



Crimes Legislation Amendment (Powers and Offences) Bill 2015

Senate Legal and Constitutional Affairs Committee

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Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee, the Law Society of South Australia and the Bar Association of Queensland in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs' Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.
2. The Law Council supports measures in the Bill relating to ensuring the forced marriage offence applies where a victim does not freely and fully consent because he or she is incapable of understanding the nature and effect of a marriage ceremony due to age or mental incapacity.
3. However, the Law Council considers that there are problematic aspects of the following amendments that:
 - make recklessness the fault element for attempted offences against Part 9.1 of the *Criminal Code Act 1995* (Cth) (Criminal Code) relating to drugs and precursor offences (Schedule 1 of the Bill);
 - remove the intent to manufacture element from border controlled precursor offences in sections 307.11 to 307.13 of the Criminal Code (Schedule 1 of the Bill);
 - insert the concept of being 'knowingly concerned' in the commission of an offence as an additional form of secondary criminal liability in section 11.2 of the Criminal Code (Schedule 5 of the Bill);
 - introduce mandatory minimum sentences of five years imprisonment for firearm trafficking (Schedule 6 of the Bill); and
 - ensure that only non-parole periods (rather than recognizance release orders) can be fixed for sentences exceeding 3 years (Schedule 7 of the Bill).
4. The Law Council understands that State and Territory jurisdictions were not consulted on a number of the main amendments in the Bill, including the proposals to broaden the concept of attempt to include 'recklessness' (even if limited to serious drug offences) and to include the term 'knowingly concerned' as a form of derivative liability.
5. The Model Criminal Code Committee (MCCOC) process involved an expert committee and a nation-wide consultative process where both of these proposals were considered and rejected at the national level by both common law and Griffiths Code jurisdictions. The reasons for doing so remain cogent. Piecemeal reforms to fundamental common law and Code provisions should only be adopted in the clearest cases. Neither of these proposals meets that criterion. Further, the proposed Commonwealth amendments would work against the emergence of national uniform criminal law. This was a prime objective of the MCCOC process.
6. The Law Council's key recommendations include that:
 - (a) measures in the Bill that seek to change fundamental principles of the Criminal Code, such as permitting recklessness for attempt and introducing the concept of 'knowingly concerned' into the Criminal Code, must undergo a full public consultation process, including with State and Territory jurisdictions and the relevant specialist professional associations;

- (b) new section 300.6 of the Bill providing recklessness as a fault element for attempted drug and precursor offences under the Criminal Code should be removed from the Bill;
- (c) items 3 to 7 of Schedule 1 of the Bill that remove the intent to manufacture element from border controlled precursor offences should be removed from the Bill;
- (d) the proposal to include 'knowingly concerned' as one of the general elements of criminal responsibility in chapter 2 of the Criminal Code should be removed from Bill;
- (e) the broadening of the definition of forced marriage and the increase in penalties should be accompanied by awareness raising / education within the community;
- (f) consideration be given to:
 - (i) the framing of sexual and other offences that may accompany an offence of forced marriage; and
 - (ii) criminalising the procuring of an underage marriage.
- (g) the mandatory sentencing penalties in the Bill be removed; and
- (h) the proposed amendments to sections 19AB and 19AC of the *Crimes Act 1914* (Cth) (Crimes Act) relating to requiring that only non-parole orders (not recognizance release orders) can be fixed for sentences that exceed three years, be removed from the Bill.

Introduction

7. The Government has stated that the Bill will deliver on the government's commitment to tackle crime and to make our communities safer.¹ The Bill aims to provide our law enforcement agencies with the tools and powers they need to effectively perform their functions and reflects the Government's efforts to target criminals, protect Australian's from gun-crime and reduce the heavy cost of crime for all Australians.²
8. The Bill contains a range of measures across various Commonwealth acts, including updating offence provisions in the Criminal Code. However, key measures of the Bill have been introduced into the Parliament without State and Territory consultation.
9. In contrast, several principles and provisions that the Bill seeks to amend were initially developed over a period of more than ten years, where MCCOC undertook extensive consultation and research, including with States and Territories, which resulted in the progressive publication of nine chapters of the Criminal Code.
10. The need for greater uniformity in the area of criminal law remains as pressing today as it did almost two decades ago when the project was commenced.
11. The Law Council supports the Model Criminal Code project and other efforts to harmonise criminal law and procedure across the Commonwealth, States and Territories. Accordingly, it considers that measures that seek to change fundamental principles of the Criminal Code, such as permitting recklessness for attempt and introducing the concept of 'knowingly concerned' into the Criminal Code, must undergo a full public consultation process, including with State and Territory jurisdictions.

Recommendation:

- **The Law Council recommends that measures in the Bill that seek to change fundamental principles of the Criminal Code, such as permitting recklessness for attempt and introducing the concept of 'knowingly concerned' into the Criminal Code, must undergo a full public consultation process, including with State and Territory jurisdictions.**

Recklessness as the fault element for attempted drug and precursor offences

12. New section 300.6 the Bill would amend the Criminal Code to make recklessness the fault element for attempted offences against Part 9.1 of the Criminal Code (relating to drug and precursor offences).
13. The Explanatory Memorandum to the Bill notes the rationale of this amendment:

¹ Minister for Justice, Second Reading Speech to the Crimes Legislation Amendment (Powers, Offences and other Measures) Bill 2015, 19 March 2015 at <http://parlinfo.aph.gov.au/parlInfo/search/display.w3p;query=Id%3A%22chamber%2Fhansard%2F311d5444-ac02-4c7a-aca5-e3d5a5e1c2a7%2F0009%22>

² Ibid.

... in practice in prosecutions for attempted offences against Part 9.1, it has been very difficult to show that a person had actual knowledge that his or her actions involved a controlled or border controlled substance, unless the person has made a direct admission. These difficulties are particularly pronounced where individuals are part of a larger operation and who deliberately operate with limited knowledge about how their actions fit into the broader criminal enterprise. This has meant that offenders who are involved in the trafficking and importation of illicit drugs and their precursors have been able to escape liability for attempted offences against Part 9.1, rather than facing penalties commensurate with the gravity of their conduct.

Prosecutions for serious drug and precursor offences may also be affected by the use of specific law enforcement methodologies. For example, the use of a controlled operation in an investigation may make it impossible to charge the person with a primary offence against Part 9.1 on the basis that the person cannot technically complete the offence. The person must therefore be charged with an attempt to commit an offence against Part 9.1, and the prosecution must prove the person's knowledge or intention, rather than the fact that he or she was reckless.³

14. The offence of attempt involves a defendant who fails to commit the *actus reus* (or physical element) of a complete offence, but has the *intention* to commit the complete offence.
15. The Law Council does not support the lower level fault element of recklessness applying to the offence of attempt on the basis that the essence of 'attempt' is that, if the defendant has not committed the substantive offence (or conspired to commit it) then a fault element of intention or knowledge is required to make him/her criminally liable.
16. Currently, under the Criminal Code, even where a completed offence allows a lower fault element than intention or knowledge (for example, recklessness) for a particular fault element, the offence of attempt requires intention or knowledge.⁴ Recklessness is not sufficient. As noted by Justice Blockland in *R v BW* [2012] NTSC 29:

The need to prove only an incomplete actus reus [physical elements of an offence] was to some degree balanced by the requirement to prove a high level of culpability in order to constitute mens rea [fault elements of an offence] for attempts.⁵

17. The MCCOC concluded that for the offence of attempt, the accused must act intentionally or knowingly with respect to each physical element of the offence attempted.⁶ That is, recklessness would not suffice for the fault element of the completed offence, on the basis that:
 - Both the common law and the Griffith Codes always required intent;
 - Several submissions opposed the proposal, principally on the basis that purposiveness is the essence of attempt; and

³ Explanatory Memorandum to the Bill, p. 15.

⁴ Subsection 11.1(3) of the *Criminal Code Act 1995* (Cth).

⁵ *R v BW* [2012] NTSC 29, [11].

⁶ MCCOC report 78.

- Allowing recklessness would widen the extensions of criminal responsibility too far.⁷
18. A possible reason for the proposed change may be that law enforcement officials intercept unlawful drugs in customs inspections and substitute lawful substances for the illicit ones. But where a person deals with this substance believing it to be an illicit drug, they will be guilty of attempt, even though - because of the substitution – it was impossible to possess the drug: see subsection 11.1 (4) of the Criminal Code.
19. However, it is not justifiable to convict a person of ‘attempt’ where the item was in fact not an illicit drug and he or she did not believe it was an illicit drug, even if aware that that it might be. These are very serious offences with very heavy penalties and the general rules of criminal liability under both common law and the Griffiths Codes should continue to apply.
20. Under current law, it is well established that intention to possess drugs may be inferred from awareness of a real risk that a substance is drugs. In *R v Saengsai-Or* (2004) 61 NSWLR 135; [2004] NSWCCA 108 Bell J (Wood CJ at CL and Simpson J agreeing) stated at [74]:

It is appropriate for a judge in directing a jury on proof of intention under the Criminal Code to provide assistance as to how (in the absence of an admission) the Crown may establish intention by inferential reasoning in the same way as intention may be proved at common law. Intention to import narcotic goods into Australia may be the inference to be drawn from circumstances that include the person’s awareness of the likelihood that the thing imported contained narcotic goods.⁸

21. In *Luong v DPP (Cth)* [2013] VSCA 296 the Victorian Court of Appeal upheld a judge’s direction to a jury that:

If you are satisfied beyond reasonable doubt that the accused was aware of the likelihood in the sense that there was a real chance that his conduct involved the possession of narcotics and he nevertheless persisted in that conduct, that would be sufficient to infer an intention to possess.⁹

22. For these reasons, the Law Council does not support new section 300.6 of the Bill.

Recommendation:

- **New section 300.6 of the Bill providing recklessness as a fault element for attempted drug and precursor offences under the Criminal Code should be removed from the Bill.**

Intent to manufacture

23. Offences 307.11 to 307.13 of the Criminal Code relate to importing and exporting border controlled precursors and incur maximum penalties ranging from 7-25 years imprisonment. These offences are supported by a rebuttable presumption in section

⁷ Ibid.

⁸ *R v Saengsai-Or* (2004) 61 NSWLR 135; [2004] NSWCCA 108 per Bell J (Wood CJ at CL and Simpson J agreeing) at [74]. See also *Cao v The Queen* (2006) 198 FLR 200; [2006] NSWCCA 89.

⁹ *Luong v DPP (Cth)* [2013] VSCA 296 at [62].

307.14 of the Criminal Code which operates so that, where the defendant imported or exported the substance without appropriate authorisation, he or she is presumed to have the relevant intention or belief that the border controlled precursor would be used to manufacture a controlled drug. A defendant can rebut the presumption by proving on the balance of probabilities that he or she did not have the relevant intention or belief.¹⁰

24. As noted in the Explanatory Memorandum to the Bill, 'this presumption was included in the Criminal Code in an effort to assist the prosecution in proving a defendant's state of mind in importing a precursor'.¹¹

25. Items 3 to 7 of Schedule 1 of the Bill will remove the intent to manufacture element from these border controlled precursor offences. The Explanatory Memorandum justifies this on the basis that:

*... the CDPP, has faced formidable difficulties in prosecuting offenders for importing precursor chemicals. Those difficulties are particularly pronounced where individuals are part of a larger operation and who deliberately operate with limited knowledge about how their actions fit into the broader criminal enterprise. In these circumstances, it is very difficult to prove the intention or belief of the persons involved in undertaking discrete parts of the importation, even where each person knew or believed they were involved in some form of illicit activity... These difficulties are compounded where the prosecution involves an extension of criminal liability under Part 2.4 of the Criminal Code because the prosecution cannot rely on the presumption in section 307.14.*¹²

26. However, the Law Council suggests that a more appropriate way to avoid the difficulties faced by the CDPP may be to amend the Criminal Code so that the prosecution can rely on the presumption in section 307.14 for the offences in sections 307.11 to 307.13 where there is an extension of criminal liability under Part 2.4 of the Criminal Code.

27. Alternatively (if there is some difficulty with bringing presumptions into sections under Part 2.4 of the Criminal Code) or in addition to the presumption, the fault elements in sections 307.11 to 307.13 could be broadened. For example, there could be a requirement for the prosecution to prove that the person intends to use any of the substance to manufacture a controlled drug or the person believes that any of the substance has been imported for the purposes of manufacture of a controlled drug. Such a formulation would relate the importation to an expectation that it would be used in manufacture of a controlled drug, while avoiding the directness of current provisions.

28. In the Criminal Code where subjective intent is the default fault element for conduct,¹³ and where precursors may have innocent uses (e.g. pseudoephedrine has medicinal uses), it is not appropriate for the intent to manufacture element from border controlled precursor offences to be removed. Otherwise, a person could be imprisoned for a maximum of 25 years on the basis that he or she knew there was a substantial and unjustifiable risk that the substance was a border controlled precursor even though they may have had an innocent reason for the importation.

¹⁰ Subsection 307.14(2) of the *Criminal Code Act 1995* (Cth).

¹¹ Explanatory Memorandum to the Bill, p. 16.

¹² *Ibid.*

¹³ Subsection 5.6(1) of the *Criminal Code Act 1995* (Cth).

Recommendation:

- **Items 3 to 7 of Schedule 1 of the Bill that remove the intent to manufacture element from border controlled precursor offences should be removed from the Bill.**

Knowingly concerned

29. Schedule 5 would amend the Criminal Code to insert 'knowingly concerned' as an additional form of secondary criminal liability into section 11.2. This would mean that, where persons are knowingly concerned in the commission of an offence under the Criminal Code and the Crimes Act, they would be liable for the offence.

30. The Explanatory Memorandum notes the rationale for the introduction of the concept as follows:

- This additional form of criminal liability will enable the Commonwealth Director of Public Prosecutions (CDPP) to more effectively prosecute federal criminal offences, including offences regarding illegal substances (such as importation and trade in drugs), fraud, corruption and insider trading, which traditionally rely on the involvement of secondary persons.
- The CDPP has advised that the absence of this prosecuting option is a significant impediment, and has rendered certain prosecutions more complex and less certain. The CDPP cites *Campbell v R* [2008] NSWCCA 214 (*Campbell v R*) an example of a drug importation case that would have benefited from a knowingly concerned provision, given the temporal limits on existing forms of secondary criminal liability. The existing forms of liability already available in section 11.2 of the Criminal Code are often perceived as being limited in coverage to finite activities of assistance to the principal offender prior to and during the commission of the offence. Knowingly concerned liability can, by comparison, extend to after the conclusion of an offence.
- This form of secondary liability previously existed in the Crimes Act. The Gibbs Committee, in the 1990 report *Principles of Criminal Responsibility and Other Matters*, found that the knowingly concerned concept in the Crimes Act had the merit of ensuring that circumstances amounting to knowing involvement in an offence, but not amounting to participation as a principal or as an aider, abettor, counsellor or procurer, would nevertheless fall within the reach of that provision.¹⁴
- Allowing the CDPP to bring charges for being knowingly concerned in the commission of an offence allows for the accused's involvement to be accurately reflected in the charge against them, rather than relying on other prosecution options (such as conspiracy charges).

¹⁴ Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility and Other Matters* (Third Interim Report, 1990) 214 [16.57]; agreed with by Weinberg AJA in *Campbell v R* [2008] 73 NSWCCA 272, 298 [161].

- The absence of a 'knowingly concerned' form of criminal liability in Commonwealth legislation has attracted judicial comment.¹⁵
31. However, the Explanatory Memorandum to the Bill does not provide evidence of the significant impediments faced by the CDPP by the absence of the concept of 'knowingly concerned' in the Code.
32. The Criminal Code creates general principles of criminal responsibility to all offences. The MCCOC, which was appointed by the Standing Committee of Attorneys General, and comprised senior criminal lawyers (both defence and prosecution) from every jurisdiction, noted that:
- Parliament can override the provisions in this chapter of the Code, either elsewhere in the Code or in other legislation. Because of the fundamental nature of the principles of criminal responsibility, we would not expect this to be done lightly.*¹⁶
33. Accordingly, the focus should be on actual cases where it can be demonstrated that this proposed substantial change to the basic principles of federal criminal law would have made a practical difference. The impediments should be made publicly available to demonstrate to the community the need for the amendments.
34. The Law Council understands that one of the possible impediments for the prosecution may be the perception of needing to rely on complex conspiracy charges, particularly in 'substitution cases' (that is, where law enforcement substitute inert substances for genuine precursors) where the prosecution then is forced to rely on a conspiracy charge. However, the Law Council notes that the attempt law allows conviction even if the completed offence was impossible.¹⁷
35. Justice Weinberg's criticism was made in the *Campbell* case:
- The decision to omit the phrase 'knowingly concerned' from the various forms of complicity available under federal criminal law, **and the extension of that decision to the offences now contained in the Code dealing with drugs**, appears to me to have left a lacuna in the law that was certainly never intended.*¹⁸
[Emphasis added]
36. But that case turned on the meaning of the word 'import'. The court held that the import was complete when the goods landed in Sydney. They were not delivered to Mrs Campbell's premises until some time later. The statutory definition of 'import' has now been changed to create offences of dealing with drugs knowing them to have been imported. So the problem with the definition of 'import' has been cured.
37. In *Campbell v R*, the accused, who was a pharmacist by trade, was importing furniture from Indonesia. Her evidence was that she had done a large number of importations and that in several previous instances her Indonesian agent had included parcels of his own in the shipment and arranged for them to be collected by his agent in Sydney. There were various pieces of evidence including phone tap evidence, which suggested that at the very least, the accused knew that her Indonesian agent was 'up to no good'. Ms Campbell was charged with intentionally importing pseudoephedrine. However, the Crown case ultimately relied on a fallback argument that the concept 'to

¹⁵ *Campbell v R* [2008] NSWCCA 214, 173. Explanatory Memorandum to the Bill, 61-63.

¹⁶ MCCOC report, p. 5.

¹⁷ Paragraph 11.1(4)(a) of the *Criminal Code Act 1995* (Cth).

¹⁸ *Campbell v R* [2008] NSWCCA 214, 173. Explanatory Memorandum to the Bill, 61-63.

import' was a continuing concept which continued well after the goods had landed in Sydney and were delivered to a warehouse she owned. The prosecution argued that at the time the container was opened and packages were found in it containing pseudoephedrine that she intended to import them. The defence argued that by that time the goods had already been imported and that her knowledge and/or intention post-dated their having been imported. The Court of Appeal accepted the defence argument. It was a standard argument about the need for the physical element and the fault element of the offence to coincide.¹⁹

38. Most of the Court of Appeal judgment centred on the concept of what it meant to 'import' and the distinction between 'import' – a relatively finite concept completed once goods hit Australian soil – versus a more extended or continuing act analysis where an 'importation' began in the country of origin and continued for some time until they were 'handled' by the defendant in Australia. The old *Customs Act* provisions had used the word 'importation' which the Court took to indicate a *process* whereas the new drug offences in the Criminal Code had reverted to the word 'import'.
39. The ratio of *Campbell v R* means that even if the term 'knowingly concerned' had been used, the accused would not have been guilty because the drugs had already been imported at the time she became 'knowingly concerned' with them. The definition of 'import' in section 300.2 of the Criminal Code solves this problem. It includes 'dealing with a substance in connection with its importation'.²⁰
40. Under the new definition, Ms Campbell would have been guilty if she had dealt with a substance at any stage 'in connection with its importation', believing that another would use it to make drugs, and knowing or being reckless as to it being a controlled substance: see section 307.11 of the Criminal Code (relating to importing and exporting commercial quantities of border controlled precursors).
41. *Campbell's Case* does not support a case for a sweeping change to the law of complicity, or even for the drug importation offences.
42. The Law Council's concern is with the notion that the bases of criminal liability can be expanded to a quite general proposition when the real nub of the *Campbell* case actually turns on the concept of importing.
43. It is also important to remember that the notion of 'aiding and abetting' is itself already a very general term, which can capture a wide range of conduct. For example, in *Wilcox v Jeffrey* [1951] All ER 464, it was held that a journalist was guilty of aiding and abetting for attending a Coleman Hawkins concert in post-war London to write a review for *Jazz Illustrated*, knowing that Coleman Hawkins, a US citizen, did not have the relevant work permit. In *R v Coney* (1882) 8 QBD 534 it was found that being present at an illegal prize fight could be put to the jury to support a charge of aiding and abetting the assault.

¹⁹ See *Thabo-Meli v R* [1954] 1 WLR 228.

²⁰ The effect of the definition of import, as noted in the Explanatory Memorandum to the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009, p. 192, is that it:

... has been extended to include dealing with a substance in connection with its importation. As such, the new definition of import relates to a process that extends before and beyond the period of the goods being landed in Australia.

The effect of this amendment is that the Commonwealth drug importation offences will capture criminal activity related to the bringing of drugs into Australia and subsequent criminal activity connected with the importation of drugs.

44. The Victorian Court of Appeal in two recent cases adopted the principles laid down in the *Wilcox v Jeffery* line of cases about whether mere presence during commission of a crime may be sufficient to constitute aiding and abetting:

*The justification for rendering the individual liable arises from the contribution that he or she intentionally makes to the commission of the crime. This, of course, can take different forms and these are encompassed by the broad descriptive notions of counselling, procuring, assisting or encouraging the principal offender. It is apparent that quite different questions will be thrown up according to the type of contribution alleged and the circumstances surrounding the particular offence. However, whatever the form of contribution, in order to become a party to or participant in the commission of a crime by another, an aider and abettor must do something of a kind that can be reasonably seen as intentionally adopting and contributing to what is taking place in his presence. In this sense, the aider and abettor becomes linked in purpose with the principal actor.*²¹

45. The Explanatory Memorandum to the Criminal Code noted the original rationale for not including the concept of 'knowingly concerned' in the Criminal Code as follows:

*The Code retains the traditional formula of "aid, abet, counsel or procure". Despite some difficulties, the meaning of the words is well understood both in Griffith Codes (except for "abet" which is not used) and common law jurisdictions. The traditional formula is preferred to the Gibbs Committee formula of being "knowingly involved" in the commission of an offence because the latter would add little in substance and is more open-ended.*²²

46. The concerns of MCCOC are more acute in light of the range of new offences, particularly very preliminary or inchoate terrorism offences, which criminalise conduct at a much earlier point than has traditionally been the case and have been enacted since the Criminal Code was introduced.
47. For example, take the offence of doing an act in preparation for a terrorist act under 101.6 of the Criminal Code. We assume that – like the existing law – merely knowing or even being present when another person performed such an act would not make D guilty. Would being 'concerned in' - whatever that may mean – add anything useful to the traditional formula of 'aid, abet counsel or procure' that act?²³
48. When might a person be 'knowingly concerned' in the commission of an offence where he or she is not aiding and abetting, counselling or procuring its commission? Plainly enough it should not suffice to be 'concerned about' the offence. For example, a journalist goes 'undercover' to observe the actions of a group of young persons in order to write a story about them and observes them commit offences. The journalist does not assist in the commission of the offences or encourage them, but could the journalist be said to be 'knowingly concerned' in the commission of them? Would such conduct be caught? What if the journalist was instead an undercover police officer, obtaining criminal intelligence?
49. Consider a further example, where family members give comfort to an aged and terminally ill parent who takes a suicide pill. Could the family members then be considered to be 'knowingly concerned' in the suicide?

²¹ *Guthridge v R* (2010) 27 VR 452 at [105], quoting its own previous decision in *R v Lam* (2008) A Crim R 453.

²² Explanatory Memorandum to the *Criminal Code Act 1995* (Cth), 35.

²³ See again, *Wilcox v Jeffery* [1951] All ER 464.

50. As the cases quoted above show, the concept of aiding and abetting is already a wide concept. There is at least some degree of clarity and certainty with the current formulation in subsection 11.2(1) which refers to a 'person who aids, abets, counsels or procures the commission of an offence'. As cases like *Guthridge v R* (2010) 27 VR 452 also show, the formulation is well understood to catch cases where a person assists or encourages the commission of an offence. Even then, at the margin, cases like *Wilcox v Jeffrey* demonstrate that 'aiding' is a very wide concept. To make it even wider by a formulation like, 'knowingly concerned' is a step too far.
51. The introduction of 'knowingly concerned' would also potentially render the Criminal Code provisions relating to aid, abet, counsel and procure – provisions with settled and well-accepted meanings in both common law and Griffiths Code jurisdictions - redundant. If the change were accepted, it might also undermine the long-established requirement that the relevant fault element must coincide in time with the relevant physical element.
52. There is also a conceptual problem. Under paragraph 11.2(3)(a) the prosecution would have to prove that the defendant intended to be knowingly concerned. While an intent to aid, abet, counsel or procure some offence has some sensible meaning, an intent to be 'knowingly concerned' in it introduces a confusion between the concepts of 'intention' and 'knowledge' which are separate concepts under the Criminal Code and in common usage. Paragraph 11.2(3)(a) would require the prosecution to prove that the defendant 'intended' that his or her conduct would result in the person (i.e. the defendant him or herself) being knowingly concerned in the commission of an offence. This does not appear to make sense. The general principles of criminal liability are difficult enough – for lawyers and juries alike – without additional confusions.
53. The Law Council *Rule of Law Principles* require that the law be both readily known and available, and certain and clear.²⁴ Introducing the concept of 'knowingly concerned' into the Criminal Code as a general provision of derivative liability would not be precise enough to allow people to readily ascertain prohibited conduct, which is essential given that a criminal offence is the ultimate sanction for breaching the law and there can be far-reaching consequences for those convicted of criminal offences.²⁵
54. For these reasons, the Law Council does not support the introduction of the concept of 'knowingly concerned' into the Criminal Code as a general principle of criminal responsibility. Specific problems – such as the one which arose in connection with the definition of 'import' in *Campbell's Case* – should be dealt with by legislation specific to that problem.

Recommendations:

- **The proposal to include 'knowingly concerned' as one of the general elements of criminal responsibility in chapter 2 of the Criminal Code should be removed from Bill.**

²⁴ Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 1, 2.

²⁵ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) 12.

Forced Marriage

55. The human right of all individuals to enter into marriage with the free and full consent of both parties is enshrined in international human rights treaties.²⁶ The Law Council has previously supported this right by advocating for the introduction of forced marriage offences in Australia.²⁷
56. Schedule 4 of the Bill amends the definition of forced marriage in the Criminal Code (subsection 270.7A (1)) by inserting a requirement that both parties to a marriage have the capacity to understand the nature and effect of the marriage ceremony.
57. The Explanatory Memorandum states that the amendments will put beyond doubt that where a person is incapable of understanding the nature and effect of a marriage ceremony, he or she has not given free and full consent to enter the marriage.²⁸
58. The Bill also inserts a provision which, for the purposes of the forced marriage offence, creates a presumption that a person under 16 years is incapable of understanding the nature and effect of a marriage ceremony,²⁹ meaning that a defendant would bear the legal burden of proving the contrary on the balance of probabilities. Laws which shift the burden of proof to the defendant can be considered a limitation on the presumption of innocence under Article 14(2) of the *International Covenant on Civil and Political Rights*³⁰, however in this context such limitation is necessary, reasonable and proportionate. The amendment is also in line with Article 16(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* which provides that the marriage of a child shall have no legal affect.
59. The creation of this presumption takes into account the potential for harm to a child when forced to marry. The UN report on *Preventing and Eliminating Child, Early and Forced Marriage* noted that the Committee on the Elimination of Discrimination against Women and the Committee against Torture identified child marriage as a harmful practice which leads to the infliction of physical, mental or sexual harm or suffering, with both short and long-term consequences, and which negatively impacts on the capacity of victims to realise the full range of their rights.³¹
60. Schedule 4 of the Bill also amends the Criminal Code to increase the penalties for forced marriage from four to seven years imprisonment for the base offence, and from seven years to nine years for an aggravated offence.
61. The Explanatory Memorandum states that the penalty increase will ensure the forced marriage offences align with the most serious slavery-related facilitation offence and

²⁶ The *International Covenant on Civil and Political Rights* (Article 23(3)), the *International Covenant on Economic, Social and Cultural Rights* (Article 10(1)), the *Convention on the Elimination of All Forms of Discrimination Against Women* (Article 16(1)(b)) and the *Convention on the Rights of Persons with Disabilities* (Article 23(1)(a)).

²⁷ Law Council of Australia, Submission to the Attorney General's Department, *Inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012*, 20 January 2012, 19; Law Council of Australia, Submission to the Joint Standing Committee on Foreign Affairs and Trade, *Inquiry into Slavery, Slavery-like conditions and People Trafficking*, 2 October 2012, 18.

²⁸ Explanatory Memorandum, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 4.

²⁹ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Cth) sch 4 item 3.

³⁰ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), (16 December 1966), Article 14: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

³¹ *Preventing and eliminating child, early and forced marriage*, GE 14-12876, 26th Sess, UN Doc A/HRC/26/22 (2 April 2014), 5.

that it also reflects the seriousness of forced marriage as a slavery-like practice, a form of gender-based violence and an abuse of fundamental human rights.³²

62. The Law Society of South Australia (the LSSA) overwhelmingly supports the proposed amendments to forced marriage, but notes that there is a divergence of views in relation to the proposed penalty increases. Whilst their Family Law Committee queries whether the proposed increases are sufficient, the alternate view within the Society is that the existing maxima are appropriate. The Bar Association of Queensland is supportive of the definition of forced marriage being amended to reflect that the consent issue refers to the victim's capacity to understand the nature and effect of the marriage ceremony.
63. The Bar Association of Queensland is not aware of any reported case of a prosecution pursuant to these forced marriage provisions and assumes that offences of this nature have been prosecuted under another offence section. For that reason, the Bar Association notes that it is not clear that the increase in maximum penalty is warranted.
64. The LSSA has also noted two further issues that should be given some consideration during the process of assessing the proposed amendments in general. They noted that non-consensual sexual intercourse and other related offences may accompany an offence of forced marriage in many cases, and submitted that it may be prudent to give consideration to any potential amendments that may be needed in regards to the framing of non-consensual sex and other offences that may accompany forced marriage. The Society also noted concerns relating to young children providing evidence (potentially against family members in the case of arranged forced marriages) and proposed that consideration be given to criminalising the procuring of an underage marriage, which would not need to rely on a presumption that a person under the age of 16 has been unable to consent to a marriage.
65. The Law Council has previously commented in its submission to the inquiry into the Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 that forced marriage offences may be difficult to enforce without extensive community education.³³ The need to accompany legal reforms with awareness-raising efforts for families and communities was also highlighted in the UN report on *Preventing and Eliminating Child, Early and Forced Marriage*.³⁴ The report revealed that several civil society organisations noted that criminalization of early marriage may deter victims, especially those from immigrant or minority communities, from coming forward, particularly if it may result in the criminal prosecution and imprisonment of family members.³⁵

³² Explanatory Memorandum, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 5.

³³ Law Council of Australia, Submission to the Joint Standing Committee on Foreign Affairs and Trade, *Inquiry into Slavery, Slavery-like conditions and People Trafficking*, 2 October 2012, 19.

³⁴ *Preventing and eliminating child, early and forced marriage*, GE 14-12876, 26th Sess, UN Doc A/HRC/26/22 (2 April 2014), 15.

³⁵ *Ibid.*

Recommendations

- **The Law Council supports the forced marriage amendments and recommends that the broadening of the definition of forced marriage and the increase in penalties should be accompanied by awareness raising / education within the community.**
- **The Law Council recommends that consideration be given to:**
 - **The framing of sexual and other offences that may accompany an offence of forced marriage; and**
 - **Criminalising the procuring of an underage marriage.**

Mandatory minimum penalties

66. Schedule 6 of the Bill would introduce a mandatory minimum five year term of imprisonment for the:

- existing offences of trafficking firearms and firearm parts within Australia (in Division 360 of the Criminal Code); and
- new offences of trafficking firearms into and out of Australia in Division 361 of the Criminal Code.³⁶

67. The Law Council acknowledges the potential for serious social harms associated with firearms trafficking. It notes that the inclusion of a mandatory minimum penalty for these offences is aimed at the objective of ensuring offenders receive sentences that reflect the seriousness of their offending.

68. The mandatory minimum penalties contained in the Bill do not apply to children (those under the age of 18) and do not impose a minimum non-parole period on offenders. This aspect is said in the Bill's Explanatory Memorandum to preserve a court's discretion in sentencing, and to help ensure that custodial sentences imposed by courts are proportionate and able to take into account the particular circumstances of the offence and the offender.

69. Nevertheless, the Law Council unconditionally opposes mandatory sentencing as a penalty for any criminal offence on the basis that raises the potential for unintended consequences, such as:

- the imposition of unacceptable restrictions on judicial discretion and independent inconsistent with rule of law principles;
- the potential imposition of unjust or unduly harsh sentences;
- the infringement of a fundamental sentencing principle that a sentence and retribution should be proportionate to the gravity of the offence, having regard to the circumstances of the case;

³⁶ As included in the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth).

- potentially increasing the likelihood of recidivism because prisoners are inappropriately placed in a learning environment for crime. This reinforces criminal identity and fails to address the underlying causes of crime. This has particular relevance to young offenders.
- undermining the community's confidence in the judiciary and the criminal justice system as a whole. Research demonstrates that when members of the public are fully informed about the particular circumstances of a case and the offender, 90 per cent view judges' sentences as appropriate;³⁷ and
- unjust outcomes, particularly for vulnerable groups within society: indigenous peoples, young adults, juveniles, persons with a mental illness or cognitive impairment and the impoverished.³⁸

70. The following example, as noted by Mr Stephen Odgers SC, a member of the Law Council's National Criminal Law Committee at a hearing before the Committee's inquiry into the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (Psychoactive Substances Bill), sheds light on potential injustice that may be caused by the imposition of a mandatory minimum penalty.³⁹

Example⁴⁰

A prominent businessman exported gunpowder, cartridges, primer and propellant from Australia to Papua New Guinea without a permit when the Lae Pistol Club was short of ammunition after the defendant's home in Lae (where the club's ammunition was stored) was destroyed in a fire. The defendant disguised the export in order to try to get the items into Papua New Guinea quickly. The magistrate who sentenced him accepted that he was a passionate sporting shooter and was only motivated to assist the Club. Other hypothetical examples can be given where there would be agreement in the community that any period of imprisonment, let alone a sentence of 5 years imprisonment, would be an excessive punishment.

71. The Law Council's Mandatory Sentencing Policy and Discussion Paper (released in June 2014) describes in detail a number of concerns expressed by the Law Council's Constituent Bodies, the judiciary, other legal organisations and individuals regarding mandatory sentencing. A copy of the Mandatory Sentencing Policy and Discussion Paper are attached.

72. While Australia's criminal justice system and penalties for firearms trafficking offences act as a general deterrent to offending, mandatory minimum penalties are unlikely to reduce or deter the importation of illicit firearms. As noted by the Australian Strategic Policy Institute:

...if the desired outcome is to reduce the availability of illegal firearms in Australian communities the focus needs be on strategies which increase the likelihood that a

³⁷ K Warner, J Davis, M Waler, R Bradfield & R Vermey, "Public Judgement on Sentencing: Final results of the Tasmanian Jury Study", *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, February 2011, p. 3.

³⁸ Law Council of Australia, *Policy Position: Mandatory Sentencing*, May 2014.

³⁹ Mr Stephen Odgers SC, Member, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 22 August 2014, pp. 9-10.

⁴⁰ As reported by Adam Cooper, 'Australian pleads guilty to exporting arms to PNG', *The Age*, 4 April 2013 at <http://www.theage.com.au/victoria/australian-pleads-guilty-to-exporting-arms-to-png-20130404-2h8ox.html>.

firearms trafficker will be caught. Those strategies should focus on continuing to enhance our border agencies' capabilities to detect and investigate illicit firearm trafficking at the border.

*Mandatory sentencing of illicit firearms traffickers...won't deliver the desired results.*⁴¹

73. In addition, the current amendments were considered and rejected by Parliament in relation to the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Act 2015* (Cth) (Psychoactive Substances Act). The NSW Director of Public Prosecutions opposed the introduction of mandatory minimum sentences for the firearms trafficking offences on the following basis:

*It was the experience in NSW when there were a number of people smuggling cases before the NSW Courts that the accused did not enter pleas of guilty because of the mandatory minimum sentence and all the trials ran the full course. This had a significant impact on the District Court to dispose of other work and on the resources of the [Commonwealth Director of Public Prosecutions]...Additionally trials with a mixture of Commonwealth and State offences by reason alone of the combined effect of State and Commonwealth provisions are more complex cases to prosecute. The inclusion of a mandatory minimum sentence in this mix will add to the overall complexity.*⁴²

74. Similarly, the Tasmanian Office of the Director of Public Prosecutions noted that mandatory sentencing provisions 'can lead to unjust results' and that, if it is thought desirable to have some form of mandatory minimum sentencing scheme, then it should be drafted in such a way that allows the court to exercise its discretion and depart from the mandatory minimum sentence, if a particular case calls for it.⁴³
75. The Bar Association of Queensland has also noted that the imposition of a mandatory minimum imprisonment sentence is a partial fettering of judicial discretion that impedes the sentencing judge's ability to fashion a sentence that is of an appropriate severity in all the circumstances, as is required in sentencing for federal offences by section 16A of the Crimes Act.
76. Further, the Bar Association of Queensland has noted that the imposition of a mandatory minimum imprisonment sentence is contrary to other sentencing principles enshrined in the Commonwealth sentencing framework, which judges apply. Specifically, section 17A of the Crimes Act provides that a sentencing court shall not pass a sentence of imprisonment unless, having considered all other sentences, it is satisfied that no other sentence is appropriate in the circumstances. While this provision can be overridden, it is an important and longstanding principle of sentencing that imprisonment ought to be imposed only where no other sentence is appropriate. This principle is derived from the recognition that imprisonment is not an effective means of achieving all sentencing objectives.
77. The Explanatory Memorandum to the Bill incorporates alternative recommendations made by the Law Council in relation to the Psychoactive Substances Bill, which were

⁴¹ John Coyne, Australian Strategic Policy Institute, 'Gun Trafficking and Mandatory Jail Terms', *The Strategist*, 18 March 2015 at <http://www.aspistrategist.org.au/gun-trafficking-and-mandatory-jail-terms/>

⁴² Director of Public Prosecutions (NSW), Submission 3 to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, 1 August 2014, pp. 1-2.

⁴³ As referenced in the Senate Legal and Constitutional Affairs Committee's Report into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, p. 24.

subsequently accepted by the Committee, namely that it make clear that it is intended that:

- the sentencing discretion be left unaffected in respect of the non-parole period;
- in appropriate cases there may be significant differences between the non-parole period and the head sentence; and
- the mandatory minimum is *not* intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').⁴⁴

78. In this way, some of the Law Council's concerns regarding the mandatory sentences in the Bill are mitigated. Others remain such as undermining the community's confidence in the judiciary and the criminal justice system as a whole by not allowing judicial discretion to impose an appropriate head sentence.

Recommendation:

- **The mandatory sentencing penalties in the Bill be removed.**

Removing a court's discretion to issue a recognizance release order

79. Under the current section 19AB of the Crimes Act, when sentencing a person convicted of a federal offence (or offences) to a period of imprisonment (whether single or aggregate) exceeding 3 years, a sentencing court must *either* fix a single non-parole period in respect of the sentence or make a recognizance release order.

80. Schedule 7 of the Bill seeks to remove the power to make a recognizance release order, and requires the court to fix a non-parole period. This is a further and unnecessary constraint on the exercise of judicial discretion.

81. The Explanatory Memorandum to the Bill states that if a court makes a recognizance release order in relation to a sentence that exceeds three years' imprisonment, then the offender is automatically released after serving the period of imprisonment that is specified in the order, whereas if a court fixes a non-parole period in relation to a sentence that exceeds three years' imprisonment, then release is discretionary and depends on an assessment by the Attorney General, or a delegate, of matters relevant to the making or refusal to make a parole order.⁴⁵

82. The Explanatory Memorandum acknowledges that the amendments may engage the rights to individual liberty and freedom of movement, but justifies any potential infringement by submitting that:

Federal offenders who are sentenced to imprisonment have been convicted of a criminal offence and any restriction on their freedom of movement is a

⁴⁴ See Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014*, 4 August 2014, p. 2; Explanatory Memorandum to the Bill, pp. 65-66.

⁴⁵ Explanatory Memorandum, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, 29.

consequence of their criminal conviction and sentence, and serves to protect the public...

...A sentence that exceeds three years' imprisonment is likely to be imposed for a serious matter. It is appropriate that an assessment is made, around the time of the offender's release date, of their suitability for release (an assessment largely based on recommendations from corrective services and other authorities)...

Such detention is not arbitrary and release on parole (or otherwise) is determined applying principles of administrative law. Further, a decision about granting or refusing to grant release on parole is subject to judicial review under the ADJR Act.⁴⁶

83. The Law Council and the Bar Association of Queensland do not support the proposed amendments to sections 19AB and 19AC of the Crimes Act because the amendments require a sentencing judge to follow a course pre-determined by the legislature without regard to the individual circumstances of the case and of the offender. The nature of a non-parole period order and a recognizance release order are fundamentally different in an important respect. The former is one pre-condition to release, that the release decision subsequently being made by a different decision maker based on different factors and subject to limited methods of review. In contrast, the recognizance release order, while still imposing conditions on release, is an immediate sentencing solution decided by the sentencing judge as appropriate having regard to all the circumstances and evidence at the time of sentencing.

84. The 2005 Australian Law Reform Commission's (ALRC) Issues Paper *Sentencing of Federal Offenders* referenced the Office of the CDPP when noting that it had been said that recognizance orders remain a desirable policy option as they promote rehabilitation in the community.⁴⁷ The follow-up report which came out in 2006 also referred to comments from the CDPP that:

...a sentencing option that enabled courts to release a federal offender conditionally after serving a period of imprisonment was a useful sentencing tool....⁴⁸

85. Promotion of the rehabilitation of the offender is one of the recognised purposes of sentencing.⁴⁹ Recognizance release orders give the Court the option to require that the offender be subject to supervision and/or undertake a program upon release, both of which have the potential to contribute to the rehabilitation of the offender and prevent reoffending.

86. The ALRC report recommended that a recognizance release order should be a sentencing option available to courts sentencing federal offenders, and noted that judicial officers sentencing federal offenders should have a wide variety of sentencing

⁴⁶ Ibid.

⁴⁷ The Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper No 29, (2005) 177, referencing Office of the Commonwealth Director of Public Prosecutions, *Consultation*, Sydney, 16 September 2004.

⁴⁸ The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 233 referencing Commonwealth Director of Public Prosecutions, Submission SFO 51, 17 June 2005.

⁴⁹ Ibid 29.

options at their disposal to enable them to impose the most appropriate sentence in all the circumstances of the case.⁵⁰ The ALRC report went on to say:

*A recognizance release order has the potential to satisfy a number of the purposes of sentencing, such as denunciation and specific deterrence. It may also represent a proportionate sentence in the circumstances of the case. Recognizance release orders are an established and frequently utilised sentencing option for federal offenders and orders of that nature are currently available in all states and territories.*⁵¹

87. In response to the issue of whether or not federal sentencing legislation should maintain the provision requiring the court to make a recognizance release order for sentences of imprisonment between six months and three years, the ALRC report recommended that a court sentencing a federal offender should have the discretion to wholly or partially suspend any period of imprisonment imposed on a federal offender, regardless of the length of the sentence.⁵² The Law Council considers that such comments apply equally to the question now before the Committee, of whether or not recognizance orders should be available for offenders sentenced to more than three years imprisonment.

88. For the reasons outlined above in relation to the importance of individualised and context based sentencing and the availability of diverse sentencing options to judges in achieving sentencing objectives, the Law Council and the Bar Association of Queensland do not support the removal of the recognizance release order discretion proposed by Schedule 7.

Recommendation:

- **The Law Council recommends the removal of the proposed amendments to sections 19AB and 19AC of the Crimes Act relating to requiring that only non-parole orders (not recognizance release orders) can be fixed for sentences that exceed three years.**

⁵⁰ The Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) 233.

⁵¹ *Ibid.*

⁵² *Ibid* 234.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.