Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.

About the Australian Drug Law Reform Initiative 'ADLaRI'

1. ADLaRI is comprised of academics, visiting fellows, students and former students in the UNSW School of Law and associated UNSW entities. The purpose of ADLaRI is to provide a legal perspective on drug policy issues.

Summary

2. The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 contains a large number of proposed amendments to 15 different federal statutes.

3. This submission is directed to the amendment of federal narcotic offences within the Criminal Code, and thus only considers the amendments proposed in Schedules 1 and 5.

Schedule 1: Recklessness as the fault element for attempt import/export offences

4. ADLaRI agrees that s 11.1(3), which mandates that the fault elements for attempt offences are intention and knowledge, has added to the complexity of some trials for narcotic offences and potentially resulted in disparities in the treatment of persons accused of dealing in narcotics.

5. As acknowledged in the Explanatory Memorandum (EM) to this Bill, at paragraph 278, the unfairness caused by the operation of s 11.1(3) is demonstrated most clearly in the context of alleged narcotics offences involving controlled operations by police. Where controlled operations lead to the border controlled substance being removed or substituted prior to delivery or collection, and the evidence of the accused's involvement relates to activity after the substitution, the accused must be charged with an attempt to import a border controlled drug offence, for example, under ss 11.2 and 307.1 rather than the offence of importing under s 307.1 alone. The accused charged with attempting to import thus has the benefit of a higher standard of fault element than another accused who imports a border controlled drug under the same circumstances but where the police are unable to or choose not to substitute the drug.[1]

6. However, the law of attempt, at common law and under the Code, has traditionally required the fault element to be intention or knowledge in recognition of the absence of the

[1] See further Peter Zahra and Courtney Young, *Zahra and Arden's Drug Laws in NSW* (3rd ed, Federation Press, 2014) 285-289.

commission of the full physical elements.[2] As the High Court in *Knight v R* declared "[t]his is because the intention which must accompany the inchoate crime of attempt is an intention to commit the complete offence: see *DPP v Stonehouse* [1978] AC 55 at 68."[3]

7. ADLaRI concedes that the proposed ss 300.5 and 300.6 will sufficiently deal with the disparity, and the amendment is properly limited to the lowering of the mental standard associated with the the physical element of 'the substance being' a controlled or border controlled drug/plant/precursor for only the narcotic offences within Part 9.1.

8. Nevertheless, the watering down on any fault element associated with an offence of attempt represents a significant departure from traditional criminal law principles and thus, cannot be supported.

Schedule 1: Removing intent to manufacture from import precursor offences

9. ADLaRI acknowledges that the removal of the requirement that the Crown prove beyond reasonable doubt that the accused intended or believed another intended to use the precursor substance being imported to manufacture a controlled drug has significant advantages for the prosecution, particularly in the context of large criminal enterprises, as outlined in paragraph 283 of the EM.

10. Acceptance of that premise would warrant the repeal of the intent to manufacture element currently contained in ss 307.11(1)(b), 307.12(1)(b) and 307.13(1)(b) and the associated presumption as to deemed presence of such intent contained in s 307.14.

11. However, the repeal of ss 307.12(4) and 307.13(3) relating to the 'defence' of lack of commercial intent would cause the precursor offences to fall out of line with the rest of the import/export offences in div 307. Sections 307.12(4) and 307.13(3) represent a statutory defence, applicable to other import/export offences,[4] where the accused bears the burden, on the balance of probabilities, to prove they did not intend, nor did they believe another intended to sell the border controlled substance.[5]

12. Thus, ss 307.12(4) and 307.13(3) should be retained, with appropriate amendment to reflect the changed state of the precursor offence to one which does not require intent or belief about manufacturing. For example, such amendment might take the form of a reference to the intention to sell or supply the precursor itself.

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[2] *DPP v Stonehouse* [1977] 2 All ER 909.
[3] *Knight v R* [1922] NCA 56 [18].
[4] *Criminal Code Act 1995* (Cth) ss 307.2(4), 307.3(3), 307.5(4), 307.6(4), 307.9(4).
[5] Peter Zahra and Courtney Young, *Zahra and Arden's Drug Laws in NSW* (3rd ed, Federation Press, 2014) 314-315.

13. Additionally, to combat any concern that the retention of such a defence creates loopholes, a provision modelled on s 307.4 which already exists for the import/export of border controlled drugs could be added after s 307.12.[6] This offence does not allow for any defence of commercial intent and thus has an appropriately reduced maximum penalty to reflect the reduced impact of the criminal offending.

Schedule 5: Expanding liability to include knowingly concerned

14. ADLaRI acknowledges that the addition of "knowingly concerned" to s 11.2 of the Code, as an extra head of criminal liability, brings the Code into line with some state drug acts (see for example *Drug Misuse and Trafficking Act 1985* (NSW) s 6; *Criminal Code 2002* (ACT) s 45).

15. In ADLaRI's view, the difficulty with adding knowingly concerned is two fold.

16. Firstly, arguably it does no more than cover ground already acknowledged in s 11.2 "aids, abets, counsels or procures". It was for this reason that the Model Criminal Code Officers Committee (MCCOC) recommended against the inclusion of the comparable concept of knowingly involved:

> The Code retains the traditional formula of "aid, abet, counsel or procure". ...The Committee preferred the traditional formula to the Gibbs Committee formula of being "knowing involved" in the commission of an offence. The Committee concluded that such a formula would add little in substance."[7]

As Odgers argues, the four forms of alternative liability recognised in 'aid, abet, counsel and procure' have specific meanings at common law which has been picked up in the interpretation of the Code.[8]

17. Secondly, if the insertion of "knowingly concerned" achieves the expansion of secondary liability signalled in the EM by reference to Justice Weinberg's comments in *Campbell v The Queen,*[9] it represents yet another step in the journey towards attaching criminal liability to

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[6] See s 307.4 Importing and exporting border controlled drugs or border controlled plants--no defence relating to lack of commercial intent:

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

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

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

[7] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapters 1 and 2 General Principles of Criminal Responsibility* (Report) December 1992, 89.

[8] Steven Odgers, *Principles of Federal Criminal Law* (2nd ed, Lawbook Co, 2010) 162.

[9] [2008] NSWCCA 214, 61-62.

preliminary events, and even to a person's mere presence, against general criminal law principles. For example, under the NSW version of knowingly concerned as applied to the offence of supply, simply introducing another person to a drug dealer may be sufficient for a conviction of being knowingly concerned in supply.[10] Furthermore, it imports unnecessary uncertainly into the law. As the MCCOC commented:

> ... [knowingly involved] is much more open-ended than the traditional formula. This means that it is less certain than is appropriate for a general provision defining the ambit of criminal responsibility in the new Code."[11]

18. With reference to the example provided on page 62 of the EM, to facilitate the conviction of a person for being involved in discussions at meetings of a criminal group, based on background evidence of association, without proof of the accused's involvement in drug delivery or other acts is deeply concerning. It circumvents the protection provided under the federal version of conspiracy which requires proof of at least one overt act, because as Leader-Elliot declares, 'conspiracy has long been recognised as one of the most invasive forms of criminal liability'.[12]

19. The criminalisation of some conduct capable of falling within the definition of 'knowingly concerned' in a criminal enterprise that does not fall within the well-developed terms, 'aid, abet, counsel or procure' is repugnant to general principles of criminal law. The definition potentially captures conduct of a passive observer of a criminal enterprise who happens to apprise themselves of the details of the enterprise, notwithstanding the individual neither assists the principal(s) in the planning and/or execution of the enterprise. Further, there is scant justification for the criminalisation of conduct that involves something less that the facilitation of the commission of the offence. Any involvement in the facilitation of the offence will likely be captured within the existing definition.

20. The more appropriate avenue for prosecution for the example provided on page 62 is under the existing forms of extended liability provided for in s 11.2. A person who involves themselves in meetings about drug supply may be considered to have counselled or procured the offence, depending on the nature of their involvement in the meetings. The retention of the requirement under s 11.2(2)(a) that the accused *in fact* aided, abetted, counsels or procures retains some small measure of protection for the accused. Furthermore, the Code avoids the common law difficulties associated with the concept of presence for accomplices but making presence a matter of fact for the jury (s 11).

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[10] Jane Sanders, *Drug Offences,* The Shop Front Youth Legal Centre (2012) http://www.theshopfront.org/documents/Drug_offences_September_2012.pdf 2.
[11] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Chapters 1 and 2 General Principles of Criminal Responsibility* (Report) December 1992, 89.
[12] Ian Leader-Elliott, 'Framing preparatory inchoate offences in the Criminal Code: The identity crime debacle' (2011) 35 *Criminal Law Journal* 80, 96.

21. Additional alternative options of prosecution remain open without the addition of knowingly concerned including but not limited to being an accomplice to an attempt (s 11.1), attempt to incite (s 11.4), conspiracy (s 11.5) and the joint offence provision (s 11.2A).[13]

Conclusion

22. ADLaRI has strong reservations about the appropriateness of the amendments proposed in Schedules 1 and 5. ADLaRI would welcome the opportunity to appear at any hearings and further elaborate on our submissions.

[13] See further Steven Odgers, *Principles of Federal Criminal Law* (2nd ed, Lawbook Co, 2010) 157-164.