Chapter 1

Introduction and Background

Referral of the inquiry

1.1 The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Bill) was introduced into the House of Representatives by the Minister for Justice, the Hon Michael Keenan MP, on 19 March 2015.[1]

1.2 On 26 March 2015, the Senate referred, on the recommendation of the Selection of Bills Committee, the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 13 May 2015.[2] On 12 May 2015, the Senate extended the committee's reporting date to 15 June 2015.[3]

Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and invited a number of stakeholders to make submissions by 7 May 2015. The committee received 16 submissions, all of which are published on the committee's website. A list of published submissions is at Appendix 1.

1.4 A public hearing was held in Sydney on 20 May 2015. A list of witnesses who appeared is at Appendix 2. The *Hansard* transcript of the committee's hearing is available on the committee's website.

Acknowledgment

1.5 The committee acknowledges those who participated in the inquiry and thanks them for their assistance. The committee is particularly grateful to witnesses who appeared at the public hearing.

Note on references

1.6 References in the report to the committee *Hansard* are to the proof committee *Hansard*. Page numbers between the proof committee *Hansard* and the official *Hansard* may differ.

Structure of the report

1.7 This report has been divided into two chapters. Chapter 1 is an introductory chapter and provides a summary of the key amendments proposed in the Bill, while Chapter 2 discusses some of the issues raised by submitters and sets out the committee's recommendations.

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1 House of Representatives, *Votes and Proceedings*, No. 107, 19 March 2015, p. 1211.

2 *Journals of the Senate*, No. 9, 26 March 2015, pp 2458–2459.

3 *Journals of the Senate*, No. 92, 12 May 2015, p. 2555.

Overview of the Bill

1.8 The Bill contains a range of measures which in some cases substantially change the current Commonwealth criminal justice arrangements.[4] It comprises of 17 schedules and amends 14 separate Commonwealth Acts. In particular, the Bill seeks to:

- amend the *Criminal Code Act 1995 (*Criminal Code) to make recklessness the fault element for attempted offences against Part 9.1 (Schedule 1) and remove the 'intent to manufacture' element of the border-controlled precursor offences in sections 307.11-307.13 (Schedule 1);
- clarify the operation of the offence of 'bribing a foreign public official' (Schedule 2);
- amend the Criminal Code to clarify the war crime offence of 'outrages upon personal dignity' in non-international armed conflict (Schedule 3);
- 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, and increase the penalties for those who commit a forced marriage offence (Schedule 4);
- insert 'knowingly concerned' as an additional form of secondary criminal liability under section 11.2 of the Criminal Code (Schedule 5);
- introduce mandatory minimum five-year terms of imprisonment for firearm trafficking offences (Schedule 6);
- make technical amendments to the *Crimes Act 1914* (Crimes Act) affecting the sentencing, imprisonment and release of federal offenders (Schedule 7);
- allow the interstate transfer of federal prisoners to occur at a location other than a prison (Schedule 8);
- facilitate information sharing about federal offenders between the Attorney-General's Department and relevant third-party agencies (Schedule 9);
- amend the *Anti-Money-Laundering and Counter-Terrorism Financing Act 2006* to expand the exceptions where self-incriminating evidence can be used against a witness in certain civil and criminal proceedings (Schedule 10);
- amend the *Law Enforcement Integrity Commission Act 2006* to clarify the role and powers of the Integrity Commissioner, including providing the Commissioner with greater discretion in deciding when and how to keep persons informed of actions taken in relation to a corruption issue (Schedule 11);

4 Explanatory Memorandum, p. 2.

- amend the *Australian Crime Commission Act 2002* to alter the definition of an 'eligible person' and clarify an examiner's power to return 'returnable items' during an examination (Schedule 12);
- make a number of technical amendments to the *Proceeds of Crime Act 2002* (POC Act) and amend the POC Act to increase penalties for failing to comply with a production order or with a notice to a financial institution in proceeds of crime investigation (Schedules 13 and 14);
- enable the Independent Commissioner Against Corruption South Australia (ICAC SA) to access information from Commonwealth agencies (Schedule 15);
- update existing references to the Queensland Crime and Corruption Commission to reflect its new name and title (Schedule 16); and
- make minor technical corrections to the *Classification (Publications, Films and Computer Games) Act 1995* (Schedule 17).[5]

Key provisions of the Bill

1.9 The Bill contains a number of significant amendments. In particular, Schedules 1, 4, 5, 6, 7, 9 and 10 of the Bill have attracted scrutiny from submitters and other Senate committees. This section discusses the operation of and rationale behind each of these schedules.

Schedule 1—Serious drug offences

Item 2

1.10 According to the Explanatory Memorandum, the purpose of Schedule 1 of the Bill is 'to improve the operation and effectiveness of the serious drug and precursor offences in Part 9.1' of the Criminal Code.[6]

1.11 Item 2 would introduce new section 300.6, which would make recklessness the fault element for attempted drug and precursor offences. There are currently different fault elements that apply depending on whether a person is charged with committing an offence or attempting to commit an offence. The Law Council of Australia (LCA) explained the offence of attempt to mean one that 'involves a defendant who fails to commit the *actus reus* (or physical element) of a complete offence, but has the intention to commit the complete offence'.[7]

1.12 In order to prove that a defendant intended to commit a serious drug offence prescribed under Part 9.1 of the Criminal Code, the prosecution must currently establish that the defendant actually knew that the substance was a controlled or border-controlled drug. Under new section 300.6, it would be sufficient for the prosecution to prove that the defendant was reckless as to whether the substance

5 Explanatory Memorandum, pp 2–3.

6 Explanatory Memorandum, p. 3.

7 Law Council of Australia, *Submission 10*, p. 6.

involved was a controlled or border-controlled substance. Recklessness is defined under section 5.4 of the Criminal Code to mean that a person was aware of a substantial risk with respect to a particular circumstance, and having regard to those circumstances the risk could not be justified.

Items 3 to 7

1.13 The amendments contained in items 3 to 7 of the Bill are also aimed at improving the ability of the Commonwealth Director of Public Prosecutions (CDPP) to prosecute offenders for serious drug offences:

> These items will remove the requirement for the prosecution to prove, in a prosecution for an offence against sections 307.11 to 307.13, 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. Removing this requirement to prove the intention or belief of an accused will engage the presumption of innocence because it will cause more people to rely on the defence of lawful authority under section 10.5 of the Criminal Code.[8]

Schedule 4—Forced marriage

Items 1 to 3 and 8

1.14 Items 1 to 3 and 8 of Schedule 4 of the Bill seek to amend the definition of forced marriage in the Criminal Code.

1.15 Currently, a marriage is considered to be forced where the person does not freely and fully consent, due to the use of coercion, threat or deception. The proposed amendments would expand the current definition to include circumstances where a person does not freely or fully consent because he or she is incapable of understanding the nature and effect of the marriage ceremony.

1.16 The amendments would also create a presumption that a person under the age of 16 is not capable of understanding the nature and effect of a marriage ceremony. This would mean that the defendant bears the onus of proving on the balance of probabilities that the person did understand the nature and effect of the marriage ceremony.

1.17 Even where a defendant can prove that the person under the age of 16 had the required level of understanding, the marriage will still not be valid. The *Marriage Act 1961* considers a person to be of marriageable age once they turn 18 (though there are exceptional circumstances where a person aged between16 and18 may lawfully marry a person aged over 18). The minister, while noting these exceptions, stated that 'in general child marriage is considered unacceptable in Australia'.[9]

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8 Explanatory Memorandum, p. 16.

9 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 326.

1.18 The Explanatory Memorandum provides that the purpose of these amendments 'is to increase protections against forced marriage for children and persons with a disability who do not have the capacity to provide free and full consent to marriage'.[10]

Items 4 to 7

1.19 Items 4 to 7 of Schedule 4 of the Bill would amend the Criminal Code to increase the penalties for forced marriage offences. As a result of these amendments, the penalty for a base offence would increase from 4 to 7 years and the penalty for an aggravated offence would increase from 7 to 9 years.

1.20 Section 270.8 of the Criminal Code provides that a forced marriage offence considered to be an aggravated offence if the victim is under 18; the offender, in committing the offence, subjects the victim to cruel, inhuman or degrading treatment; or the offender, in committing the offence engages in conduct that gives rise to a danger of death or serious harm to the victim or another person and is reckless as to that danger.

Schedule 5—Knowingly concerned

1.21 Schedule 5 of the Bill would insert knowingly concerned as a secondary form of criminal liability into section 11.2 of the Criminal Code. Section 11.2 already lists aids, abets, counsels and procures as grounds of secondary liability. This means that a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. It is irrelevant whether the principle offender is found guilty of the offence.

1.22 According to the Explanatory Memorandum, 'to be found liable for being knowingly concerned in the commission of an offence, an accused must be knowingly and intentionally involved in the offence, which requires an objective demonstration of connection or involvement'.[11] The prosecution must prove that this connection or involvement goes beyond mere knowledge or concern:

> For example, a father learning that his son has made arrangements to import an illegal substance is not guilty of being knowingly concerned in the commission of that illegal importation merely because of his knowledge of its occurrence (although the father may commit other criminal offences as a result of failing to notify police). There must be knowledge of the essential elements or facts of the offence on the part of the person alleged to be knowingly concerned in its commission, which they intentionally and knowingly acquired or involved themselves in.[12]

1.23 The minister noted that 'the proposed reintroduction of knowingly concerned is in direct response to the operational constraints identified during prosecutions since

10 Explanatory Memorandum, p. 20.

11 Explanatory Memorandum, p. 63.

12 Explanatory Memorandum, p. 63.

the introduction of the Code in 1995'.[13] The concept of knowingly concerned previously existed in the Crimes Act but was not included in the Criminal Code. At the time, members of the drafting committee 'did not consider the concept necessary, finding that it added little in substance to the other forms of derivative liability, and was too open ended and uncertain than was appropriate for a general provision in a model code'.[14]

1.24 However, the CDPP has advised the minister that:

> …the absence of knowingly concerned is a significant impediment to the effective investigation and prosecution of key individuals involved in serious criminal activity, especially those who have organised their participation so as to be disconnected from the most immediate physical aspects of the offence'.[15]

Changing technologies have allowed offenders to further disconnect from the physical elements of an offence.[16]

1.25 The minister explained that these amendments would allow the CDPP to bring charges that more accurately reflect an accused's involvement in a crime and result in less complex trials and jury instructions. In particular, the amendments would result in the prosecution no longer having to:

- establish a relationship between the accused and a principal offender to prove that the accused jointly commissioned an offence, conspired with, aided, abetted, counselled or procured the principal offender;
- prove that the conduct occurred at a particular point in time, that is, prior to the commission of the offence, for counsel and procure, or during it, for aid and abet; and/or
- adduce and rely upon evidence of co-offenders.[17]

Schedule 6—Penalties for firearm trafficking offences

1.26 Schedule 6 of the Bill would introduce a mandatory minimum five-year term of imprisonment for the existing offences of trafficking firearms and firearm parts within Australia (Division 360 of the Criminal Code) and for the recently introduced offences of trafficking firearms into and out of Australia (Division 361 of the Criminal Code).

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13 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 330.

14 Explanatory Memorandum, p. 61.

15 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 330.

16 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 330.

17 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 331.

1.27 The provisions in Division 361 were introduced through the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014 (the Psychoactive Substances Bill).[18] The committee conducted an inquiry into the Psychoactive Substances Bill and tabled its report in September 2014.[19] The committee ultimately recommended that the provisions be passed without amendment though also recommended that the government:

> …amend the Explanatory Memorandum to make clear that it is intended that: sentencing discretion should be left unaffected in respect of the non-parole period; in appropriate cases there may be significant differences between the non-parole period and the head sentence; and that the mandatory minimum is not intended to be used as a sentencing guidepost (where the minimum penalty is appropriate for 'the least serious category of offending').[20]

1.28 The provisions relating to mandatory minimum sentences were removed from the Bill before it passed the Senate. The government has chosen to reintroduce these provisions to uphold its election commitment to 'implement tougher penalties for gun-related crime'.[21]

1.29 As with the amendments contained in the Psychoactive Substances Bill, Schedule 6 of this Bill would introduce some safeguards. Mandatory minimum penalties would not apply to offenders under the age of 18 and the Bill would not introduce a prescribed non-parole period. As a result of the recommendation made by the committee, the Explanatory Memorandum expressly states that 'the mandatory minimum sentence is not intended as a guide to the non-parole period, which in some cases may differ significantly from the head sentence'.[22]

Schedule 7—Sentencing and parole

1.30 Schedule 7 of the Bill would make a number of amendments to the sentencing and parole provisions set out in the Crimes Act. In particular, Part 4 would ensure that only non-parole periods (rather than recognizance release orders) could be fixed for sentences exceeding three years.

1.31 The Explanatory Memorandum states how these amendments would operate:

> The amendments require that only non-parole orders (not recognizance release orders) can be fixed for sentences that exceed three years. If a court

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18 See the Bill's homepage for further information: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5323

19 See the committee report for further information: Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures)*, September 2014.

20 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures)*, September 2014, p. 26.

21 The Hon Michael Keenan MP, *House of Representatives Hansard*, 19 March 2015, p. 2909.

22 Explanatory Memorandum, p. 65.

> makes a recognizance release order in relation to a sentence that exceeds three years' imprisonment, then the offender is automatically released after serving the period of imprisonment that is specified in the order. If a court fixes a non-parole period in relation to a sentence that exceeds three years' imprisonment, then release is discretionary and depends on an assessment by the Attorney-General, or a delegate, of matters relevant to the making or refusal to make a parole order.[23]

1.32 In its submission, the LCA explained the difference between non-parole orders and recognizance release orders, stating that:

> The nature of a non-parole period order and a recognizance release order are fundamentally different in an important respect. The former is one pre-condition to release, that the release decision subsequently being made by a different decision maker based on different factors and subject to limited methods of review. In contrast, the recognizance release order, while still imposing conditions on release, is an immediate sentencing solution decided by the sentencing judge as appropriate having regard to all the circumstances and evidence at the time of sentencing.[24]

Schedule 9— Information sharing arrangements

1.33 The provisions in Schedule 9 of the Bill would amend the Crimes Act to allow for information to be shared between the Attorney-General's Department and relevant third party agencies. The aim of these measures is to improve the decision-making ability of the Attorney-General in relation to matters such as parole and prisoner review.[25]

1.34 Item 1 of Schedule 9 would insert Division 9A into the Crimes Act, which sets out the new provisions on information-sharing. Item 1 would repeal and replace section 20BZ, which lists the relevant definitions for 'authorised officer' and 'relevant person'. The definition of relevant person would provide a non-exhaustive list of agencies which would be subject to the information-sharing provisions. Applying the provisions, agencies would be required to respond to a request by the Attorney-General's Department for information 'despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten)'.[26]

1.35 The Explanatory Memorandum notes that while these provisions would engage the right to privacy of offenders, they would be proportional as they would 'only allow the authorised person to seek or provide information for the purposes of making informed decisions and for the proper administration of criminal justice'.[27]

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23 Explanatory Memorandum, p. 29.

24 Law Council of Australia, *Submission 10*, p. 20.

25 Explanatory Memorandum, p. 31.

26 NSW Director of Public Prosecutions, *Submission 9*, p. 1.

27 Explanatory Memorandum, p. 32.

Schedule 10—Anti-money laundering and counter-terrorism financing amendments

1.36 Schedule 10 of the Bill would amend the *Anti-Money-Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) to broaden the operational and enforcement powers of the Australian Transaction Reports and Analysis Centre (AUSTRAC). In particular, item 3 of Schedule 10 of the Bill would repeal and replace paragraphs 169(2)(c) and (d) of the AML/CTF Act to 'widen the circumstances in which the protection of the privilege against self-incrimination is removed'.[28]

1.37 The Explanatory Memorandum explains that currently subsection 169(1) of the AML/CTF Act provides that a person is not excused from giving information or producing a document under section 167 on the grounds that compliance might be incriminating.[29] However, under subsection 169(2), such disclosed information cannot be used as evidence against the person who disclosed that information, whether directly or indirectly (a 'use' immunity and 'derivative use' immunity), except by way of civil proceedings instituted under the POC Act that relate to the AML/CTF Act; prosecutions for an offence against sections 136 or 137 or subsection 167(3) of the AML/CTF Act; or prosecutions for an offence against subparagraphs 137.1 or 137.2 of the Criminal Code as they relate to Part 14 of the AML/CTF Act.[30]

1.38 The amendments set out in Schedule 10 would widen the abrogation of privilege by adding to the types of proceedings for which compellable information received from a person under AUSTRAC's powers may be used against that person. The LCA notes that:

> …information that a person is compelled to provide subject to coercive information gathering powers will be able to be used against that person in a broader range of civil and criminal proceedings including the offences contained at Part 5.3 terrorism and Part 10.2 Money Laundering.[31]

1.39 The Explanatory Memorandum states that this 'limited broadening of the exceptions represents a further abrogation of the privilege against self-incrimination' but is reasonable, necessary and proportionate due to the narrow scope of the amendments and the legitimate public interest.[32]

Reports of other committees

1.40 The Senate Standing Committee for the Scrutiny of Bills examined the Bill in *Alert Digest No. 4 of 2015*. The committee drew senators' attention to Schedules 1, 4, 5, 6, 10, 13 and 14 of the Bill.[33]

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28 Law Council of Australia, *Supplementary Submission 1*, p. 1.

29 Explanatory Memorandum, p. 34.

30 Explanatory Memorandum, p. 34.

31 Law Council of Australia, *Supplementary Submission*, p. 1.

32 Explanatory Memorandum, p. 34.

33 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 4 of 2015*, 25 March 2015, pp 4–15.

1.41 The Parliamentary Joint Committee on Human Rights examined the Bill in its *Twenty-second Report of the 44th Parliament*. The committee considered that the amendments proposed in Schedule 6 of the Bill were 'likely to be incompatible with the right to a fair trial and the right not to be arbitrarily detained' and raised concerns about the amendments proposed in Schedule 10 of the Bill.[34]

34 Parliamentary Joint Committee on Human Rights, *Twenty-second Report of the 44th Parliament*, 13 May 2015, pp 35-41.