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# Supplementary submission: Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015

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## **Senate Legal and Constitutional Affairs Committee**

**1 June 2015**

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## Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

## Question on Notice

1. The Law Council of Australia attended a hearing of the Senate Legal and Constitutional Affairs Committee's (the Committee) inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the Bill) on 20 May 2014.
2. In response to a question from Senator Collins and evidence provided to the Committee by the Attorney-General's Department and the Commonwealth Director of Public Prosecutions (CDPP) at the hearing, the Law Council has prepared this supplementary submission to further inform the Committee's consideration of the Bill.
3. Senator Collins asked the following question at the hearing:

*We are hoping that the Attorney-General's Department will be able to provide us with the Attorney's response to the Scrutiny of Bills Committee today in their concerns about knowingly concerned. If they are able to do so, could I ask you to take on notice to look at their response and respond further to the Committee?*

4. The Senate Standing Committee for the Scrutiny of Bills Committee's (the Scrutiny of Bills Committee) view of knowingly concerned is:

*... the justification for now reintroducing this form of secondary criminal liability into the Commonwealth Criminal Code does not give a detailed response to the view that this form of derivative liability is too open ended and uncertain. While there is some discussion in paragraph 367 of the explanatory memorandum relating to the scope of the measure, given that uncertainty in the application of criminal offences means that the limits of liberty are not known with clarity, the committee seeks the Minister's more detailed advice about the scope, application and justification for the proposed approach.<sup>1</sup>*

## Law Council Answer

5. For the reasons outlined below, the Law Council reiterates the recommendation that measures contained in the Bill that seek to change fundamental principles of the Criminal Code and criminal responsibility, such as introducing the concept of knowingly concerned and permitting recklessness for attempt, must undergo a full public consultation process, including with State and Territory jurisdictions. Such consultation could be undertaken, for example, by the Attorney-General's Department or the Law, Crime and Community Safety Council. Indeed, as the Chair of the Committee suggested at the hearing, the legislative process would benefit from full consultation on technical amendments such as these at an early stage in their development.
6. These proposals should also accordingly be removed from the current Bill until thorough consultation with State and Territory jurisdictions is undertaken.

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<sup>1</sup> Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2014, p. 329.

## Minister's response to Scrutiny of Bills Committee

7. The Minister's response to the Scrutiny of Bills Committee has suggested that knowingly concerned is capable of clear definition as a legal concept on the basis, for example, that:
- it has a significant history in case and statute law. In addition to existing previously in the *Crimes Act 1914* (Cth) (the Crimes Act) and the *Customs Act 1901* (Cth) (the Customs Act), the formulation currently appears in the *Competition and Consumer Act 2010* (Cth), the *Corporations Act 2001* (Cth) and the Australian Capital Territory's (ACT) *Criminal Code 2002* (ACT);
  - the Review of the Commonwealth Criminal Law Committee, chaired by Sir Henry Gibbs (the Gibbs Committee) in 1987 found that the concept of knowingly concerned had independent utility and captured circumstances not amounting to participation as a principal offender, or an aider, abetter, counsellor or procurer; and
  - it captures intentional involvement in an offence, which requires prosecutors to demonstrate objective involvement in or connection to the offence, whether at a specific point in time or on an ongoing basis.<sup>2</sup>

## Consultation and the Model Criminal Code process

8. While the concept of knowingly concerned existed in the previous Crimes Act, it was not included in the *Criminal Code Act 1995* (Cth) (the Criminal Code) intentionally as the Model Criminal Code Officer's Committee (MCCOC) considered it was too uncertain and open-ended.<sup>3</sup> As noted in the Law Council's written submission to the Committee, MCCOC undertook extensive consultation, including with States and Territories, which resulted in this finding.<sup>4</sup>
9. At the time of the introduction of the Criminal Code, the Attorney-General's Department supported the decision not to include the concept from the Crimes Act in its initiation of the Criminal Code.<sup>5</sup>
10. In 2008, MCCOC undertook a review and update of Chapter 2 of the Model Criminal Code which covers the general principles of criminal responsibility. A proposal to include concept of knowingly concerned was again rejected.
11. A further review in 2012 by the National Criminal Law Reform Committee (formerly the MCCOC) again rejected this proposal. This 2012 review was undertaken after *Campbell v R* [2008] NSWCCA 214 (*Campbell's case*), the case cited as justification for re-introduction of the concept, and which resulted in an amendment to section 300.2 of the Criminal Code to address the problem that had arisen in that case
12. The concept of knowingly concerned does not exist as part of the law of complicity – applicable to all criminal offences – in any Australian jurisdiction (with the recent

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<sup>2</sup> Ibid, pp.331-332.

<sup>3</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 2: General Principles of Criminal Responsibility*, Final Report, December 1992.

<sup>4</sup> Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, 7 May 2015, p. 5.

<sup>5</sup> Explanatory Memorandum to the *Criminal Code Act 1995* (Cth), p. 35.

exception of the ACT<sup>6</sup>) – or in the United Kingdom. The concept does exist in relation to some *specific substantive offences* (typically drug and drug importation offences in some Australian jurisdictions and in the United Kingdom).

13. The proposal to introduce knowingly concerned as part of the law of complicity in the Criminal Code – making it applicable to *all* Commonwealth offences, offences numbering in the hundreds – is a radical change which has been proposed without apparent consultation with States and Territory jurisdictions and against a background of its rejection on three prior occasions in the Model Criminal Code process.
14. The Gibbs Committee recommendation to include knowingly concerned was made in 1987, in the context of the Commonwealth criminal law as it then stood. This was prior to:
  - codification of the general principles of criminal responsibility effected by the Criminal Code;
  - the process of harmonising Commonwealth criminal offences to the new scheme; and
  - the large range of new offences introduced into the Criminal Code and other Commonwealth statutes, including a wide range of preparatory offences.
15. As explained in detail below, the proposed amendment:
  - (a) does not fit within the existing complicity provisions; and
  - (b) is inconsistent with both the:
    - (i) division between physical and fault elements; and
    - (ii) definitions of intention and knowledge in Part 2.2 of the Criminal Code.
16. The explanatory materials to the Bill provide no analysis of the effect of the amendments across offences in the Commonwealth statute book.
17. The development of Criminal Code was a major reform and went through an exhaustive and broad-based consultation process. There has been a period of familiarisation since passage of the legislation and when tested in the courts – including most recently in the High Court in *LK* – the principles set out in Chapter 2 of the Criminal Code have generally been applied in accordance with their intended meanings.<sup>7</sup> While chapter 2 of the Model Criminal Code has not yet been adopted as widely as had been hoped, many of the substantive parts of the Model Criminal Code have been adopted in other Australian jurisdictions. Importantly, the law of complicity is virtually uniform across the country and, with the recent exception of the ACT, no jurisdiction uses knowingly concerned. The need for national uniformity in the criminal law – and the need to ensure the established principles of criminal responsibility are upheld and respected – remains as pressing today as it did two decades ago when the Model Criminal Code process was commenced.

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<sup>6</sup> As a result of the *Crimes (Serious Organised Crime) Amendment Act 2010* (ACT).

<sup>7</sup> See *R v LK* (2010) 241 CLR 177 and generally, Goode, 'An Evaluation of Judicial Interpretations of the Australian Model Criminal Code' in Chan, Wright and Yeo, 'Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform' (Ashgate Publishing, 2011).

## Target reform to specific problems

18. The Criminal Code draws an important distinction between *general* principles of criminal responsibility in Chapter 2 applicable to all offences – defining the basic building blocks of physical (*actus reus*) and fault (*mens rea*) elements applicable across all offences - and the specialised physical and fault elements necessary for specific offences.
19. The case for this reform has particularly identified drug and drug importation offences, insider trading drug offences, and competition law offences.<sup>8</sup> However, the offences specific to these areas already address the issues identified as supporting change.
20. This is most clearly exemplified in what the CDPP has identified as the biggest area of concern, drug law. The amendment to section 300.2 of the Criminal Code in 2010 dealt with the issue of drug importation without the need for a knowingly concerned formulation. Because of that amendment, it is now a substantive offence to ‘deal with a substance in connection with its importation’. The defendant is directly liable for the offence. This dealing could occur before, during or after its importation. It does not depend on complicity. The defendant is charged as a principal offender and guilt depends on the standard fault elements of intention, knowledge and recklessness (e.g. that the defendant intended to deal with the substance knowing or believing that it was a prohibited drug).
21. Similarly, the insider trading offences have their own specific physical and fault elements in the Corporations Law but incorporate the general criminal responsibility provisions in Chapter 2 of the Criminal Code. But the insider trading provisions modify the complicity provisions of Chapter 2 for this offence by expanding the definition of ‘procures’ to include induce, incite or encourage another person to engage in insider trading. It does not appear that the drafters of those provisions saw a need to include knowingly concerned in those provisions.
22. Where there is seen to be a need to extend complicity associated with an offence, such an amendment should be specific to that offence. There are at least five pieces of Commonwealth legislation which contain substantive offences which include knowingly concerned. This is a far preferable approach to a radical change to the law of complicity which affects *all* Commonwealth offences.

## Uncertainty regarding knowingly concerned

23. The proposed amendment does not fit within the scheme of chapter 2 of the Criminal Code. Conceptual difficulties arise in terms of separating knowingly concerned into physical and fault elements as proposed by the Bill’s amendments to section 11.2 of the Criminal Code. The draft confuses physical and fault elements and is not congruent with sections 3.1, 4.1 and 5.1. For ease of analysis, we have attached a marked-up copy of section 11.2 to reflect the proposed amendment.
24. The proposed subparagraph 11.2(2)(a)(ii) suggests that the physical element of the offence of being knowingly concerned will be that the person’s conduct must have resulted in the person being in fact knowingly concerned in the commission of the offence by the other person. It is not clear how the physical element can sensibly include ‘knowingly’ which is a mental state. The physical element is actually being ‘concerned in’ the principal offender’s offence.

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<sup>8</sup> See for example oral evidence of the CDPP to the Committee, Wednesday 20 May 2015, *Hansard* p. 29.

25. As argued in our principal submission, being ‘concerned in’ is a very vague concept and there is nothing to explain why or what it adds to a simple term like ‘aid’. Given that ‘aid’ is a commonly understood word, has been interpreted widely and has a settled case law base, to introduce any further uncertainty is contrary to the principle that criminal laws should be precise and knowable.
26. The uncertainty of terms like ‘concerned’ is illustrated both by the amendment to section 300.2 of the Criminal Code in relation to importing drugs (see above) which actually avoids the term altogether, and by South Australian drug legislation which uses a similarly imprecise term but then defines it.<sup>9</sup> Its definition of trafficking contains the term, ‘takes part in the process of sale’ – analogous to the term ‘concerned’ – but then defines the term as storing, carrying, loading, unloading, packaging, financing and so on.
27. Proposed subsection 11.2(3) of the Criminal Code outlines the necessary fault element for this version of complicity. The person must intend that their conduct will *result* in them being *knowingly* concerned in another person’s offence. It is not clear how the marrying of the concepts of intention and knowledge works: how does a person intend the result of being knowingly concerned? How does this sit within the Criminal Code framework, which provides definitions of intention and knowledge as fault elements? Further, it is difficult to understand how a person *intends* a result that he/she is *knowingly* concerned in an offence.
28. On a proper analysis, ‘knowingly’ is the fault element for this form of complicity. But even then, it is also not clear how a jury would make sense of proposed subparagraph 11.2(a)(ii) and paragraph 11.3(b) where it appears they will be effectively be asked to decide the same question twice. Contrast this with the simplicity of directing a jury that the person’s conduct must have in fact aided the principal offender (physical element) and that the person must have intended to aid the principal offender (fault element). The explanatory material provides no assistance with these matters. The Committee identified the technical nature of this area in the hearing. Introducing further complexity to this area of the law will impose a significant burden on courts and juries.
29. A number of the problematic features of the concept have been raised in the Law Council’s written submission and oral evidence before the Committee.<sup>10</sup> For example, acting on behalf of the Law Council, Dr David Neal SC noted in his evidence before the Committee on 20 May 2015, that the open-endedness of the concept of knowingly concerned would be particularly acute for certain offences within the Criminal Code that seek to capture conduct which is preparatory or very early in the course of wrong doing.
30. For example, section 101.6 of the Criminal Code which criminalises doing an act in preparation for, or planning, a terrorist act. Dr Neal SC noted the case of a defendant who was convicted under section 101.6 on the basis of making a phone call to seek a ruling whether a proposed attack was permissible under Islamic law – wanting and expecting that the answer would be that it was impermissible (which was the ruling) – amounted to an act of preparation. He was sentenced to 18 years imprisonment.<sup>11</sup> This example was provided to demonstrate the dangers of vaguely defined laws. Moreover, this offence was designed to capture lone wolf offenders where a

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<sup>9</sup> Section 4 of the *Controlled Substances Act 1984* (SA).

<sup>10</sup> Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee’s Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, 7 May 2015, pp. 10-13.

<sup>11</sup> *Aways v R* [2014] HCA Trans 87.

conspiracy charge would not be available. But in this case, the defendants were charged with a *conspiracy* to do an act of preparation for a terrorist act. The trial lasted six months and the judge's charge to the jury ran to 500 pages and was delivered over nine days. The proposed amendment would allow a person to be charged with being knowingly concerned in an act of preparation for a terrorist act. The potential for vaguely-defined, complex offences to cause injustice is very real.

31. Other preparatory terrorism offences in Division 101 of the Code cover conduct ranging from providing or receiving training (section 101.2), to possessing a 'thing' (section 101.4), to collecting or making a document (section 101.5), that in each case is 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act'.
32. These offences are committed if the person either knows of, or is reckless as to the existence of, this connection (with knowledge attracting a higher penalty).
33. The impact of a far-reaching concept of knowingly concerned on such preparatory offences would make the offences too inchoate. This is, as the Law Council has noted in its written submission, inconsistent with the rule of law which requires that the Criminal Code should be precise enough to allow people to readily ascertain prohibited conduct, particularly where there are high penalties for those convicted of criminal offences.

## Reflecting the true criminality

34. The Ministerial Response to the Scrutiny of Bills Committee argues that the absence of knowingly concerned means that the true liability of ringleaders cannot be captured and that they are less likely to plead guilty to 'accessorial' charges.<sup>12</sup>
35. This view may be misdirected. Ringleaders ought to be charged as principal offenders, not as accessories to reflect their true liability. Additionally, knowingly concerned under the Bill is proposed as an accessorial charge. Accordingly, the solution adopted in section 300.2 of the Criminal Code in relation to the expanded definition of importing drugs is a much better solution to the problem (see above). The person is charged as a principal. Mrs Campbell – whose case is said to justify this proposal – was a minor party not a ringleader.
36. The conclusion that the director in Example A in the Ministerial Response is more appropriately convicted of being knowingly concerned is similarly misconceived. This is an accessorial charge but the suggestion in the example is that he is a principal.
37. The difficulties that attempting to extend liability some significant distance from the principal offence and dividing criminal conduct into the proposed components presents should not be exaggerated. The fact that one director in Example A in the Ministerial Response sets up the bank accounts and receives payments, and that the part he plays takes place at different times from the director who effects the share trades does not prevent the CEO from being convicted as a principal, if that is what the evidence shows, or as an aider and abettor, if that is the evidence.<sup>13</sup> Further, sections of the Evidence Act relating to provisional admissibility of evidence and admissions with

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<sup>12</sup> Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2014, pp. 330 and 331.

<sup>13</sup> See, for example *R v Bainbridge* [1960] 1 QB 129 who supplied oxy-acetylene equipment to another who Bainbridge knew was going to use it to commit an offence.



authority<sup>14</sup> provide the prosecution with tools similar to those available in conspiracy cases in cases involving joint principals to prove agreement.

## Substitution

38. The CDDP, in his evidence before the Committee, indicated that the amendment to the definition of 'import' effectively took into account the circumstance in *Campbell's* case where there had been no substitution of powder for the prohibited substance. The CDDP also noted that difficulties arise when there is a substitution for the illegal substance and there is no concept of knowingly concerned.
39. There are two answers to this. First, the problem is specific to the context of drugs and does not demonstrate a need for a change of derivative liability to *all* Commonwealth offences. Second, where a person deals with a substance believing it to be an illicit drug where it is a substitution (either before or after importation), that person can currently be found guilty of attempt, even though it was impossible to possess the drug (see Part 9.1 and subsection 11.1(4) of the Criminal Code). The person is subject to the same maximum penalty as the completed offence. This is no different from other cases of attempt where the defendant intended to commit the offence but failed.
40. Similarly, difficulties encountered in the areas of insider trading and corporate fraud – as provided in the Minister's response to the Scrutiny of Bills Committee's concerns regarding knowingly concerned – should be dealt with by legislation specific to that problem.

## Accessory after the fact

41. In oral testimony before the Committee, the CDDP advised that the Defendant in *Campbell* was ultimately convicted as an accessory after the fact.<sup>15</sup> The maximum penalty for an accessory after the fact is 2 years imprisonment.<sup>16</sup> However, under the amendment, she may be convicted as an accessory *to the offence* and would be liable to a maximum of 25 years.<sup>17</sup> The distinction between accessories to the offence and accessories after the fact is important, as the different maximum sentences indicate. Mrs Campbell would be subject to the vagaries of the sentencing process in an area of drug law which is currently very volatile. The uncertainty of knowingly concerned has the potential to blur the lines which are meant to protect against unjust convictions. As the Ministerial Response admits, the amendment seeks to avoid the need 'to prove that the offence occurred at a particular point in time, prior to the offence'.<sup>18</sup> But that is the heart of the distinction between accessories at or before the crime, and accessories after the fact. It also strikes at the principle that criminal intent accompany the criminal act.

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<sup>14</sup> See for example sections 57, 59, 60 and 87 of the *Evidence Act 1995* (NSW).

<sup>15</sup> See for example oral evidence of the CDDP to the Committee, Wednesday 20 May 2015, *Hansard* p. 32.

<sup>16</sup> Section 6 of the *Crimes Act 1914* (Cth).

<sup>17</sup> Section 307.11 of the *Criminal Code Act 1995* (Cth).

<sup>18</sup> Senate Standing Committee for the Scrutiny of Bills, *Fifth Report of 2015*, 13 May 2014, p. 331.

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## Attachment A: Mark-up of section 11.2 of the Criminal Code

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### 11.2 Complicity and common purpose

- (1) **A person who aids, abets, counsels, ~~or procures~~ or is knowingly concerned in, the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**
- (2) For the person to be guilty:
- ~~(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and~~
  - (a) the person's conduct must have:
    - (i) *in fact aided, abetted, counselled or procured the commission of the offence by the other person; or*
    - (ii) *resulted in the person being in fact knowingly concerned in the commission of the offence by the other person; and*
  - (b) the offence must have been committed by the other person.
- (3) For the person to be guilty, the person must have intended that:
- (a) his or her conduct would aid, abet, counsel, ~~or procure~~, *or result in the person being knowingly concerned in*, the commission of any offence (including its fault elements) of the type the other person committed; or
  - (b) his or her conduct would aid, abet, counsel ~~or procure~~, *procure*, *or result in the person being knowingly concerned in*, the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
- (3A) Subsection (3) has effect subject to subsection (6).
- (4) A person cannot be found guilty of aiding, abetting, counselling ~~or procuring~~, *procuring*, *or being knowingly concerned in*, the commission of an offence if, before the offence was committed, the person:
- (a) terminated his or her involvement; and
  - (b) took all reasonable steps to prevent the commission of the offence.
- (5) A person may be found guilty of aiding, abetting, counselling ~~or procuring~~, *procuring*, *or being knowingly concerned in*, the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
- (6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).
- (7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
- (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
  - (b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

## **Attachment B: Profile of the Law Council of Australia**

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

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

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

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

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

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

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

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