CDPP
Australia's Federal Prosecution Service

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

SUBMISSION BY THE COMMONWEALTH DPP

7 MAY 2015

INTRODUCTION

1. The Office of the Commonwealth Director of Public Prosecutions ('CDPP') was established under the *Director of Public Prosecutions Act 1983* and is responsible for the prosecution of offences against the Commonwealth. Cases typically prosecuted by the CDPP include drug importation, money laundering, offences against corporate law, fraud on the Commonwealth (including tax fraud, medifraud and social security fraud), people smuggling, sexual servitude and terrorism.

Schedule 1 – Serious drug offences

2. Schedule 1 will amend the *Criminal Code* ('the Code'), which is a Schedule to the Criminal Code Act 1995, to improve the operation and effectiveness of the serious drug and precursor offences in Part 9.1 by:
    - making recklessness the fault element for attempted offences against Part 9.1.
    - removing the 'intent to manufacture' element of the border controlled precursor offences in sections 307.11 to 307.13.

3. In accordance with section 11.1(3), liability for attempt currently requires proof of intention or knowledge with respect to each physical element of the principal offence. The proposed amendment allows for recklessness as the fault element in relation to the following physical elements:
    - that a plant is a controlled plant
    - that a substance is a controlled precursor
    - that a substance is a border controlled drug or border controlled plant
    - that a substance is a border controlled precursor

4. This amendment will enhance the ability of the CDPP to prosecute serious drug and precursor offences, particularly when a controlled operation has been undertaken and a complete substitution of the drugs has occurred. The amendment will help ensure that criminals who

participate in serious drug offences cannot avoid criminal liability merely because police have taken steps to substitute the drugs with an inert substance.

5. As pointed out in the explanatory memorandum, applying recklessness as the fault element for attempted offences against Part 9.1 of the Criminal Code is necessary to keep pace with criminal methodologies, and effectively capture and deter criminal conduct associated with the illicit importation, manufacturing and trafficking of serious drugs and precursors.

6. Schedule 1 (items 2-8) will remove the requirement for the prosecution to prove that a person who imports or exports a border controlled precursor did so with the intention to use it to manufacture a controlled drug, or with the belief that another person intends to use the substance to manufacture a controlled drug.

7. As pointed out in paragraph 63 of the explanatory memorandum, the precursor offences in sections 307.11, 307.12 and 307.13, and the presumption in section 307.14 have not functioned as effectively as intended. Even with the presumption, the CDPP has faced formidable difficulties in prosecuting offenders for importing precursor chemicals.

8. The amendment will create a precursor importation offence without the requirement to prove the intention to manufacture a controlled drug (or belief that someone else intends to do so). An offence of this nature is a clear legislative response to the seriousness of increasing precursor importations into Australia, especially in relation to the precursor pseudoephedrine, which is commonly used in the manufacture of methamphetamines (i.e. ice). The amendment would also overcome some unintended consequences that the law enforcement community is currently dealing with in relation to the existing offences.

9. Historically, absent a clear admission, it was necessary to prove this aspect of the offence by reference to circumstantial evidence. Often offenders were part of a larger operation and were deliberately provided with limited information about how their actions fit into the broader criminal enterprise. That is especially so when the gap in evidence to prove an intention to manufacture (or that someone else intends to do so) is not matched by the reality that this is what in fact was almost certainly going to take place in many cases, but for the intervention of the authorities in detecting and seizing a particular consignment. If that aspect of intended manufacture does not in fact exist, that is a fact able to be established in mitigation on sentence.

10. The growth of precursor importations indicates that there is available a lucrative and increasing income stream for organised crime groups through such importations. The steep increase in precursor importations supports the conclusion that this is no accident and is tied to the high profit/lower risk represented by importing precursors, especially the lower risk for those a step or more removed from the physical act of importing. That apparent deliberate shift is of itself an indication of organisation and planning consistent with organised crime involvement.

11. In most cases, importations involve multiple players participating in the venture at different levels and in different ways. The result, from a prosecution point of view, is that we are often relying on an extension of liability or accessorial provisions, such as conspiracy or aid and abet,

in order to prosecute those who are involved in the importation, but not actually themselves bringing the drugs or precursors into Australia. That includes a growing number of postal importations using the innocent agency of postal and courier services.

12. A key feature of organised criminal activity is the capacity to use a variety of participants to carry out separate parts of an overall criminal enterprise, most or many of whom were not the principals or even necessarily at the centre of the active planning and co-ordination of the overall scheme. In the area of drug and precursor importations, this extends to timeframes and activities either side of the actual act of importing, as well as different roles with differing degrees of proximity and involvement above the necessary threshold for criminal responsibility.

13. The growing seriousness of the situation requires a shift towards more serious criminal liability applying to the event of importing of precursors above reasonable personal use quantities. In our view the amendment addresses the difficulties associated with prosecuting precursor offences in a significant and effective way.

Schedule 2 – Bribing foreign public officials

14. As the Explanatory Memorandum makes clear Schedule 2 will amend the Criminal Code to clarify the operation of the offence of bribing a foreign public official in Division 70.2. The amendment clarifies that proof of an intention to influence a particular foreign official is not required to establish the offence. This will avoid arguments that the Prosecution is required to prove the intention to bribe a particular foreign official and is supported by the CDPP.

Schedule 4 – Forced marriage

15. Schedule 4 will amend the definition of 'forced marriage' in the Criminal Code. Under the existing definition, a marriage is forced if the victim does not freely and fully consent because of the use of coercion, threat or deception. The amendments will expand the definition of forced marriage to include circumstances in which a victim does not freely and fully consent because he or she is incapable of understanding the nature and effect of a marriage ceremony. The amendments will therefore make clear that the forced marriage offences apply where a person cannot give their free and full consent to marry, including for reasons such as age or mental capacity. Schedule 4 will also amend the Criminal Code to increase the penalties for the forced marriage offences.

16. Forced marriage offences in section 270.7B of the Criminal Code currently apply where a person does not freely and fully consent to a marriage because of coercion, threat or deception.

17. Schedule 4 of the Bill proposes:
    - an amendment to section 270.7A(1) expanding the definition of 'forced marriage' to apply where a person is incapable of understanding the nature and effect of a marriage ceremony, including because of their age or mental capacity.

- the insertion at section 270.7A(4) of a presumption that a person under 16 years of age is presumed, unless the contrary is proved, to be incapable of understanding the nature and effect of a marriage ceremony.

- increased maximum penalties for the base and aggravated offences[1] to 7 years and 9 years' imprisonment respectively.

18. The CDPP supports all these measures.

19. The CDPP recently considered a matter where a child swore on oath that she fully consented to her marriage to an adult male, which had been arranged by her family. Under the current definition of forced marriage[2], to prove a forced marriage had taken place, the prosecution must prove that, as a result of the use of threats, coercion or deception, the victim entered into the marriage without fully and freely consenting. To establish those means were exercised against a child who appears to consent to the marriage, the prosecution would need to rely to on the extended definition of 'coercion' which includes taking advantage of a person's vulnerability[3].

20. Without the proposed amendment, the prosecution would have to establish that a person is vulnerable because they are a child. Such a proposition is not straight forward. Often, the only evidence of the exercise of coercive means will be from the victim herself. However, the child may not give that evidence. It will be readily seen that the motive for a child to apparently 'consent' will vary. For example, the child may truly believe that getting married is a positive thing, or the child may agree to the marriage in order to please her family, which can be a powerful motive in many cultures.

21. The child may also have been threatened or coerced, but is unwilling to say so on oath to the authorities, and so appears to 'consent'. Without evidence from the victim that she has been subjected to deception or threats, or was coerced in the ordinary sense, in the face of her apparent consent to the marriage the prosecution must prove coercion on the basis that the accused took advantage of the child's vulnerability.

22. 'Vulnerability' is not defined in the Criminal Code, and in relation to a child, 'vulnerability' may include the absence of features, such as maturity, which does not lend itself to a purely objective assessment, but rather a judgement which can be disputed amongst experts. In the matters referred to in paragraph 19 above; the child presented as articulate, confident and well educated and adamant she entered into the marriage of her own volition, notwithstanding her age. Without the proposed amendment, the accused, the husband, a close relative of the child, or religious community leader would, without difficulty, point to evidence of the child's apparent maturity. Given the age of the child, one would not expect the same level of insight. Further, a Court would not necessarily admit the evidence of an expert engaged to opine about the child's 'maturity' given this assessment is one for the jury.

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[1] Section 270.7B(1) and section 270.7B(2) *Criminal Code*
[2] Section 270.7A(1) *Criminal Code*
[3] 'Coercion' is defined at section 270.1A *Criminal Code*

23. Without the proposed amendment, the prosecution would have to prove that the child was threatened, coerced or deceived. Under Article 3 of the Trafficking in Persons Protocol[4], the presence of 'means' to achieve compliance, such as threats, coercion or deception is irrelevant where the victim is a child, unlike for an adult. This protocol applies to trafficking, slavery and slavery like offences, which includes forced marriage. Article 3 recognises the vulnerable nature of children as victims, and that the prosecution ought not to have to prove the presence of coercive force to ensure the child's compliance in the offence.

24. Consistently with sections 11-12 of the *Marriage Act 1961*, the proposed amendment recognises that a child under a certain age is not capable of full and free consent, whether or not force, threats or deception are used. It is anomalous that a Federal civil law[5] protects all children under the age of 16 years from entering into a binding marriage on the basis that they cannot consent to such a marriage and it will still be a lawful marriage, but a Federal criminal law[6] allows an accused to escape liability if the child apparently freely consents.

25. The proposed amendment, with a legal burden on the accused to prove the child's capacity to consent, is also broadly consistent with the policy behind s.270.11 of the Criminal Code which makes it clear that for all offences in that Division, consent or acquiescence of the victim to the conduct of the accused constituting an element of the offence will not found a defence.

26. The rationale for this provision is that it reflects accepted jurisprudence in slavery cases (of which *The Queen v Wei Tang*[7] is the most notable example) that a person cannot consent to a human rights abuse and by consenting render it no longer an abuse of that person's rights. However, the extent to which section 270.11 moderates (if at all) the need to prove a lack of consent by the victim for offences such as forced marriage, forced labour and some organ trafficking offences, has yet to be tested. However, by the reasoning in *Wei Tang*, it is abusive to children to allow marriages involving children to be anything other than forced marriages, even if the child appears to consent.

27. Section 270.7A(4) proposes that a person under 16 years of age is presumed, unless the contrary is proved, to be incapable of understanding the nature and effect of a marriage ceremony. As drafted in the Bill, the CDPP supports imposing a *legal* burden on the accused, in order to displace that presumption. By contrast, an accused can discharge an *evidential* burden relatively easily by pointing to evidence which suggests a 'reasonable possibility'[8] that the child was capable of freely consenting to the marriage. The prosecution would then be required to rebut such evidence beyond reasonable doubt.

[4] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, United Nations Human Rights (15 November 2000) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>
[5] *Marriage Act 1961*
[6] *Criminal Code*
[7] *The Queen v Wei Tang* (2008) 237 CLR 1
[8] Section 13.3 *Criminal Code*

28. Where a marriage is consummated, an adult could be prosecuted for State sexual offences against a child. When compared to an offence against section 270.7B(1) of the Criminal Code, there exists an anomaly regarding the treatment of child victims between Federal and State criminal law where the child victim has entered into a marriage. In such a case, the adult would be guilty of (or accessory to) statutory rape or sexual penetration of a child, 'consent' or 'maturity' notwithstanding.

Schedule 5 – Knowingly concerned

29. As the Explanatory Memorandum makes clear Schedule 5 will amend the *Criminal Code* to insert into section 11.2 'knowingly concerned' as an additional form of secondary criminal liability. This will mean that, where persons are knowingly and intentionally involved in the commission of an offence, they will be liable for the offence. This measure is strongly supported by the CDPP and will ensure that a significant impediment to prosecuting a range of Commonwealth offences is removed.

30. The concept of 'knowingly concerned' was included in the *Crimes Act 1914* when it was first enacted in 1914 and in the *Customs Act 1901* in 1910. It was a clear and well understood concept from the perspective of prosecutors, defence practitioners, the judiciary, juries and, most importantly, persons charged with criminal offences and their lawyers. The concept required proving that the acts shown to have been done by the defendant "*in truth implicate or involve him in the offence, whether it does show a practical connexion between him and the offence*".[9] To prove objective involvement in or connection to an offence, the prosecution needed to prove that an accused intentionally concerned themselves with the essential elements or facts of a criminal offence. Mere knowledge or concern *about* the offence, by contrast, was insufficient to make out a charge of knowingly concerned.

31. This concept was well understood and did not lend itself to highly technical legal arguments, but rather encouraged a focus on the facts and evidence and on precisely what individuals had themselves done in relation to the commission of an offence by others. It had little or none of the vagueness or archaic language of the retained concepts of "aid, abet, counsel or procure", nor some of the more problematical aspects of conspiracy or attempt charges.

32. The existing forms of derivative liability in section 11.2 of the Criminal Code (aid, abet, counsel or procure) capture criminal involvement at particular stages of an offence—generally, counsel and procure serve to criminalise conduct prior to the commission of offence, and aid and abet criminalise the conduct of persons present during the commission of the offence. A charge of joint commission (section 11.2A) or conspiracy (section 11.5) require prosecutors to demonstrate that two or more offenders made an agreement prior to the commission of the offence, and that the accused committed an overt act pursuant to that agreement. These kinds of charges require complex, technical instructions to a jury and frequently result in more complex, lengthy and costly trials, often resulting in accused persons being less likely to plead

[9] *Ashbury v Reid* [1961] WAR 49 at 51

guilty to this kind of charge than a charge that reflects their discrete individual responsibility, such as knowingly concerned.

33. Further, the absence of 'knowingly concerned' has resulted in the CDPP regularly prosecuting persons who can be characterized as "ringleaders" with "aiding, abetting, counselling or procuring" (in effect on the basis of accessorial liability). This has resulted in defendants effectively being charged with offences which do not accurately reflect their true criminality, possibly also affecting the sentences imposed upon ultimate conviction. One such example is where a defendant is charged with "aid/abet" the offences committed by a family company, of which the defendant is the principal director. The artifice of having to charge such a defendant with "aid/abet", in contrast to a "knowingly concerned" charge, carries the risk of the defendant's criminality being viewed as inferior to that of the company and thereby distorting the real circumstances of the offending.

34. Prosecuting persons variously involved in federal offences such as drug importation, money laundering and insider trading is difficult where a particular pattern of involvement is not neatly captured by an existing form of liability, but the accused is nonetheless intentionally involved in the offence. The following example serves to illustrate the point in the context of a drug importation scenario:

> *The accused is involved in discussions at a number of meetings of a known criminal group, who are arranging the importation of a prohibited drug. There is no evidence that the accused is personally taking the delivery of the drug, but evidence to show that the accused is a key member of the group and was actively involved at various stages of arranging the delivery. While he does not specifically aid the other offenders in possessing the drug he has made arrangements to distribute the drug once it is received and is the intended recipient. The accused was an intentional participant in the delivery through attending the meetings and had made arrangements for the distribution of the drug once it was received. Whilst he was not directly in possession of the drug delivered he could be charged with being knowingly concerned in the commission of that offence by others.*

35. In the above example a charge of importation on the basis of being knowingly concerned would be most appropriate and its absence would present a significant impediment to the effective investigation and prosecution of key individuals involved is serious criminal activity, especially those who have organised their participation so as to be disconnected from the most immediate physical aspects of the offence.

36. The absence of 'knowingly concerned' as a form of criminal liability in Commonwealth matters has attracted judicial comment. In particular, Justice Weinberg of the New South Wales Court of Criminal Appeal stated in *R v Campbell* [2008] NSWCCA 214, (2008) 73 NSWLR 272 that:

> *'the decision to omit the phrase 'knowingly concerned' from the various forms of complicity available under federal criminal law...appears to me to have left a lacuna in the law that was certainly never intended.'*

37. For all of these reasons the CDPP strongly supports this measure.

Schedule 7 – Sentencing and parole

38. Schedule 7 makes technical amendments to Part 1B of the *Crimes Act*. Many of these amendments relate to provisions which do not directly affect the conduct of prosecutions by the CDPP, such as, for example, parole.

39. However, in so far as the amendments affect cases prosecuted by the CDPP we make the following comments:

- Schedule 7 Part 1 will introduce general deterrence as a specific factor a sentencing court is required to take into account under section 16A in determining the sentence to be passed on a federal offender. The absence of general deterrence as a factor appears to have been an oversight when section 16A was first enacted and has been the source of comment and criticism by judges and magistrates over the years, albeit that the common law has recognised that while general deterrence is not specifically listed in s 16A(2) it is clearly a factor which should be taken into account in the sentencing process[10]. The CDPP has accordingly been advocating for the inclusion of such a provision for many years and strongly supports it as it will result in the very important factor of general deterrence being expressly listed as a sentencing factor a court must take into account.

- Schedule 7 Part 2 relates to the procedure a court must follow when granting a sentencing discount based on the offender's cooperation with law enforcement agencies in proceedings relating to any offence and effectively relocates section 21E of the *Crimes Act 1914* to section 16AC. The new section applies to all penalties imposed on federal offenders including orders under section 19B and paragraphs 20(1)(a) and 20(1)(b), orders made under subsection 20AB(1AA) and fines and not just to sentences of imprisonment. The terms of section 16AC are accordingly wider than the previous section 21E and will enhance the administration of the criminal justice system by ensuring that offenders can be the subject of the section even if they have not been sentenced to a term of imprisonment. By way of example, a sentencing court may, based on the offender's promised future cooperation, reduce the sentence imposed from a $10,000 fine to a $2000 fine and, pursuant to the new provision the offender will be liable to a CDPP appeal against sentence were s/he to fail to comply with his/her undertaking to cooperate with law enforcement agencies in other proceedings. Under the previous provision it was not clear whether such a situation could be the subject of an appeal. The CDPP supports this measure.

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10 *DPP v El Karhani* (1990) 21 NSWLR 370; *R v Paull* (1990) 20 NSWLR 427; *R v Oancea* (1990) 51 A Crim R 141; *R v Carroll* [1991] 2 VR 509, 512; *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568. In *R v Sinclair* (1990) 51 A Crim R 418 the WA CCA decided that whilst s16A did not specifically refer to general deterrence the imposition of a sentence "of a severity appropriate in all the circumstances", as required by s 16A(1), would necessitate general deterrence being taken into account as would s 16A(2)(k) which referred to "the need to ensure that the person is adequately punished for the offence".