subject to any conditions and limitations as are set out in the notice.

Clause 112 - Exemption from operation of Act or regulations

233. Clause 112 authorises the relevant Minister (enacting States could for example specify the Minister of Health) to exempt any person or class of persons, or any drug of abuse, controlled chemical, equipment or material from the application of the Act or regulations if this is in the public interest and is necessary for a medical or scientific purpose. The exemption is narrowly drawn, and is two fold - the exemption must be necessary for either a medical or scientific purpose, and further must be in the public interest. Such a provision is necessary to ensure that the legislative regime put in place by this Act and regulations made under it can operate flexibly in changing circumstances. For example, it may be the case that reputable medical authorities endorse the use of a certain drug for the treatment of a particular medical disorder (a current example would be the use of cannabis for Aids sufferers). The Minister may consider in the light of this advice that it is appropriate, and in the public interest, to exempt doctors treating persons with this disorder from the application of the Act in respect of that drug. This provision enables him/her to do so quickly, without the need for cumbersome and lengthy legislative amendment. Before deciding to make any such amendment, the Minister will need to consider the enacting state´s international obligations under the drug conventions.

Clause 113 - Offence of tipping-off

234. Clause 113 is designed to deal with tipping off, where an investigation is prejudiced by the subject or any other person being warned about it. The clause makes it an offence to do so. Clause 113(2) recognises that once a search warrant has been issued and executed against a person, or a warrant for arrest made, such a restriction is largely pointless.

Clause 114 - Obstruction of officers etc.,

235. As well as the specific clause in relation to obstruction under Part V (Administration, compliance and enforcement) set out in clause 96, clause 114 sets out a general provision in relation to the whole Act.

Clause 115 - Perverting the course of justice

236. Clause 115 penalises perversions of the course of justice. Malicious action, ie action taken knowingly and without just cause or excuse, is caught by the provision, whereas action which is unreasonable but not motivated by spite or ill will, or action which it transpires is ill founded but was based on reasonable grounds at the time, would not be. So that the legislation provides a coherent regime to protect victims of malicious action pursuant to its powers, this provision should be applicable to the class of law enforcement officials, be they police or other officials, on whom the powers of entry, search, seizure and arrest under the Act are conferred. Clause 115(1)(b) can be extended to apply to the Money Laundering Act.

Clause 116 - Immunity where official powers or functions exercised diligently and in good faith

237. Clause 116 confers immunity from legal proceedings in respect of things done by persons acting in the exercise of any power or in the performance of any function under the Act or its regulations, provided that they acted with due diligence and in good faith. The reference to "*anything done*" would also include omissions to act. Actions may still be taken in respect of the *way* something was done if that contravened due process. Actions in respect of the infringement of individual rights protected by the state in its constitution, such as the right to privacy, would be ruled out by this provision, insofar as the exercise of the powers necessarily entailed such an infringement (most states would subject the constitutional rights of invididuals to a prevention of crime exception).

Clause 117 - Protection of informers

238. Clause 117 makes provision for the protection of informers [(20)]. In order that the protection conferred by this provision is not used to abuse the processes of justice, clause 117(3) provides that where an informer has made a false statement, the Court may allow full disclosure of that person´s identity. Clause 117(3) also strikes a balance between the competing claims of protection of the informer, and the interests of the defendant whose ability to deal with the case against him may be severely prejudiced. In such a case, the court may take the view that justice cannot be fully done without the disclosure of the name of the informer or any other person, and it has the discretion to permit full disclosure in such a case if it sees fit.

Clause 118 - Conditional immunity where offenders assist the prosecution

239. Clause 118 provides that the Attorney-General or other specified official (eg. the DPP) may grant a person immunity from prosecution for any offence under the Act, provided that the person makes *"a full and true disclosure*" of the whole circumstance relating to the contravention. Immunity from prosecution only extends to the offence in question; thus if the person has contravened another provision, or the same provision on another occasion, the grant of immunity under clause 118(1) would not prevent them from being prosecuted (clause 118(2)). Clause 118(3) is designed to prevent the abuse of the immunity procedure. Looking at clause 118(3)(b) where the person has wilfully concealed something or given false or misleading evidence, "*any other offence*" would include an offence under clause 114.

Clause 119 - Limited official secrecy

240. Clause 119 subjects persons exercising powers or performing duties under the Act to secrecy

---

[(20)]Protection for witnesses is the subject of the model UNDCP Witness Protection Bill, the object of which is to ensure that the due administration of justice in criminal and related proceedings is not prejudiced by witnesses not being prepared to give evidence without protection from violent or other criminal recrimination.

obligations, in order to avoid a perversion of the course of justice. "*Directly or indirectly*" in clause 119(2) ensures that it is no defence for a person to claim that they did not reveal the information openly or obviously. Exceptions are specified in clause 119(3), with a safeguard in clause 119(4) that nothing in clause 119(3)(e) should subvert the ordinary rules of discovery.

Clause 120 - Penalty for offences where no penalty expressly provided

241. Clause 120 is a catch all provision whereby it is an offence to violate any provision of the Act for which a punishment is not otherwise provided, or to violate a regulation made pursuant to the Act.

Part VI - FUND FOR DRUG ABUSE PREVENTION AND CONTROL

Clause 121 - Establishment of the Fund

242. This clause provides for the establishment of a fund for drug abuse prevention and control. The creation of such a fund will be a legal necessity rather than merely a matter of administrative convenience in some states, to ensure that the use of confiscated assets does not itself amount to laundering the proceeds of drug and drug related crime. States have found that the costs of enforcement of drug abuse and money laundering legislation can be offset by the seizure or confiscation of property derived from offences under this legislation, so that in effect the law enforcement and prosecution units can be self funding in this regard. The existence of this Fund emphasises the link between successful enforcement and the fight against drug abuse and drug related crime.

Clause 122 - Receipts and disbursements

243. Clause 122 makes provision for the receipt of money into the Fund. In addition to voluntary contributions, under the relevant provisions of the other model legislation, property is to be transferred where it has been seized or confiscated in accordance with the powers under that

legislation.

244. Clause 122(2) sets out the wide range of activities for which the Fund´s assets can be disbursed. In this regard, enacting states may wish to keep in mind Article 5(5)(b) of the 1988 Convention, which provides that parties may give "special consideration" to concluding agreements on contributing the value of confiscated proceeds and property, or a substantial part of it, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances, and/or sharing with other parties on a regular or case-by-case basis such proceeds or property. The former would cover a contribution to the activities of an organisation such as UNDCP, (see optional clause), which as the commentary to the 1988 Convention notes would further the purpose of the Convention as set out in article 2 (the promotion of cooperation amongst the parties to deal more effectively with the various aspects of illicit traffic). In any event, it is for the trustees to decide on the priorities of the Fund.

Clause 123 - Board of Trustees

245. Clause 123 sets out provision on the suggested composition of the trust, comprising a broad range of individuals, such as politicians, medical, legal, law enforcement and financial experts. This spread of expertise reflects the wide range of activities the Fund is concerned with.

PART VII - MISCELLANEOUS

Clause 124 - Paramountcy and repeal

246. Enacting states may choose to insert or omit these provisions - they may prefer/consider it more appropriate to have their normal provisions of interpretation to apply to resolve any inconsistencies between this Act and other legislation (eg later Act to have precedence). If included, clause 124(2) will be subject to the transitional provisions in clause 125.

Clause 125 - Transitional

247. Clause 125 sets out transitional provisions in relation to proceedings and licences, registrations, permits, authorizations or certificates issued under the former drug control legislation (enacting states to specify which Acts or regulations comprise such legislation).

Clause 126 - Regulations

248. Clause 126 provides the Minister with the power to make regulations which are not inconsistent with the Act, "*prescribing all matters necessary or convenient for giving effect to it*". Examples of what may be considered necessary subjects for regulation are set out in clause 126(a) to (v).

Clause 127 - Administration of this Act

249. Clause 127 provides that the parts and divisions of the Act are to be administered by such Ministers as may be notified by order in a publication to be specified.

May, 2000