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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Sir or Madam

LIBERTY VICTORIA SUBMISSION ON THE *CRIMES LEGISLATION AMENDMENT (POWERS, OFFENCES AND OTHER MEASURES) BILL* 2015

1. Liberty Victoria is grateful for the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee on the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill* 2015 (Cth) ("the Bill").

2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.

3. Liberty Victoria is deeply concerned about the following aspects of the Bill:

   (1) Making recklessness the fault element for attempted offences against Part 9.1 of the *Criminal Code Act* 1995 (Cth) ("the Criminal Code");

(2) Removing the "intent to manufacture" element from border controlled precursor offences in ss 307.11 to 307.13 of the Criminal Code;
(3) Creating being "knowingly concerned" as an additional form of criminal responsibility under s 11.2 of the Criminal Code;
(4) Introducing mandatory sentencing with regard to firearms trafficking offences;
(5) Restricting the use of recognizance release orders;
(6) Further abrogating the right to freedom from self-incrimination in AUSTRAC matters; and
(7) Placing a reverse burden of proof on accused persons with regard to the forced marriage offence.

(1) Recklessness for Attempted Drug and Precursor Offences

4. Schedule 1 of the Bill would amend the Criminal Code to make recklessness the fault element for attempted offences against Part 9.1 of the Code.

5. It is plain that this issue was considered and rejected by the Model Criminal Code Committee, as part of an extensive national consultation. That process included consultation with the State Attorneys-General and leaders in the legal community (both prosecutors and defence practitioners).

6. Simply put, given an attempt does not require the conduct element (*actus reus*) of the substantive offence to be made out, to lower the fault element (*mens rea*) to a standard of recklessness will result in people being found criminally responsible for matters with very low levels of moral culpability and in circumstances where they will be exposed to lengthy sentences of imprisonment.

7. If enacted, the Bill would overturn the long held common law principle that an attempt is a crime of intention, not recklessness. However, the jurisprudence on "intention" with regard to attempted offences has evolved. In some circumstances a jury may draw an inference of intention beyond reasonable doubt in circumstances where an offender has been aware that there was a "real chance" that a thing contained a prohibited substance.[1]

[1] [20]-[21]; *R v Saengsai-Or* (2004) 61 NSWLR 135, [74]; *Luong v DPP (Cth)* (2013) 279 FLR 453, [62].

8. Accordingly, it behoves those calling for the reforms to justify through careful analysis why the present state of the law is inadequate.

9. While in some cases an accused person's awareness that was a "real and substantial chance" may be used to draw an inference to the criminal standard that the person *intended* something to occur, that does not mean that the fault element should be lowered to recklessness for all attempted drug and precursor offences. If a person is reckless, but did not intend for something to occur, it is very difficult to see how they can properly be regarded as attempting to commit an offence, which inherently requires an intention to bring about a certain state of affairs.

10. Further, the practical reality of the proposed reforms is that, by lowering the fault element threshold, accused persons will plead guilty to offences in circumstances where they may well have a defence at law. Prosecutors may well offer to resolve matters on the factual basis the accused person held the lesser fault element of recklessness. In some circumstances that may well make the difference as to whether a person is required to serve a prison sentence, and will place enormous pressure on accused persons to plead guilty.

11. There is no proper basis that has been provided for such a significant reform. If the Commonwealth Director of Public Prosecutions regards this as a necessary change, then detailed case studies should be provided that detail why the current statutory regime, as interpreted by recent case law, is insufficient.

(2) Intent to Manufacture

12. Schedule 1 of the Bill would also amend the Criminal Code in order to remove the requirement in importation of precursor offences that the prosecution prove an accused person intended that the given precursor would be used to manufacture a controlled drug.

13. Liberty Victoria submits that if a person is to be charged with importation of a precursor, with significant maximum penalties, it is reasonable for the prosecution to have to prove that the accused person intended that the precursor would be used to manufacture a controlled drug.

14. In the current environment such provisions often apply to persons who knowingly import ephedrine with the intention that it be used in the manufacture of methylamphetamine.

15. Already the Criminal Code provides a rebuttable presumption pursuant to s 307.14 that an accused person will be presumed to have the intention or belief that the precursor will be used to manufacture a drug. An accused person is required to rebut that presumption on the balance of probabilities, although that does not apply for extended criminal liability (such as attempts) under Part 2.4 of the Criminal Code.

16. It should not be assumed that persons in the community are aware of what constitutes illegal precursors. The *Criminal Code Amendment Regulation* 2013 (No 1) (Cth) moved the Schedules from the Criminal Code to the Criminal Code Regulations and allows for illicit substances (including border-controlled precursors) to be listed through regulation. Presently, the regulations list the following substances as border-controlled precursors: Ergometrine, Ergotamine, Isosafrole, Lysergic acid, 3,4Methylenedioxyphenylacetic acid, 3,4Methylenedioxyphenyl2propanone, Phenylacetic acid, Phenylpropanolamine, Phenyl2propanone, Piperonal, Pseudoephedrine and Safrole.

17. Notably, prosecuting authorities are able to prosecute accused persons for possession or attempted possession of a drug of dependence which include some precursors (such as ephedrine) under State laws such as s 73 of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) without having to prove that the precursor was intended to be used in the manufacture of a drug of dependence. For persons who cannot be proven to have knowledge or intent that the substance will be used to manufacture a controlled drug, that is often an appropriate charge.

18. There are very significant maximum penalties under the Criminal Code for importing border-controlled precursors (25 years' imprisonment for a commercial quantity, 15 years' imprisonment for a marketable quantity, and 7 years' imprisonment for a lesser quantity).

19. The element of quantity is one of absolute liability, meaning there is no fault element regarding quantity and there is no defence of honest and reasonable mistake pursuant to s 6.2 of the Criminal Code.

20. In those circumstances, it is appropriate that for an accused person to be found guilty of importing or attempting to import a border controlled precursor it be established that the

person intended that the substance be used to manufacture a border controlled drug. The alternative is that someone might be found guilty of importing a particular quantity of a border controlled precursor, with no intention that it be used to manufacture a drug of dependence (it may be imported unlawfully but for a legal purpose), and then be exposed to severe sentences of imprisonment.

21. It is again submitted that the case has not been made through proper analysis as to why the proposed reform is necessary.

(3) Knowingly Concerned

22. Schedule 5 of the Bill would amend s 11.2 of the Criminal Code to create an additional form of criminal responsibility of an accused person being "knowingly concerned" with the commission of an offence.

23. After the Model Criminal Code Committee consultation, Parliament made the specific decision not to include being "knowingly concerned" as a form of extended criminal responsibility. In no small part that was because it was thought that the extension of criminal responsibility in the form of aiding, abetting, counselling or procuring would be sufficient, and the concept of being "knowingly concerned" was too open ended.

24. One fundamental problem with the concept of an accused person being "knowingly concerned" with the commission of an offence is that it permits the person to be punished as a principal offender in circumstance where they may have become involved after the conduct element (*actus reus*) of the offence has been completed.

25. Already the criminal code permits a person to be punished as a principal in circumstances where they:

    (1) Attempted to commit the substantive offence contrary to s 11.1 of the Code;

    (2) Aided, abetted, counselled or procured the commission of an offence contrary to s 11.2 of the Code;

    (3) Jointly committed an offence contrary to s 11.2A of the Code;

    (4) Committed the offence by proxy contrary to s 11.3 of the Code;

    (5) Incited the commission of the offence contrary to s 11.4 of the Code; or

(6) Conspired to commit the offence contrary to s 11.5 of the Code.

26. Pursuant to s 6 of the *Crimes Act* 1914 (Cth), a person can be prosecuted as an accessory after the fact, with a maximum penalty of 2 years' imprisonment.

27. The purported justification for expanding extended criminal responsibility has already been rectified by statute. While previously there may have been an issue with proving importation offences under the narrow definition of "import" (which was to "bring the substance into Australia"), that has been addressed by Parliament amending the definition of "import" in s 300.2 of the Criminal Code to include "deal with a substance in connection with its importation".

28. That amendment captures those who may have been alleged to have been "knowingly concerned" with the importation of a drug of dependence after the substance was brought into Australia.

29. Accordingly, in light of that amendment that has already been made at the behest of prosecuting agencies, it behoves such agencies to demonstrate why the present, and expansive, categories of extended criminal responsibility are insufficient.

30. To create a new category of extended criminal responsibility in Commonwealth offences, which could see persons involved after the fact punished as though they were principals, is a radical change to criminal responsibility in Commonwealth law and there has not been any proper basis to refute the considered position of the Model Criminal Code Committee that being "knowingly concerned" should not be included as a form of extended criminal responsibility in the Criminal Code.

31. It has been held that the doctrine of being knowingly concerned extends to, not only positive actions committed by an accused person, but also to omissions.[2]

32. Such an expansion of criminal responsibility may see people prosecuted who have committed no overt act in furtherance of a crime, and who have merely become knowingly concerned about the circumstances in which the criminal act is committed. That is particularly concerning when the doctrine is applied to inchoate offences such as preparatory terrorism offences. That could result in persons being prosecuted where they have become "knowingly concerned" that another person has, for example, advocated

[2] *Kennedy v Sykes* (1992) 93 ATC 4012.

terrorism without the accused person taking any overt steps to aid or otherwise assist that person. The potential for abuse of such an amorphous extension of criminal responsibility is obvious, particularly where such forms of criminal responsibility may be used by police or prosecutors in order to pressure accused persons to give evidence against others.

33. There are clear and dangerous consequences with regard to such expansions of criminal responsibility when applied to journalists and whistleblowers. By lowering the threshold of criminal responsibility to a person being "knowingly concerned" about a criminal act, the key decision in criminal prosecutions shifts from the fact-finder (judge or jury) to the prosecutor in determining whether to charge and prosecute a case in a particular way. History demonstrates that we should be slow to support key decisions being shifted to the executive in such a manner.

(4) Mandatory Sentencing

34. Schedule 6 of the Bill would introduce a mandatory minimum sentence of 5 years' imprisonment for the existing offence of trafficking firearms and firearm parts within Australia, and for the new offence of trafficking firearms into and out of Australia.

35. Liberty Victoria notes that the proposed amendments were removed from the *Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill* 2014 (Cth) in order to ensure that Bill was passed by Parliament. It is concerning that the same provisions have now merely been reinserted into a different Bill.

36. Liberty Victoria acknowledges that the offence of trafficking firearms is a serious offence concerning conduct that has the potential for serious social harms associated with trade in illegal firearms. Many instances of these offences will require condign punishment. However, Liberty Victoria opposes mandatory sentencing as a penalty for any offence, including for offences of firearms trafficking.

37. Mandatory sentencing removes the discretion from the sentencing judge to impose a sentence that is appropriate having regard to the circumstances of the particular instance of the offence. It runs counter to the fundamental sentencing principle that the punishment should be proportionate to the seriousness of the offence, having regard to the circumstances of the offender.

38. There is a superficial appeal to having a mandatory minimum sentence for an offence such as firearms trafficking which, on its face, may appear to justify the presumption that every instance of the offence will warrant a minimum prison sentence of 5 years. This is not necessarily so. The offence under Division 360 of the Criminal Code is cast in broad terms. It has the capacity to capture instances of the offence that lack any sinister intent or illegal purpose for the use of firearms. There is also the capacity for persons to be found guilty of a relevant offence through principles of accessorial liability, where their level of culpability for the commission of the offence could be low.

39. Mandatory sentences are often justified on the basis that the conduct is serious and tougher sentences are required to deter potential offenders and to make a statement by Parliament about the seriousness of the offence.

40. Parliament should not seek to prescribe that every instance of the commission of an offence will warrant a minimum sentence, particularly a minimum as high as 5 years, which is 50% of the maximum penalty for the relevant offence. Any statement about the seriousness of the offence should be expressed through the prescribed maximum penalty.

41. Sentencing should be the province of the courts. The sentencing judge is best placed to determine a sentence that takes into account the gravity of the offence and the circumstances of the offender. The discretion of the sentencing judge should not be curtailed by the imposition of such a substantial minimum sentence. There is too great a risk that persons will be caught by these provisions who were never the intended targets of such legislation. In such cases, sentencing judges would be left without the necessary flexibility to impose an appropriate sentence. This could lead to unjust outcomes.

42. Liberty Victoria respectfully adopts the criticisms of mandatory sentencing from former NSW Director of Public Prosecutions Nicholas Cowdery AM QC.[3]

43. The central problem caused by mandatory sentences was eloquently described by Mildren J in *Trenerry v Bradley*:[4]

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a Court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require

[3] www.justinian.com.au/storage/pdf/Cowdery_Mandatory_Sentencing.pdf
[4] (1997) 6 NTLR 175, 187.

sentencers to impose heavier sentences than would be proper according to the justice of the case.

44. It is acknowledged that the Bill does not propose to impose a minimum non-parole period, and that this aspect of the Bill is said in the Explanatory Memorandum to preserve the court's discretion in sentencing. Nevertheless, it is not appropriate to require that a sentencing court impose a minimum head sentence of 5 years where that is not otherwise justified according to sentencing principles. This creates the risk of making the sentencing process farcical and reducing community confidence in the courts and the judicial system.

45. When the public is fully informed of relevant sentencing facts, the research confirms that sentencing standards of judicial officers are not out of step with the community.[5]

46. No argument has been made that sentences imposed for the existing offence have been insufficient. Nor has any argument been made that an increase in sentences for these offences is likely to be successful in deterring the commission of relevant crimes, or reducing the harm caused by illegal firearms in society.

47. Liberty Victoria opposes the measure to introduce mandatory minimum sentences for firearms trafficking offences and recommends that such measures be removed from the Bill.

(5) Recognizance Release Orders

48. Schedule 8 of the Bill would require a sentencing court to impose a non-parole period for a sentence that exceeds 3 years' imprisonment rather than a recognizance release order.

49. It is submitted that sentencing judges should retain the capacity to sentence a person to a sentence of imprisonment of more than 3 years' imprisonment, with a condition that the person be released after a set period of time on a recognizance release order.

50. The Court may set conditions upon an offender as part of a recognizance release order, such as to undertake rehabilitative courses and to be subject to supervision.

[5] "Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study", http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi407.html).

51. Accordingly, there will be appropriate cases where an offender should be sentenced to a longer head sentence but be regarded as suitable for conditional release after a period of time without the person being subject to discretionary release on parole. That would be particularly so where a person on previous good character has committed a serious offence but is regarded as already rehabilitated at the time of sentence or presents with very little prospects of reoffending because of the circumstances of the offence. If such offender are now required to be considered for parole, that will require significant resources to be expended on decision-makers to very little end.

52. At present, the vast majority of Commonwealth offenders on parole are released immediately once they have served the non-parole period. The resources that would be necessary to support this proposed amendment would be much better spent on ensuring that there is a proper risk assessment of those offenders who are sentenced to lengthy head sentences with lengthy non-parole periods.

(6) Freedom from Self-Incrimination

53. Liberty Victoria adopts the submissions of the Australian Human Rights Commission ("AHRC") dated 16 April 2015 with regard to the operation and effect of Schedule 10 of the Bill that would significantly abrogate the privilege against self-incrimination by persons who are required to respond to a notice issued by AUSTRAC.

54. The amendments would mean that a person can be compelled to produce documents to AUSTRAC and that material can then be used in any civil or criminal proceeding for an offence against the *Anti-Money Laundering and Counter-Terrorism Financing Act* 2006 (Cth) or any offence against the Criminal Code that relates to the Act.

55. There is not a proper justification for such a radical abrogation of the privilege against self-incrimination. It will result in persons being compelled to produce information to assist in their own prosecution, and potentially subject to very lengthy terms of imprisonment.

56. Liberty Victoria agrees with the AHRC that the proposed amendments are "neither precise, nor narrow".[6]

57. While it is suggested that the Bill will minimise the harm to individual rights by the provision of use immunities, as observed by the AHRC, that is precisely what the Bill proposes to remove in relation to any offence that AUSTRAC has responsibility for investigating.[7]

58. This part of the Bill reflects a radical departure from the common law position, held over centuries, that an accused person must not to be compelled to be a witness in his or her own prosecution. It should not be enacted.

(7) Reverse Burden of Proof for Forced Marriage Offence

59. Liberty Victoria supports the proposed amendment in Schedule 4 of the Bill that would expand the definition of "forced marriage" under s 270.7A(1) of the Criminal Code to encompass circumstances where a person cannot give his or her free and full consent to marry because he or she "was incapable of understanding the nature and effect of the marriage ceremony".

60. However, it is submitted that the proposed creation of a reverse burden of proof, that would require an accused person to establish on the balance of probabilities that a person under 16 years of age was capable of understanding the nature and effect of a marriage ceremony, is not necessary.

61. The problem with reverse onus provisions is that they create a situation where a fact-finder (be it a judicial officer or jury) may not be satisfied beyond reasonable doubt about an element of the offence, but the person is found guilty and exposed to significant punishment because he or she did not satisfy the fact finder on the balance of probabilities about the given issue. Accordingly, reverse onus provisions undermine the "golden thread" of criminal law that the prosecution is required to prove the guilt of a defendant beyond reasonable doubt.[8]

[6] [95].
[7] [97].
[8] *Woolmington v DPP* [1935] AC 462.

62. It should be noted that any marriage made to a person under the age of 16 is invalid at law pursuant to the *Marriage Act* 1961 (Cth).

63. It is submitted that in most cases of alleged forced marriage, where a person has married a child under the age of 16, the prosecution will be able to establish beyond reasonable doubt that the child could not meaningfully consent. Further, there may be significant problems with having accused persons call child witnesses in their own defence in order to try to establish circumstances on the balance of probabilities.

64. Thank you for the opportunity to make this submission. If the panel has any questions with regard to this submission, or if we can provide any further information or assistance,

Yours sincerely

George A Georgiou SC
President
Liberty Victoria