



CDPP

Australia's Federal Prosecution Service

Commonwealth Director
of Public Prosecutions

Director's Coordination Unit

GPO Box 21
Melbourne VIC 3001
Level 16 460 Lonsdale Street
Melbourne VIC 3000
DX. 446
Telephone **03 9605 4333**
Facsimile 03 9670 4295
www.cdpp.gov.au

1 June 2015

Ms Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100 - Parliament House
CANBERRA ACT 2600

Dear Madam

Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

I refer to the evidence given by the Commonwealth Director of Public Prosecutions, Mr Robert Bromwich SC, at the public hearing of the Inquiry into the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, at the Parliament of New South Wales on 20 May 2015.

Questions on notice were taken during the Director's evidence in relation to various issues, as shown below, with page numbers referring to the draft transcript which has been provided by the Committee Secretariat. The CDPP was asked to provide:

- some State based examples of the use of the concepts of "knowingly concerned" or "knowing involvement" (pages 27-29);
- some case based examples where "knowingly concerned" would have been a preferable option (page 34);
- details pertaining to one of the defendants in *Operation Neath*, involving a counter-terrorism prosecution (page 31).

In dealing with each of these questions on notice the CDPP has prepared separate Annexures, as follows:

- ***Annexure A – Commonwealth, State and Territory based examples of "knowingly concerned"***
 - While the question on notice related only to State based examples, Annexure A also includes, for convenience and completeness, the Commonwealth and ACT examples which were given by the Director during his evidence before the committee;
 - The examples provided in Annexure A are only examples and do not represent a comprehensive list of all legislation where the concept of "knowingly concerned" appears. The actual number of such provisions significantly exceeds the relatively limited number of examples contained in Annexure A.

- **Annexure C – Details of Operation Neath**

- In his evidence Dr Neal referred to a particular counter-terrorism case in support of the Law Council's submissions in relation to knowingly concerned, which it is now apparent is the case of *R v Aweys*;
- Annexure C provides details of the Aweys matter. The characterisation given to the case by Dr Neal in his evidence before the Committee at pp 6-7 was essentially the unsuccessful defence case that was rejected by the jury, sentencing judge, and Victorian Court of Appeal. The High Court rejected Dr Neal's argument on the application for special leave to appeal, finding no error on the part of the Court of Appeal;
- As was pointed out by the Crown in opposing special leave to appeal, *"The defence advanced on behalf of Mr Aweys was that far from seeking to promote or advance the conspiracy, he was endeavouring to prevent it, and her Honour made crystal clear that that was something that had to be excluded by the Crown beyond reasonable doubt."*: see *R v Aweys* [2014] HCATrans 87 (11.04.14) at p.17 line 669-672 – copy enclosed;
- As French CJ pointed out during the course of argument, *"He did not say there are a number of people who want to do something which is going to have terrible consequences, please issue a fatwa that they cannot"*: *R v Aweys* [2014] HCATrans 87 at p 7, line 212-4;
- The trial judge instructed the jury: *"But in order to find Mr Aweys guilty, the Crown must prove to you beyond reasonable doubt that he not only intended to ask the question, but that he also intended to get approval from the sheikh. In other words that he intended to get the answer "yes"":* *R v Aweys* [2014] HCATrans 87 at p 9, line 290-3.
- It follows that Mr Aweys was correctly convicted for his role. His defence that he was trying to prevent a terrorist attack from taking place was rejected at every stage of the proceedings.

An additional matter which I wanted to bring to the committee's attention concerns a factual correction to the evidence given by Dr Neal (at page 4.4) in relation to *Campbell's case*, where he said:

The case that is relied on in the materials is a case called Campbell, which is the case of a woman pharmacist who was importing furniture from Indonesia. Some person in Indonesia, who she did not know was doing the wrong thing but she thought might be, had put packages of, I think, pseudoephedrine into the container. It landed in Sydney and got taken to a warehouse or somewhere where she was going to take delivery of it.

In fact, as the judgment of the NSW Court of Criminal Appeal¹ makes clear, the person in Indonesia who was sending her the furniture (and drugs) was a person who was well known to her, being described in the judgment (at paragraph 11) as *"her Indonesian business associate"*. The NSWCCA said:

¹ *R v Campbell* [2008] NSWCCA 214, (2008) 73 NSWLR 272 at 275 [11]-[12]

- 11 *Over a period of about five years she had received 25 shipments of furniture, which had been arranged by her Indonesian business associate, Mr Samuel Rantesalu. Mrs Campbell became aware of the fact that Mr Rantesalu had included packages in seven of those 25 shipments to her, which packages were not part of any order she had placed. The packages were not declared for customs purposes. Mr Rantesalu had arranged for these packages to be picked up from her business premises after each container had arrived at those premises. That is what happened on the occasion of the shipment the subject of the charge.*
12. *On Mrs Campbell's evidence, she had made numerous efforts to stop Mr Rantesalu engaging in this practice but to no avail. She also admitted that she had opened some of these packages and became aware that they contained cigarettes. Furthermore, on at least one occasion (perhaps three occasions) there had been a shipment, like the shipment the subject of the charge, which contained a quantity of cold tablets containing the same precursor substance. As noted above, Mrs Campbell was a pharmacy graduate and had conducted a pharmacy business before the furniture business.*

Yours faithfully,

Berdj Tchakèrian
Assistant Director
Director's Coordination Unit

ANNEXURE A – COMMONWEALTH, STATE AND TERRITORY BASED EXAMPLES OF “KNOWINGLY CONCERNED”

Juris-diction	Act	Section Summary	Link to legislation
CTH	<i>Crimes Act 1914</i>	5 (Repealed in 2001): Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly...	http://www.comlaw.gov.au/Details/C2004C03174
CTH	<i>Customs Act 1901</i>	233B (Repealed in 2005): For the purposes of this Division, a person shall be taken to engage in a prescribed narcotics dealing if... he aids, abets, counsels or procures, or is in any way knowingly concerned in, the sale of, or other dealing in, narcotic goods imported into Australia in contravention of this Act...	http://www.comlaw.gov.au/Details/C2005C00653
CTH	<i>Competition and Consumer Act</i>	79: A person who...is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of... a cartel offence provision is taken to have contravened that provision.	http://www5.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s79.html
CTH	<i>Building and Construction Industry Improvement Act 2005</i>	48 (Repealed in 2012): a person who is involved in a contravention of a civil penalty provision is treated as having contravened that provision. For this purpose, a person is involved in a contravention of a civil penalty provision if, and only if, the person... has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention...	http://www.comlaw.gov.au/Details/C2011C00531/Html/Text#_Toc298424099
CTH	<i>Corporations Act 2001</i>	79: A person is involved in a contravention if, and only if, the person... has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention.	http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s79.html

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Juris-diction	Act	Section Summary	Link to legislation
CTH	<i>Environment Protection and Biodiversity Conservation Act 1999</i>	484: A person must not... be in any way directly or indirectly knowingly concerned in, or party to, a contravention of a civil penalty provision...	http://www5.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/s484.html
CTH	<i>Income Tax Assessment Act 1936</i>	94V: In a prosecution of a person for an offence that the person is taken to have committed because of paragraph (1)(c), it is a defence if the person proves that the person... was not in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the person).	http://www5.austlii.edu.au/au/legis/cth/consol_act/itaa1936240/s94v.html
CTH	<i>Income Tax Assessment Act 1997</i>	126-260: In a prosecution of a trustee for an offence against subsection (3) for an act or omission contravening subsection (1), it is a defence if the trustee proves that the trustee... was not in any way knowingly concerned in, or party to, the act or omission (whether directly or indirectly and whether by any act or omission of the trustee)...	http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/cth/consol_act/itaa1997240/s126.260.html?stem=0&synonyms=0&query=knowingly
CTH	<i>Migration Act 1958</i>	140ZC: An offence against this Division that would otherwise be committed by a partnership is taken to have been committed by each partner in the partnership, at the time the offence is committed, who... was in any way knowingly concerned in, or party to, the relevant act or omission... 140ZF: An offence against this Division that would otherwise be committed by an unincorporated association is taken to have been committed by each member of the association's committee of management, at the time the offence is committed, who... was in any way knowingly concerned ...	http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s140zc.html http://www5.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s140zf.html

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Juris-diction	Act	Section Summary	Link to legislation
ACT	<i>Criminal Code 2002</i>	45: A person is taken to have committed an offence if the person aids, abets, counsels, procures, or is knowingly concerned in or a party to, the commission of the offence by someone else...	http://www5.austlii.edu.au/au/legis/act/consol_act/cc200294/s45.html
NSW	<i>Animal Research Act 1985 - No 123 of 1985</i>	58A: Liability of directors etc for offences by corporation-accessory to the commission of the offences... For the purposes of this section, a corporate offence is an offence against this Act or the regulations that is capable of being committed by a corporation, whether or not it is an executive liability offence referred to in section 58.... is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the corporate offence.	http://www5.austlii.edu.au/au/legis/nsw/consol_act/ara1985134/s58a.html
NSW	<i>Casino Control Act 1992 - No 15 of 1992</i>	34: Injunctions to prevent contraventions etc... If the Supreme Court is satisfied on the application of the Authority that a casino operator has engaged or is proposing to engage in conduct that constitutes or would constitute:... (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision,...	http://www5.austlii.edu.au/au/legis/nsw/consol_act/cca1992166/s34.html
NSW	<i>Drug Misuse and Trafficking Act 1985</i>	25; 23A: A person who supplies, or who knowingly takes part in the supply of, a prohibited drug is guilty of an offence. 43B: Liability of directors etc for offences by corporation-accessory to the commission of the offences	http://www5.austlii.edu.au/au/legis/nsw/consol_act/dmata1985256/s25.html http://www5.austlii.edu.au/au/legis/nsw/consol_act/dmata1985256/s23a.html

ANNEXURE A – COMMONWEALTH, STATE AND TERRITORY BASED EXAMPLES OF “KNOWINGLY CONCERNED”

Juris-diction	Act	Section Summary	Link to legislation
NSW	<i>Fair Trading Act 1987</i>	61: A reference in this Part to a person involved in a contravention of a provision of this Act is a reference to a person who:... (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention...	http://www5.austlii.edu.au/au/legis/nsw/consol_act/fta1987117/s61.html
NSW	<i>Firearms Act 1996</i>	51: A person must not supply, or knowingly take part in the supply of, a firearm to another person unless...	http://www5.austlii.edu.au/au/legis/nsw/consol_act/fa1996102/s51.html
NSW	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>	66: Form of warrant...(c) whether the occupier is believed to be knowingly concerned with the commission of that searchable offence...	http://www5.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s66.html
NSW	<i>Terrorism (Police Powers) Act 2002 - No 115 of 2002</i>	27N: Contents of covert search warrant... (i) any person believed to be knowingly concerned in the commission of the terrorist act in respect of which the warrant is issued...	http://www5.austlii.edu.au/au/legis/nsw/consol_act/tpa2002291/s27n.html
NT	<i>Co-operatives Act</i>	451: being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act or the Regulations; or	http://www3.austlii.edu.au/au/legis/nt/consol_act/ca157/s451.html
NT	<i>Petroleum Act</i>	108: Where a body corporate is guilty of an offence against this Act, an officer of the body corporate who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence is also guilty of that offence.	http://www3.austlii.edu.au/au/legis/nt/consol_act/pa137/s108.html

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Juris-diction	Act	Section Summary	Link to legislation
NT	<i>Racing and Betting Act</i>	142: Where under this Act a club or committee of a club is guilty of an offence, any officer of the governing body of that club (by whatever name called) or member of the committee, as the case may be, who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence	http://www3.austlii.edu.au/au/legis/nt/consol_act/raba153/s142.html
NT	<i>Terrorism (Emergency Powers) Act</i>	27C: any person believed to be knowingly concerned in the commission of the terrorist act for which the warrant is issued.	http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nt/consol_act/tpa323/s27l.html?stem=0&synonyms=0&query=knowingly
NT	<i>Work Health and Safety Act</i>	256: has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.	http://www5.austlii.edu.au/au/legis/nt/consol_act/whasula497/s256.html
QLD	<i>Agents Financial Administration Act 2014</i>	125: Grounds for injunction... (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act.	http://www5.austlii.edu.au/au/legis/qld/consol_act/afaa2014293/s125.html
QLD	<i>Crime and Corruption Act</i>	344: being in any way, directly or indirectly, knowingly concerned in or a party to the contravention of section 212;	http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/qld/consol_act/ca2001219/s344.html?stem=0&synonyms=0&query=knowingly%20concerned
QLD	<i>Debt Collectors (Field Agents and Collection Agents) Act 2014</i>	122: Grounds for injunction... being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by another person of this Act or a prescribed conduct provision.	http://www5.austlii.edu.au/au/legis/qld/consol_act/dcaacaa2014425/s122.html

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Juris-diction	Act	Section Summary	Link to legislation
QLD	<i>Education and Care Services Act 2013</i>	233: Executive officer may be taken to have committed offence... the officer was, directly or indirectly, knowingly concerned in the corporation's conduct.	http://www5.austlii.edu.au/au/legis/qld/consol_act/eacsa2013235/s233.html
QLD	<i>Invasion of Privacy Act 1971</i>	49A: Executive officer may be taken to have committed offence...(b) the officer was, directly or indirectly, knowingly concerned in the corporation's conduct.	http://www5.austlii.edu.au/au/legis/qld/consol_act/iopa1971222/s49a.html
QLD	<i>Offshore Minerals Act 1998 - No 10 of 1998 - Updated on 1 Nov 2013</i>	404: Effect of declaration of safety zone...(b) was not in any way, directly or indirectly, knowingly concerned in, or party to, the vessel's entering or remaining in the safety zone.	http://www5.austlii.edu.au/au/legis/qld/consol_act/oma1998188/s404.html
SA	<i>Associations Incorporation Act 1985</i>	49AD: a person who was knowingly concerned in the doing of the act with that intent or for that purpose commits an offence.	http://www5.austlii.edu.au/au/legis/sa/consol_act/aia1985307/s49ad.html
SA	<i>Independent Commissioner Against Corruption Act 2012</i>	5: aiding, abetting, counselling or procuring the commission of the offence; inducing, whether by threats or promises or otherwise, the commission of the offence; being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence.	http://www5.austlii.edu.au/au/legis/sa/consol_act/icaca2012463/s5.html
SA	<i>Maritime Services (Access) Act 2000</i>	39: A person is involved in the contravention of an award if the person; (c) was knowingly concerned in, or a party to, the contravention	http://www.austlii.edu.au/au/legis/sa/consol_act/msa2000237/s39.html

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Juris-diction	Act	Section Summary	Link to legislation
SA	<i>National Electricity (South Australia) Act 1996</i>	Schedule: be in any way directly or indirectly knowingly concerned in, or a party to, a breach of a civil penalty provision or conduct provision by another person	http://www.austlii.edu.au/au/legis/sa/consol_act/neaa1996388/sch1.html
SA	<i>Public Sector (Honesty and Accountability) Act 1995</i>	22: A corporate agency executive must not counsel, procure, induce or be in any way (whether by act or omission or directly or indirectly) knowingly concerned in, or party to, a contravention of subsection.	http://www5.austlii.edu.au/au/legis/sa/consol_act/psaaa1995408/s22.html
SA	<i>Serious and Organised Crime (Control) Act 2008</i>	34A: person must not be knowingly concerned in the management of any premises habitually used as a place of resort by members of a declared organisation.	http://www5.austlii.edu.au/au/legis/sa/consol_act/saoca2008352/s34a.html
SA	<i>Fair Trading Act 1987</i>	3: has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention.	http://www5.austlii.edu.au/au/legis/sa/consol_act/fta1987117/s3.html
TAS	<i>Australian Consumer Law (Tas) Act 2010 - No 40 of 2010 - As at 31/12/11</i>	27: being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision;	http://www5.austlii.edu.au/au/legis/tas/consol_act/acla2010330/s27.html
TAS	<i>Co-operatives Act 1999</i>	453: being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act.	http://www5.austlii.edu.au/au/legis/tas/consol_act/ca1999157/s453.html

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Juris-diction	Act	Section Summary	Link to legislation
TAS	<i>Gaming Control Act 1993</i>	101: (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision.	http://www5.austlii.edu.au/au/legis/tas/consol_act/gca1993156/s101.html
TAS	<i>Legal Profession Act 2007</i>	645: being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act.	http://www5.austlii.edu.au/au/legis/tas/consol_act/lpa2007179/s645.html
TAS	<i>Work Health and Safety Act 2012</i>	256: Involvement in contravention treated in same way as actual contravention. (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.	http://www5.austlii.edu.au/au/legis/tas/consol_act/whasa2012218/s256.html
VIC	<i>Agricultural and Veterinary Chemicals (Control of Use) Act 1992</i>	72A: Criminal liability of officers of bodies corporate-accessorial liability... was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the body corporate.	http://www5.austlii.edu.au/au/legis/vic/consol_act/aavcoua1992510/s72a.html
VIC	<i>Australian Consumer Law and Fair Trading Act 2012</i>	205: Cease trading injunctions... being in any way directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision.	http://www5.austlii.edu.au/au/legis/vic/consol_act/aclafta2012372/s205.html
VIC	<i>Confiscation Act 1997</i>	Sch 2 S 4: aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of,,,	http://www5.austlii.edu.au/au/legis/vic/consol_act/ca1997137/sch2.html
VIC	<i>Drugs, Poisons and Controlled Substances Act 1981</i>	103: If a corporation is guilty of an offence against this Act, any officer of the corporation who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence is also guilty of that offence and liable to the penalty for that offence.	http://www5.austlii.edu.au/au/legis/vic/consol_act/dpacsa1981422/s103.html

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Juris-diction	Act	Section Summary	Link to legislation
VIC	<i>Firearms Act 1996</i>	142: If a body corporate is guilty of an offence against this Act or any regulation made under this Act, any officer of the body corporate or nominated person who was in any way, by act or omission, directly or indirectly, knowingly concerned in or a party to the commission of the offence is also guilty of that offence and liable to the penalty for that offence	http://www5.austlii.edu.au/au/legis/vic/consol_act/fa1996102/s142.html
VIC	<i>Gambling Regulation Act 2003</i>	3.9.6: Injunctions to prevent contraventions etc... being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision	http://www5.austlii.edu.au/au/legis/vic/consol_act/gra2003190/s3.9.6.html
VIC	<i>Domestic Animals Act 1994</i>	91: If a body corporate is guilty of an offence against this Act, any person who is concerned in or takes part in the management of that body corporate who was, in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence is also guilty of, that offence.	http://www5.austlii.edu.au/au/legis/vic/consol_act/daa1994163/s91.html
VIC	<i>Victoria Police Act 2013</i>	260: ...was knowingly concerned in any way (whether by act or omission) in the commission of the offence by the body corporate.	http://www5.austlii.edu.au/au/legis/vic/consol_act/vpa2013164/s260.html
WA	<i>Bank of Western Australia Act 1995</i>	42Q: Enforcement of Div. 2 and 4, Supreme Court's powers for...(c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention.	http://www5.austlii.edu.au/au/legis/wa/consol_act/bowaa1995254/s42q.html
WA	<i>Criminal Organisations Control Act 2012</i>	107: person who is the owner, occupier or lessee of any premises must not knowingly permit those premises to be habitually used as a place of resort by members of a declared criminal organisation.	http://www5.austlii.edu.au/au/legis/wa/consol_act/coca2012330/s107.html
WA	<i>Environment Protection Act 1986</i>	51S: Clearing injunctions... being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention.	http://www5.austlii.edu.au/au/legis/wa/consol_act/epa1986295/s51s.html

ANNEXURE A – COMMONWEALTH, STATE AND TERRITORY BASED EXAMPLES OF “KNOWINGLY CONCERNED”

Juris-diction	Act	Section Summary	Link to legislation
WA	<i>Firearms Act 1973</i>	23C: a person who by act or omission is in any way directly or indirectly knowingly concerned in the commission of any offence against this Act is deemed to have committed that offence and is punishable accordingly.	http://www5.austlii.edu.au/au/legis/wa/consol_act/fa1973102/s23c.html
WA	<i>Human Reproductive Technology Act 1991</i>	53: Offences by bodies corporate and partnerships...and that person was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the principal offence, that person as well as the body corporate shall be deemed to have committed the principal offence.	http://www5.austlii.edu.au/au/legis/wa/consol_act/hrta1991331/s53.html
WA	<i>Misuse of Drugs Act 1981</i>	5: is knowingly concerned in the management of any premises used for any of the purposes referred to in paragraphs (a) and (b);	http://www5.austlii.edu.au/au/legis/wa/consol_act/moda1981184/s5.html
WA	<i>Offshore Minerals Act 2003</i>	404: Effect of declaration of safety zone... was not in any way, directly or indirectly, knowingly concerned in, or party to, the vessel's entering or remaining in the safety zone.	http://www5.austlii.edu.au/au/legis/wa/consol_act/oma2003188/s404.html

ANNEXURE C – OPERATION NEATH

1. Dr Neal acted for Saney Edow AWEYS in his unsuccessful appeal to the Victorian Court of Appeal ([R v FATTAL & ORS \[2013\] VSCA 276 \(02 10 2013\)](#)) and in his unsuccessful application for special leave to appeal to the High Court of Australia (*R v Aweys* [2014] HCATrans 87, 11.04.14).
2. Aweys, together with Fattal and El Sayed, had been convicted of one count of conspiring to do acts in preparation for, or planning, a terrorist act, contrary to ss 11.5(1) and 101.6(1) of the *Criminal Code (Cth)* ('the Criminal Code'). In the joint judgment of the Court of Appeal delivered on 2 October 2013 (Buchanan AP, Nettle and Tate JJA), Aweys' role in the conspiracy was described as follows:

Aweys' role in the conspiracy was to seek a fatwa (a religious ruling from Muslim muftis as to whether it were permissible in Islam [halal] or impermissible [haram]) to carry out the proposed terrorist act, and to assist El Sayed also to seek a fatwa for the proposed terrorist attack.

3. One of the key grounds of appeal *advanced* by Aweys was:

The learned judge erred when she failed to correct the proposition put by the Crown, which was repeated in her Honour's charge to the jury, that as a matter of law the answer to the religious question did not matter, because the making of the request was a significant step in the planning or preparation for a terrorist act.

4. The Crown case was that by making the call to the Sheik in Somalia to seek the fatwa, Aweys had committed an overt act which was in furtherance of the conspiracy. The Crown successfully argued at trial and on appeal that it mattered not whether or not the Sheik ultimately approved of the attack or not, but that the jury did have to be satisfied beyond reasonable doubt that Aweys was not trying to prevent a terrorist attack from taking place. The defence had argued before the jury that at the time Aweys had made the call and asked the question, he had hoped that the answer would be "no" such that he could put an end to the idea of such an attack. The jury rejected that defence and there is therefore no legal or factual basis for such an argument to be maintained.
5. The appeal focussed on the directions given to the jury by the trial judge. The question was whether the directions made it clear that the jury had to be satisfied that Aweys was acting in furtherance of the conspiracy when he made the call seeking the fatwa. The defence argued the directions were inadequate and there was therefore a risk the jury had convicted Aweys even though they were not satisfied he was acting in furtherance of the conspiracy.

6. The Court of Appeal rejected that submission and found as follows:

21. *Having regard to those directions, we see no reason to doubt that the jury would well have understood that Aweys' acts of seeking answers to the religious question could not be treated as overt acts in preparation or planning for a terrorist act (or acts) in furtherance of the conspiracy unless the jury were satisfied beyond reasonable doubt that Aweys intended thereby to advance the conspiracy to attack the barracks.*
22. *In effect, the judge left the issue to the jury on the basis that:*
 - a) *the Crown case was that, although Aweys may have hoped that the fatwa would be haram, he nevertheless sought the fatwa in furtherance of the conspiracy with the intention of thereby advancing the conspiracy and with the intention that, if the fatwa were halal, the proposed armed attack would be carried out; and*
 - b) *the defence case was that Aweys' intention in seeking the fatwa was not that it be in furtherance of the conspiracy but that it would result in an haram opinion so as 'to put any talk of a terrorist act to rest'.*
23. *Contrary to Aweys' counsel's submissions, there was nothing wrong with the judge leaving the issue to the jury on that basis. In principle and in fact the Crown were entitled to argue that, although Aweys may have hoped that the fatwa would be haram, he sought the fatwa pursuant to his agreement with his co-conspirators with the intention of obtaining the fatwa in accordance with the conspiracy and, if the fatwa proved to be halal, with the intention that the attack be carried out. It was then up to the jury, as the judge directed them, to determine whether they were satisfied beyond reasonable doubt that Aweys' actions in seeking the fatwa were in furtherance of the conspiracy; always bearing in mind, as her Honour repeatedly instructed them, that they had to be satisfied beyond reasonable doubt that Aweys' intention in seeking the fatwa was that it be in furtherance of the conspiracy.*
24. *Counsel for Aweys contended there was a 'real problem' with the element of intention, inasmuch as the Crown ultimately relied on covertly recorded telephone conversations between Aweys and the sheikhs to prove Aweys' intention of entering into the agreement; to prove he took steps in preparation or planning for an armed attack on Holsworthy Barracks; to prove his intention that the attack on the barracks be carried out; and to prove his intention to obtain the fatwa from the sheikhs in furtherance of the agreement.*
25. *In our view, there was no such problem. The phone calls were not the only evidence on which the Crown relied to prove intention. They were part of a wide ranging circumstantial case. That included the association between Fattal and Aweys; Fattal's actions in reconnoitring the barracks; Aweys' actions in seeking the fatwa; the terms of his reports to his co-conspirators; and his subsequent conversations with Fattal from which it may be inferred that he associated himself with Fattal's attitudes towards kuffar Australians and Australian institutions. For reasons to which we shall come under the heading of Ground 2, we consider that, taken as a whole, that evidence sustained the inference beyond reasonable doubt that Aweys' intention in seeking the fatwa was to obtain the fatwa in furtherance of the conspiracy and, if the fatwa were halal, that the attack should proceed.*

7. The High Court (per French CJ) said in refusing special leave to appeal (*R v Aweys* [2014] HCATrans 87 at p 20, line 784-792:

In matter No M133/2013, Aweys v The Queen, we are of the opinion that the Court of Appeal did not err in its identification of the mental element of the conspiracy of which the applicant was convicted. As their Honours observed, the trial judge gave repeated instructions respecting the requirement of satisfaction beyond reasonable doubt that it was the applicant's intention in seeking the fatwa that it be in furtherance of the conspiracy. No other basis for the grant of special leave is disclosed. There is no reason to doubt the overall correctness of the Court of Appeal's decision. Special leave is refused.



[2014] HCA Trans 087

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne

No M133 of 2013
No M134 of 2013

B e t w e e n -

SANEY EDOW AWEYS

Applicant

and

THE QUEEN

Respondent

Office of the Registry
Melbourne

No M136 of 2013

B e t w e e n -

NAYEF EL SAYED

Applicant

and

THE QUEEN

Respondent

Applications for special leave to appeal

FRENCH CJ
BELL J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 11 APRIL 2014, AT 11.33 AM

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MR D.J. NEAL, SC: I appear with **MR M.D. STANTON** for the applicant, Aweys, if your Honours please. (instructed by Robert Stary Lawyers)

MR J.M. SELIMI: May it please the Court, I appear for Mr El Sayed. (instructed by Pasha Legal)

MR D.D. GURVICH: May it please the Court, I appear on behalf of the respondent in each matter. (instructed by Director of Public Prosecutions (Cth))

FRENCH CJ: Yes, Mr Neal.

MR NEAL: Thank you, your Honours. Your Honours, our oral submissions will focus primarily on grounds 1 and 2 of the application. Your Honours, the primary question in this appeal is whether the offence of conspiring to do an act of preparation for a terrorist act is committed where the defendant carries out an act of preparation said to be the asking of a ruling whether the planned attack is lawful, wanting that ruling to be negative, that is, that it is not lawful, but appreciating a risk that the ruling may be that it is lawful. We say that this has imported, impermissibly imported a concept of recklessness into an offence which is based in the law of conspiracy, that that is contrary to the ruling in *LK* and other decisions.

5 **BELL J:** But does that not involve the eliding of the offence with which your client was charged and the separate offence of a conspiracy to commit a terrorist act? The conspiracy here was to do an act preparatory to the commission of a terrorist act. Obtaining a fatwa, on the view taken by the Court of Appeal, was a preparatory act. The court found that the trial judge repeatedly and correctly directed the jury with respect to the necessary intention. It did not seem to me that there was any issue in the Court of Appeal as to the application of the principles explained by this Court in *LK* concerning the mental element of the offence of conspiracy.

15 **MR NEAL:** Your Honour, the subject matter of the conspiracy was the section 101.6 offence of the *Criminal Code*, and perhaps can I direct you to that? That is in the bundle of our authorities. It reads:

A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

20 Then there are other definitions that depend on that which go into the complications of a terrorist act and the like. We say, consistently with *LK*, that the defendant's agreement in the conspiracy must go to all of the physical and fault elements of that offence. The burden of our argument in this application is that the words "an act of preparation" are words which have to be given effect to and that the defendant's mind has to go to that element of the offence so that the physical element of it is some act which can be characterised as an act of preparation accompanied by a fault element which is because the nature of an act of preparation must itself be purposive that goes with the act.

30 So that in the instance charged in this case we say that when he asked for a ruling that can be said to be the act of preparation, but it must be accompanied by the relevant intention fault element out of the model *Criminal Code*, that is, he must have meant to obtain a yes answer to that ruling. In other words - - -

35 **BELL J:** That is the eliding of which I speak. Surely the intention is the intention involved in the agreement with one or more persons to do an act in preparation of or planning for a terrorist act.

40 **MR NEAL:** Our complaint in fact is that the two got elided in the case and that the burden of the judges' directions and the way the case was put has done exactly that and elided out of the analysis the notion that this concept, "act of preparation", itself must be given meaning. It has a physical and a fault element attached to it and that was not shown and had it been shown it would have emerged that the way in which the case was put to the jury by the prosecution on a number of occasions, namely, just asking

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the question is enough, does not matter what the answer was, and does not matter if he wanted a no, we say that is classically a recklessness formulation.

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FRENCH CJ: Well, can I just take you for a moment to the judges' direction at 1414, paragraph 20, where it is extracted, in the judgment of the - - -

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MR NEAL: In the Court of Appeal?

FRENCH CJ: Court of Appeal, yes.

MR NEAL: Yes, your Honour.

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FRENCH CJ: They said "acts in preparation or planning - - -

MR NEAL: Which paragraph are you at, your Honour?

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FRENCH CJ: I am at 20 and I am looking at the quotation - the first paragraph, the first part of the quotation from the judges' charge. Do you have any complaint about that?

MR NEAL: This is the paragraph:

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If you go to paragraph 6 on page 2 of [the Elements of the offences - - -

FRENCH CJ: Yes, that is right.

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MR NEAL: Yes, the complaint is this, your Honour, that there is no explanation there of the concept "act of preparation", what is the physical element of that and what is its fault element.

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FRENCH CJ: So far as it goes, it says you have to be:

satisfied beyond reasonable doubt that the accused intended the acts in preparation or planning to be in preparation or planning for a terrorist act -

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There is a fairly unambiguous direction, and it appears to have been reflected in the written directions, as I understand it, as to the necessary necessity to establish intention.

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MR NEAL: The real problem, though, your Honour, is intention as to what and - - -

FRENCH CJ: Well, that is a different question from the recklessness issue that you say are snuck in somehow.

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MR NEAL: Well, with respect, your Honour, it is not. The way we put it is this, that intention in the general directions in this case, which was a sprawling case - the case ran for six months; there were five defendants; there were 43 overt acts; the judges' charge ran over five or six days, I think; it ran to 549 pages - when it came down to tintacks and the case against Mr Aweys, the act of preparation relied on by the prosecution to demonstrate a number of aspects of his involvement in this crime it was relied on multiply to prove the fact of some earlier agreement to do this act. It was relied on as an overt act pursuant to that agreement. It was relied on as evidence of his participation in the agreement and it was relied on as the substantive section 101.6 offence, act of preparation.

Now, all of that would be fine if, as the Court required in *LK*, the agreement went to all of the elements of the underlying offence, that is, the section 101.6 offence, and that is your Honour Justice Bell's point. We say this: that when the prosecution repeatedly said making the call is the act of preparation, does not matter what the answer was, does not matter that he wanted the answer, no, we say how could that constitute an act of preparation because, as I said earlier, act of preparation is inherent of preparation inherently purposive, what was he intending to achieve, and if the answer that he was not intending to achieve a yes or if the answer is anything short of yes, according to section 5.2(3) of the *Criminal Code*, if he did not mean to obtain an answer yes, then this cannot be an act of preparation.

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BELL J: Why can it not be an act of preparation for a person who has agreed with others to take steps to prepare for a terrorist act involving the killing of soldiers at an army base, whose motives are religious, to seek as a step in implementation of that agreement to obtain a ruling as to whether or not it is in accord with good religious practice to do so and the rewards that follow?

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MR NEAL: Yes. Your Honour, that depends on the analysis of what the agreement in the case was and what his role in it, what his participation in it was. In fact, you need to make a distinction in this case, and this is at the heart of the objections that we put, between someone who engages in an act of preparation as opposed to someone who acts in a way which seeks to prevent the operation going ahead. You see, this call is being used to evidence the agreement itself as well as his participation and so on, so that really what his intention was in making that call goes to the heart of all of those matters that your Honour has mentioned.

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140 **BELL J:** But the Court of Appeal considered that on the whole of the evidence it had been open to the jury to conclude that although your client might have hoped that the answer to the fatwa:

145 would be no, he was committed to obtaining the fatwa because that was what had been agreed upon and he was committed to the idea of the attack being carried out in implementation of the agreement if the fatwa were halal.

This is application book 1420 at 29.

150 **MR NEAL:** Yes, I know the passage, your Honour, yes. Your Honour, can I answer that by taking you to a passage which occurred in the course of the argument in the Court of Appeal, and this is in application book 3 at page 1205.

155 **BELL J:** I am sorry, 1205?

MR NEAL: Page 1205, lines 23 and following. The passage that I take your Honours to is this:

160 **NETTLE JA:** Did that case accommodate the difficulty that it's apparent from some of the telephone conversations that Aweys did want a negative answer?

165 **MR ROBINSON:** Yes, your Honour, it did. The Crown case on Aweys was effectively, yes, that he had express views which would seem to indicate he was not in favour of it. What the Crown put to the jury and eventually we'll come to, we submit, that it provides an explanation for why a different verdict, was that nonetheless, rather than if he was truly not seeking to be involved and wanted to stop it, the proper course would be to walk away and do nothing or to go to
170 the authorities which is the point that was just referred to by Aweys counsel.

175 The Crown's position was that Aweys, with full knowledge of the events and intending to – that he pursued it, recognising that he might in fact receive a ruling that it was permissible.

180 Now, your Honour, there are a number of rhetorical questions that I invite you to consider in relation to that. One of them is, well, look, if he wanted a no how could it be said that he was with the agreement or participating in it or – and this is the burden of this part of our argument – that he was doing an act in preparation for that attack if indeed he wanted the answer no, it is not lawful. That was the case, and in the exchanges – the telephone

conversations that underlie it, they form the basis for what is being said here about how the Crown put its case.

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BELL J: Can I just ask one factual matter? As I understood it from some passage to which we have been referred, there was a submission put by the Crown to the effect that there was significance to seeking out a Somali sheikh and the view having been taken by your client that an Australian sheikh was likely to give an answer less favourable to the commission of the act than it was thought a Somali sheikh might.

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MR NEAL: Well, your Honour, I think, slightly misstates the facts. , Mr Ahmed, one of the other defendants, asked Mr Aweys to make the call because he knew a Somali sheikh. In making that request he said the crazy guys, as he described them, will not accept a ruling from an Australian sheikh, but you know that Somali sheikh, can you ask him?

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BELL J: I see.

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MR NEAL: In the course of subsequent discussions it is clear that Aweys, Ahmed expect a no from the Somali sheikh and they say “But a sheikh from the mountains” - a reference to Afghanistan - would probably say yes. So it is clear that Aweys and Ahmed – and accepted, as you have seen in that passage, by the Crown, that Aweys in fact wanted a no.

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FRENCH CJ: He wanted a no, but he did not – there is no evidence that he asked for a no, he just put the request.

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MR NEAL: Well, your Honour, I think - - -

FRENCH CJ: He did not say there are a number of people who want to do something which is going to have terrible consequences, please issue a fatwa that they cannot.

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MR NEAL: Well, your Honour, in fact, I think if you read the conversations carefully it is clear - and Aweys says at one of the conversations with Ahmed, he is a Somali, he knows what we want and he is going to say no. He was saying, well, look, there are awful things which would happen as a consequence of this going forward for Islamic people in Australia. We do not want to this to occur. They described them as crazy guys. So we say that to put that case in the way that the prosecution did and the judge did not correct was to invite an argument of recklessness, that is, I tried to get a no, I took a risk that there might be a yes, but I was pretty confident it was going to be a no, and I am still convicted, and, of course, the answer was no.

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BELL J: But that is not the way the matter was put. The jury were directed of the requisite intention.

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MR NEAL: Your Honour, we say that they were not, and can I exemplify that? That, indeed, is our complaint. The prosecution said it did not matter what his intention was, whether it was a yes or a no, it was merely enough that he asked the question.

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BELL J: But this is where, Mr Neal, there seems to be some confusion. One is not looking at proof of the intention in making the call, but rather the intention to engage in an agreement with one or more persons to do an act preparatory to an act of terrorism, so that one may think it would be better, all in all, if the fatwa was answered in the negative, but if one goes and seeks the fatwa, having the intention of agreeing with others to do an act or acts in preparation for a terrorist act, the circumstance that subjective to one might hope the answer is no does not bear on an element of liability, surely.

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MR NEAL: We say it does, your Honour, on the authority of *LK*. We say that at the time of making the agreement it is not only an intention to enter into the agreement, but you must also intend each of the elements of the unlawful act that is agreed upon, so that if the - - -

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BELL J: The intention in that respect covers the act that is seeking the fatwa, but what the result of the fatwa is is not pertinent.

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FRENCH CJ: Does not your argument really reduce to the proposition that the request for a fatwa, or at least the approach to and request for the sheikh, could not constitute an act in preparation for a terrorist act? I mean, that is what it really reduces to, is it not?

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MR NEAL: No. I would add the following, your Honour: if his intention in doing so was to get a no. Your Honour, we have a model direction which may elucidate the point that we want to make, then your Honours will decide whether you agree or not, and that is at the back of our book of authorities at tab 6. So to follow up on the point that his Honour the Chief Justice just put to me, we say there ought to have been, especially given the complexity of all of this, a very clear direction from the judge about what were the physical and fault elements of the act of preparation, which is the critical part of the section 101.6 offence. If I can read this - the first paragraph is actually a quote from the judgment, and that is in application book 2 at 677, point 2.

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The Crown submitted that as a matter of law it is irrelevant whether the answer was yes or no. The asking of the question was the step in the preparation or planning of the terrorist attack. It was sufficient to make it clear what the nature and scope of the conspiracy was.

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275 The Crown repeated that approach in relation to Mr Aweys when it
was submission that it did not matter what the answer was that he
received from the sheikhs, it was the seeking of the answer that was
the step in the furtherance of the conspiracy.

280 That is in application book 2 at 716.

 I direct you, as a matter of law, that the mere asking of the question
is not sufficient for the Crown to prove its case. It must prove that
he intended to commit an act of preparation for a terrorist act.

285 Clearly enough, by making the phone call and asking the question,
you are entitled to infer that Mr Aweys intended to ask the question.
That is not disputed.

290 But in order to find Mr Aweys guilty, the Crown must prove to you
beyond reasonable doubt that he not only intended to ask the
question, but that he also intended to get approval from the sheikh.
In other words that he intended to get the answer “yes”.

295 **FRENCH CJ:** Well, that is on the premise that asking the question could
not be an act of preparation for a terrorist act.

MR NEAL: Yes. We say that requires the Court to consider the words of
section 101.6, and in particular the words “act of preparation”, and consider
what constitutes that by way of its physical and fault elements. We say that
300 the term “act of preparation” inherently is purposive. It means preparing for
a desired result and that that would not be made out in a case where the
person intended to get a no. It is not made out either in a conspiracy case
by recklessness, and that is the complaint about what actually occurred in
305 the case, that is, if he hoped for a no but took a risk that the answer would
be yes that does not suffice for conspiracy because of the authority in *LK*.

BELL J: Well, there is no issue about that, but the matter was never put in
that way. I mean, if one goes to application book 1413, paragraph 18,
310 where one sees the written directions, the endeavour to inject recklessness
into this is in your argument, Mr Neal, not in the way the matter was put.

MR NEAL: Well, your Honour, we say it was put by the prosecution in
the way it said that the – in the quotes that they have already provided to
315 you, that is, merely asking the question is enough. It does not matter that he
thought that there were downsides to it, just asking the question is enough.
The answer does not matter. We agree that the answer does not matter, but
what we do say is that at the time of the formation of the agreement,
whenever that was, he had to intend to do an act of preparation for that

320 terrorist act and if he in fact intended to get a no, that that could not fall
within the ambit of that part of section 101.6. It could not be an act of
preparation. It was, in fact, an act of prevention and that the trial judge
should have corrected the prosecutor in order to ensure that that was made
clear.

325 **FRENCH CJ:** Mr Neal, your time is up on that, but I see you have an
application for special leave also in respect of the sentence.

330 **MR NEAL:** We do not need to take your Honours' time with that. There
were other grounds that we rely on and we rely on our written argument on
that. In relation to the sentence appeal, just two short points: firstly, if a
conviction was open on the alternative recklessness basis, as was said in the
Court of Appeal, and the jury convicted on that basis, that plays into the
sentencing which was he was sentenced on the assumption that it had been a
335 yes answer, that he had intended a yes answer, so that if that is the case that
that is a recklessness theory which attracts a lower level of culpability and
distinguishes between him and his other co-accused.

340 **FRENCH CJ:** Well, you say that even if it does not get him out of
criminal liability the absence of a desire for a yes answer is something
which lowers the level of moral culpability and ought to have fed into the
sentencing process?

345 **MR NEAL:** We do, we do. Secondly on that, there is also an issue about
his desistance from the conspiracy. The trial judge said she could not find
one way or the other on that. We say it is an odd proposition because here
the prosecution could have charged the substantive offence, 101.6 anyway.
It is a preparatory offence and it would have been a much less complicated
trial had it been done in that way. But to say that there was anything left to
350 do in this aspect of the conspiracy upon which he is convicted is wrong
because the substantive offence had been committed. He is charged with
doing an act of preparation, a phone call. If the phone call had been made
the offence was completed.

355 **BELL J:** Presumably it was put on his behalf that the sentencing judge
would find that having made the phone call he had desisted from any further
participation with his colleagues. Is that the submission that was put?

360 **MR NEAL:** It was put, yes.

BELL J: Yes. The sentencing judge's response was to say that is a matter
put in mitigation, I am not affirmatively persuaded that is so, I sentence on
the basis that I do not know and therefore do not take that into account in
mitigation. Now, what is wrong with that approach as a matter of
365 sentencing principle?

MR NEAL: Conceptually it is odd, your Honour, that given that the substantive offence which was the subject of the conspiracy had been completed the whole discussion about desistance is odd.

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BELL J: But her Honour was dealing with a submission advanced in mitigation.

375

MR NEAL: I understand that, your Honour. The second aspect of it is this: that in the telephone conversations which post-dated the ruling it had come to - a message came back from Ahmed, the original initiator, to say another man has returned from Somalia, he says the answer is yes. As the Crown accepted, Mr Aweys vehemently denounced that, said that is not right, that is lies and we must make sure that everyone here knows that those are lies. In the face of that evidence, which is on the transcript, it is very difficult to see how the conclusion her Honour reached was made out. My learned junior has drawn my attention to this passage in the Crown closing address, which is at 1760 of application book number 4. This is extracted in our submissions:

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Aweys takes that answer to be, as you know, no, and you can see why.

This is the prosecutor's closing address.

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In the end the Crown says it doesn't matter. This isn't about what the answer is, it's about asking a question, but the way in which Aweys takes that answer causes him, as you know, to reject Khayre's claim that he has got a positive, that is an [answer] in favour of going into the army base, and you might think that the way in which he expresses it as a lie, and the apparent indignation in his answer, reflects that he has been through this conversation with Abdirahman –

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one of the sheikhs –

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where the weighing up of pros and cons is laid out in such detail and Aweys, you might think, has come to the conclusion that, 'Abdirahman is a knowledgeable sheikh. He has been through the process, the methodology. His answer is no, that sounds good enough to me, that sounds like an answer,' and when Khayre arrives and says yes, he is indignant.

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The learned sentencing judge found that, unlike *Elomar*, it was not "inevitable" that the terrorist act would be committed, and noted that

she was “ . . . unable to be satisfied to that effect and *the evidence if anything points in the other direction.*”

415 **BELL J:** Well, the Court of Appeal dealt with this at 1490 at paragraph 191.

MR NEAL: Yes, your Honour.

420 **BELL J:** Noting matters which I infer the trial judge had had regard to in not accepting the matter advanced in mitigation. Now, what arises by way of a special leave point in all of this?

425 **MR NEAL:** Your Honour, in relation to that aspect I cannot say that there is a special leave point, but we do say that there is an error in the finding of a conclusion on that aspect of the matter that is conceptually odd and on the evidence not open.

430 **BELL J:** Well, you say it was not open for the trial judge not to be persuaded that the applicant had desisted. Is that the contention?

MR NEAL: Yes, because, your Honour, the act which - - -

435 **BELL J:** It is a factual issue in sentencing.

MR NEAL: Yes. Well, it is an error of law in the end because it is a conclusion that is not open.

440 **BELL J:** It was not open for the judge not to be affirmatively persuaded that the applicant had desisted, notwithstanding the matters that the Court of Appeal summarises at paragraph 191.

445 **MR NEAL:** The matters that the Court of Appeal summarises there - he is convicted of asking the question. The question has been asked and it has been answered. There is no evidence at all in the case of any further question being - this is not an act of terrorism, it is the act of preparation for the terrorism. That preparatory act had been completed, could have been the subject, should have been the subject, probably, of a charge under section 101.6 rather than conspiracy, but it is done.

450 **BELL J:** Can we concentrate on the sentence appeal?

MR NEAL: Yes.

455 **BELL J:** Yes.

460 **MR NEAL:** Well, it arises from what is being said here in relation to the sentence and the issue of desistance. That is why I say it is odd. The question of desistance does not really arise because the completed act is that, it has been completed.

FRENCH CJ: Thank you, Mr Neal.

465 **MR NEAL:** Thank you, your Honour.

FRENCH CJ: Mr Selimi.

470 **MR SELIMI:** May it please the Court, this application and, indeed, the one that just followed, raises fundamental questions of statutory interpretation of great public importance which go to the heart of national security.

475 **BELL J:** Just before we get to those, can I query this? The application for special leave pleads – which is at application book 1796 – identifies two grounds of challenge, the second being a failure to find “that the conviction of the applicant was unsafe” by reason of it being “inconsistent with the acquittal of a co-accused”.

480 **MR SELIMI:** We do not pursue that ground.

BELL J: Yes. Then if one turns to 1798 one finds the draft notice of appeal which has a different second ground and, as I understand it, you have abandoned that different second ground.

485 **MR SELIMI:** Correct.

BELL J: So am I right in my understanding that the one ground on which the application is advanced is that identified in your notice of appeal at 1798, namely that:

490 The Court of Appeal erred in failing to find [that] the seeking of a fatwa was not ““any act in preparation for, or planning, a terrorist act” within the meaning of –

495 the provision?

MR SELIMI: Yes, your Honour.

500 **BELL J:** Yes, thank you.

MR SELIMI: Your Honour, the question of whether or not the seeking of a fatwa constitutes an act in preparation for, or planning, a terrorist act

505 within the meaning of section 101.6 of the *Criminal Code* is a question of construction of great national importance. It goes to the heart of national security. In my respectful submission, it is obvious that this Court has not yet been called upon to consider the proper meaning, scope and application of those critical words, that is, the words “act in preparation for, or planning, a terrorist act.”

510 In my submission, as a matter of general principle, so far as special leave points are concerned, whether or not the seeking of a fatwa does or does not constitute an overt act is a question which ought not be clearly decided or, indeed, decided at all today. What we submit as a matter of fundamental importance and, indeed, deserving the grant of special leave is
515 that this question of construction is a question which deserves to be judicially considered by the highest Court in this land, just as indeed the question of the proper construction of the other provision, section 101.5, was the subject of consideration by this Court in *Khazaal*.

520 In my submission, therefore, as a matter of principle this Court ought entertain – ought to grant special leave to entertain the general question which arises from the specific question which is pleaded in paragraph 2 of the amended application for special leave. The actual ground stated there is that the court below erred by failing to find that the seeking of a fatwa was
525 not “any act in preparation for, or planning, a terrorist act” within the meaning of section 101.6.

What I submit, your Honours, is that that may state the ultimate specific question, but the underlying symptomatic general question which
530 falls for consideration is what is an act in planning for or preparation of a terrorist act? The legislation is indeed silent on what those words mean. It has been described by numerous legal scholars as a section which is breathtakingly vague and lacks precision. In my submission, as a matter of general principle, so far as special leave is concerned, it is entirely
535 appropriate that the highest Court in this land should offer some assistance in terms of guidance regarding the proper meaning, scope and application of these words.

FRENCH CJ: What aspect of the construction of the terms of section 101.6, properly construed, would exclude from the category of an
540 “act in preparation for, or planning, a terrorist act” the act alleged in this case? In other words, I mean, one does not have to get into a construction of the provision for all purposes. The question is whether, properly construed, the act alleged against your client falls outside it.

545 **MR SELIMI:** Your Honour, the answer to that question is that the section itself, 101.6, does not simply use the words “act in preparation for, or planning” in a vacuum. They use those words in the context of a stated

550 purpose, that is, a purpose directed to an act of terrorism. In my
submission, one cannot construe the words “act in planning or preparation
for the commission of a terrorist act” unless one has regard to the ultimate
purpose that is prescribed by the section, although, for the purposes - I am
at pains to point out - for the purposes of today, in my submission, it is not
555 necessary to be satisfied that the mere asking of the question is or is not an
overt act in furtherance of the conspiracy.

In my submission, I take the argument to a general level of
construction and that is the words of the statute themselves are unclear,
undefined, not the subject of any consideration by this Court. It is a very
560 wide provision which casts a very wide net as, indeed, your Honour
Chief Justice French noted in the case of *Khazaal*. Your Honour stated that
the statutory purpose was to cast a wide net over preparatory acts. My
submission, your Honours, in terms of this case, is that Parliament has not
seen fit to define precisely what constitutes an “act in preparation for, or
565 planning, a terrorist act”.

Whilst I accept what your Honour - with respect, great respect -
Chief Justice French said in *Khazaal*, that is, regarding the wide net over
preparatory acts, I submit, with respect, that whilst the statutory purpose
570 was to cast a wide net over preparatory acts the question remains how wide
is the net and what did Parliament intend to proscribe?

FRENCH CJ: Sufficient unto the day, we are concerned with the
particular problem. Presumably, your contention that what your client was
575 said to have done and found to have done fell outside the scope of the
provision must have some underlying principal act, for example, even if it is
narrowed down to something close to the facts of this case that a mere
request, the answer to which may, depending on that answer, lead on to
further steps of preparation for a terrorist act or lead to the termination of
580 any such enterprise, cannot itself be an act in preparation because it has this
ambivalent possibility in its outcome.

MR SELIMI: That is precisely my submission, with respect. My entire
submission is that the mere asking of the question could not, as a matter of
585 law, constitute on any view an act in planning or preparation because if one
looks at the concept of a fatwa, if one wishes to use the analogy of a traffic
analogy, a red light or a green light, which is the subject of reference in the
evidence, if it is halal it is a green light to go ahead, shall we say; if it is a
red light it is haram. Now, the whole point, your Honours - - -
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FRENCH CJ: So how is that different from going into an agricultural
supply store and saying “Do you have 20 kilos of ammonium nitrate,
please?” The answer might be yes, the answer might be no.

595 **MR SELIMI:** Because, your Honour, it requires an anterior, overarching
agreement to commit the terrorist act. My submission here, just to address
your Honour's point, is this. The section presupposes as a matter of law
and fact - it presupposes that there is an overarching agreement to commit
600 the terrorist act. What 101.6 focuses on is acts in furtherance of that
particular conspiracy.

Now, in my submission, the section presupposes that the parties have
committed themselves unconditionally to a terrorist attack and, in my
submission it covers - 101.6 on a natural construction covers acts of
605 planning or preparation with respect to an unconditional or predetermined
plan of attack. It presupposes that a green light has already been given by
the sheikhs to launch such an attack. My submission is that as a matter of
law a mere request for a clerical opinion could not be regarded as an act in
preparation or planning. The pursuit of a clerical opinion on whether the
610 proposed plot was halal or haram was not as a matter of law capable of
answering the description "acts in preparation" at all.

In my submission, this is a question of great public importance, the
scope of the section. There should be absolutely no doubt on a matter of
615 national security. There are people congregating in mosques throughout
this country. There should be no doubt what constitutes an act in planning
or preparation for the commission of a terrorist act. There should be no
doubt. If, in fact, as a matter of law - - -

620 **FRENCH CJ:** We are not a jury, Mr Selimi.

MR SELIMI: I beg your pardon, your Honours.

625 **FRENCH CJ:** I think we need to hear from you on the question of
construction and essentially it seems to me your submissions reduce to the
proposition that this is a widely framed offence and that the question
whether it extends to a circumstance of the kind alleged and found against
your client in this case is an important question of construction.

630 **MR SELIMI:** Indeed, your Honour, and putting it a bit more in a subdued
fashion, as Parliament has not seen fit to precisely define these critical
words it falls to this Court to interpret these words for the assistance of all
trial judges in this country. By failing to define and articulate the precise
acts envisaged by this nebulous phrase, Parliament has reposed its trust in
635 this Court to judicially interpret the phrase. This Court has not, until now,
been called upon to shed light on these questions of great public importance
which go to the heart of national security.

640 **FRENCH CJ:** Thank you, Mr Selimi.

MR SELIMI: May it please, your Honour.

FRENCH CJ: Yes, Mr Gurvich. We need to hear you on the sentence question.

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MR GURVICH: If your Honour pleases. At the trial, your Honours, there was no issue whatever about recklessness. The directions repeatedly and emphatically given to the jury related to intention and the relevant intention which, as your Honour Justice Bell has pointed out, was with respect to the conspiracy and the conspiracy to do an act in preparation, not, as appears to be the argument now advanced, to commit a terrorist act. That was made, in my submission, abundantly clear to the jury as the Court of Appeal pointed out.

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655 So the way in which her Honour the learned trial judge framed it, in a number of ways, in the broad way, by asking two questions: did the conspiracy exist, number one; and, number two, did the particular accused participate in the conspiracy, no issue was taken with that and that was a convenient way, in my submission, of addressing the elements of the offence.

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 But the learned trial judge went further than that and broke down the elements in the manner that your Honour Justice Bell has pointed out in the extract from the Court of Appeal judgment orally, in writing and by way of a decision tree, with which no issue was taken and no aspect of recklessness was raised at any time because, certainly in the context of a trial, there was no issue about it.

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 The defence advanced on behalf of Mr Aweys was that far from seeking to promote or advance the conspiracy, he was endeavouring to prevent it, and her Honour made crystal clear that that was something that had to be excluded by the Crown beyond reasonable doubt. On behalf of Mr El Sayed it was that it was not about the Holsworthy attack, it was about a fraud, and her Honour made that crystal clear.

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 So, coming back to the two broad questions her Honour asked, it became an issue of was the particular accused seeking the fatwa as a conspirator, co-conspirator, in order to advance the conspiracy or, could it not be excluded that he was seeking the fatwa to prevent, or not to participate, or was not participating in the conspiracy alleged.

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 Now, it is obvious, in my submission, that along the way, along the path to the ultimate terrorist act there may be a number of possibilities and contingencies. That is in the nature of that kind of offence and many other offences, but the intention to obtain the fatwa was, in my submission,

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unconditional and that was made clear by way of the evidence and by way of the requirement in the directions by her Honour.

690 So, whether there was at times an expression of hope that the answer might be no that, in my submission, was beside the point. The point was whether there was the relevant intent to agree to do the act. That is all I wish to say about grounds 1 and 2 with respect to Mr Awey's application.

695 **FRENCH CJ:** Is there anything in addition in relation to Mr Sayed's?

MR GURVICH: No, there is nothing else I wish to add, your Honour. If the Court pleases.

700 **FRENCH CJ:** All right. Mr Selimi, do you want to say anything in reply?

MR SELIMI: No, your Honour.

705 **FRENCH CJ:** Yes, Mr Neal.

MR NEAL: Thank you, your Honour. Just on the point of the prosecution's position with respect to recklessness, there were exchanges in the Court of Appeal about whether, in fact, the prosecution had relied on recklessness below and the answer given was that it had been and there were several transcript references supplied to say just that – that

710 recklessness was relied on.

Now, there certainly was no direction on recklessness but we say that the effect – we did not find the references to recklessness, but what we say

715 is this: When the prosecution puts its case in the way it did, as evidenced in the passage that I read to your Honours in our main submission, the Crown's position was that Aweys, with the full knowledge of the events and intending to, that he pursued it recognising that he might receive a ruling that it was permissible, that is, he does not want that consequence,

720 but he is willing to take a risk that it might occur. That is a classical formulation of recklessness. It was not corrected by the trial judge.

The only other matter by way of reply is that if you look at the directions, the written directions, and the decision tree, neither of those

725 documents goes into this question that we have been agitating about the physical and fault elements of the section 101 element of act of preparation, so that the claim that this matter was not, at the very least, very confusing, because the prosecution, as I say, claimed at the Court of Appeal level that it was relying on recklessness, applied passages that seemed to indicate that,

730 now it says that they were not.

That is, to say the least, confusing, and actually not surprising, given the great complexity of the interaction between the conspiracy offence and the section 101.6 offence. This combination of those two offences, the
735 conspiracy with a preparatory offence that is far removed from the actual substantive offence that is contemplated, is an experiment in criminal liability and then to add into that the Crown putting the case in a way which invited a decision on the critical issue of intent based on, “Well, although he
740 wanted a no, he was prepared to take a chance that he would get a yes, or he knew that there was a chance that he would get a yes”, we say that is the matter of special leave importance.

BELL J: Mr Neal, can I just interrupt you? As I understand the way the respondent puts its case, the trial was fought on the basis that if it were
745 reasonably possible that your client, in seeking the fatwa, hoped that the answer would be haram because his intention was not to take part in the planning or preparation for a terrorist act, then he was to be acquitted. That was the ground on which the trial was fought. The circumstance that he
750 might at times have thought it would be good if the sheikh gave an answer that the proposed attack was haram was not inconsistent with a finding that his intention was to further the conspiracy with which he was charged in asking the question.

MR NEAL: Your Honour, that is where the complexities of this case really do interplay and really required a very clear direction from the trial
755 judge about what is the intent in relation to the physical element of section 101.6 as opposed to whether it was an overt act in furtherance of the pre-existing conspiracy, but the first question, the very first question that needed to be addressed was what is the fault element that accompanies him
760 asking that question, because it is not an act of preparation unless he intends to get the yes answer.

That was what was in play, except the prosecution took it out of play by saying it does not matter what he intended or what he thought might
765 happen. The mere fact of asking the question was enough. That was reinforced by the trial judge, which left the matter open to the jury to convict on the basis that mere intention - asked the question was enough, we say that is the error of law and it introduces recklessness into the
770 section 101.6 offence which is contrary to principle we say.

FRENCH CJ: Thank you, Mr Neal. The Court will adjourn briefly to consider what course it should take.

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AT 12.27 PM SHORT ADJOURNMENT

780 **UPON RESUMING AT 12.31 PM:**

785 **FRENCH CJ:** In matter No M133/2013, *Aweys v The Queen*, we are of
the opinion that the Court of Appeal did not err in its identification of the
mental element of the conspiracy of which the applicant was convicted. As
their Honours observed, the trial judge gave repeated instructions respecting
the requirement of satisfaction beyond reasonable doubt that it was the
790 applicant's intention in seeking the fatwa that it be in furtherance of the
conspiracy. No other basis for the grant of special leave is disclosed. There
is no reason to doubt the overall correctness of the Court of Appeal's
decision. Special leave is refused.

795 In matter No M134/2013, *Aweys v The Queen*, no question suitable
for the grant of special leave is identified in the application. The Court of
Appeal's conclusion that it was not an error for the trial judge to sentence
the applicant upon the footing that she was not affirmatively persuaded that
he had desisted from the conspiracy, involved a conventional application of
the principles explained in *Weininger v The Queen* (2003) 212 CLR 629.
800 Special leave is refused.

In the matter of *El Sayed v The Queen*, there is no reason to doubt
the correctness of the Court of Appeal conclusion that the act of seeking a
fatwa was capable of being an act done in furtherance of the conspiracy
805 with which the applicant was charged. The conspiracy, as their Honours
noted, was to commit acts in preparation or planning for a terrorist act as
distinct from a conspiracy to commit a terrorist act. The act of seeking the
fatwa was capable objectively of furthering fulfilment of the agreed plan.
Special leave will be refused.

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The Court will now adjourn to reconstitute.

815 **AT 12.33 PM THE MATTERS WERE CONCLUDED**

