Chapter Two

Key issues

2.1 The committee received 16 submissions, which primarily focused on the proposed amendments in Schedules 1, 4, 5, 6, 9 and 10 of the Bill. A discussion of the various issues raised by submitters with respect to each of these schedules is set out below.

Schedule 1—Serious drug offences

2.2 As discussed in chapter 1, the proposed amendments in Schedule 1 of the Bill would substantially alter the operation of the serious drug and precursor offences in Part 9.1 of the Criminal Code.

2.3 Submitters to the inquiry expressed concerns about the introduction of these amendments. The Australian Drug Law Reform Initiative (ADLaRI) argued that the introduction of recklessness as the fault element for import/export offences 'represents a significant departure from traditional criminal law principles'.[1]

2.4 While the ADLaRI acknowledge that the current provisions have resulted in some disparities, especially in situations where law enforcement authorities have substituted the prohibited substance with a fake substance, it took the view that these inconsistencies do not warrant changing the fault element of the offence to recklessness.[2] At the public hearing, Ms Courtney Young explained the significance behind the fault element being either intention or knowledge:

> Typically an attempt charge…proceeds because for some reason, either police intervention or otherwise, the physical actions to make up that crime have not been completed and therefore on that basis, because the physical acts have not been completed, the law has traditionally required that there be a high level or a full *mens rea* to compensate for the fact that the person has not committed all the necessary acts. We refer to the *Stonehouse* case—there are many cases going back a long time to demonstrate that if you are going to move away from the principal that a person is not guilty until they commit all the acts with the corresponding mental state for those acts, then there need to be some protections in place, so requiring a full *mens rea* of intention is that protection for the attempt defence. It really is important in any circumstance where that is going to be watered down that we need to consider whether there is a justifiable reason for it.[3]

2.5 The Law Council of Australia (LCA) shared a similar view:

> …it is not justifiable to convict a person of "attempt" where the item was in fact not an illicit drug and he or she did not believe it was an illicit drug,

1 Australian Drug Law Reform Initiative, *Submission 2*, p. 2.

2 Australian Drug Law Reform Initiative, *Submission 2*, pp 1–2.

3 Ms Courtney Young, Member, Australian Drug Law Reform Initiative, *Committee Hansard*, 20 May 2015, p. 13.

> even if aware that…it might be. These are very serious offences with very heavy penalties and the general rules of criminal liability under both common law and the Griffith Codes should continue to apply.[4]

2.6 The ADLaRI also argued that the proposal to remove the intent to manufacture element from border-controlled precursor offences, combined with the proposed amendments in Schedule 5 of the Bill, would 'widen the expanse of liability too far'.[5]

2.7 Liberty Victoria submitted 'that if a person is to be charged with importation of a precursor…it is reasonable for the prosecution to have to prove that the accused person intended that the precursor would be used to manufacture a controlled drug'.[6] They noted that these changes may result in individuals being exposed to serious penalties for comparatively low-level criminal conduct:

> You have things like ephedrine being included, and undoubtedly some of these substances get used in all sorts of weird and wonderful contexts such as the racing field. Sometimes they are used in horseracing, for example. That is serious but perhaps not of the same level of seriousness as manufacturing drugs like amphetamine, or ice. Given how severe the penalties are, with penalties up to 25 years for commercial quantities and so on, it is important that in order to be captured within that penalty regime they should be part of the illegal trafficking and importation field relating to drugs of dependence for human consumption.[7]

2.8 The LCA proposed that the Criminal Code instead be amended to allow for the CDPP 'to rely on the presumption in section 307.14 for the offences in sections 307.11 to 307.13 where there is an extension of criminal liability under Part 2.4 of the Criminal Code'.[8] Alternatively, the LCA suggested that the fault elements in sections 307.11 to 307.13 be broadened.[9] Liberty Victoria agreed with these proposals, noting that to go any further would be unnecessary.[10]

2.9 The Commonwealth Director of Public Prosecutions (CDPP) assured the committee that these amendments, as well as the proposed amendments in Schedule 5 of the Bill, are required to better target Australia's illicit drug market:

> …our stance is that if those proposals were adopted it would make a significant difference to law enforcement resourcing and outcomes, with a

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

5 Ms Courtney Young, Member, Australian Drug Law Reform Initiative, *Committee Hansard*, 20 May 2015, p. 10.

6 Liberty Victoria, *Submission 11*, p. 3.

7 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, p. 13.

8 Law Council of Australia, *Submission 10*, p. 8.

9 Law Council of Australia, *Submission 10*, p. 8.

10 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, p. 13.

particular impact on organised criminal activity, in particular within the serious ice problem confronting our community. Our view is that it will do so without any loss of fairness or any other adverse, in the sense of being unfair, outcomes.[11]

2.10 The Explanatory Memorandum explained:

> …in prosecutions for attempted offences against Part 9.1, it has been very difficult to show that a person had actual knowledge that his or her actions involved a controlled or border controlled substance, unless the person has made a direct admission. These difficulties are particularly pronounced where individuals are part of a larger operation and who deliberately operate with limited knowledge about how their actions fit into the broader criminal enterprise. This has meant that offenders who are involved in the trafficking and importation of illicit drugs and their precursors have been able to escape liability for attempted offences against Part 9.1, rather than facing penalties commensurate with the gravity of their conduct.
>
> Prosecutions for serious drug and precursor offences may also be affected by the use of specific law enforcement methodologies. For example, the use of a controlled operation in an investigation may make it impossible to charge the person with a primary offence against Part 9.1 on the basis that the person cannot technically complete the offence. The person must therefore be charged with an attempt to commit an offence against Part 9.1, and the prosecution must prove the person's knowledge or intention, rather than the fact that he or she was reckless.[12]

2.11 At the public hearing, the CDPP clarified the need for the introduction of recklessness as the fault element, by stating:

> this amendment…is directed to the longstanding reality that the AFP avoid risk to the community by making 100 per cent substitution of drugs before allowing the consignment to continue as though that had not occurred. In the past, at least, some of the drugs remained—sometimes all of the drugs—which was discontinued by the AFP because of that risk. Because of that police intervention, the subsequent dealing with the consignment will not constitute a substantive offence because there are no longer any drugs there. This has resulted in an anomalous and unfair situation whereby the courier caught with the drugs has a fault element for the offending of "recklessness" as to what the substance is, while the recipient of the substituted consignment—be it obtained from a courier, from a shipping container or from a post office—who must be charged with "attempt to possess", solely because of the substitution, has the much higher fault element of "intention" or "knowledge". There is no material difference

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11 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, p. 27.

12 Explanatory Memorandum, p. 15.

> between a person bringing drugs into the country and a person collecting drugs at the next stage.[13]

2.12 The CDPP also provided justification for the removal of the intent to manufacture element, noting that the rationale for retaining this amendment is no longer justified due to the marked increase in border controlled precursors and the organised nature of these importations using technology.[14]

2.13 The Explanatory Memorandum observed that these provisions have not functioned as intended:

> Even with the presumption, the CDPP has faced formidable difficulties in prosecuting offenders for importing precursor chemicals. These difficulties are particularly pronounced where individuals are part of a larger operation and who deliberately operate with limited knowledge about how their actions fit into the broader criminal enterprise. In these circumstances, it is very difficult to prove the intention or belief of the persons involved in undertaking discrete parts of the importation, even where each person knew or believed they were involved in some form of illicit activity.[15]

Schedule 4—Forced marriage

2.14 Submitters to the inquiry were overwhelmingly supportive of the proposed amendments to strengthen the forced marriage offences in the Criminal Code.

2.15 The Australian Human Rights Commission (AHRC) expressed its support for the proposed amendment to expand the definition of forced marriage, noting that:

> The commission agrees that the amendments would increase the protection against forced marriage for children and persons with disabilities who do not have the capacity to provide a free and full consent to marriage. There were reports earlier this week that the Australian Federal Police is currently investigating 34 cases where allegations of forced marriage have been raised. Twenty-nine of these cases involve people under the age of 18—and that underpins why we think this is an important amendment.[16]

2.16 The LCA was also very supportive of the change to the definition of forced marriage though noted that some of its constituent bodies had raised concerns about the increase in penalties for individuals convicted of forced marriage offences.[17] Dr David Neal SC, on behalf of the LCA, provided some suggestions as to how the amendments could be improved:

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13 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, p. 33.

14 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, pp 33–34.

15 Explanatory Memorandum, p. 16.

16 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 18.

17 Law Council of Australia, *Submission 10*, pp 14–15.

> We support the amendments, but there were two things that we suggested in addition. One was education, in relation to these things, and the other was the one that you mentioned: the review of related underage sex offences to make sure that all of these line up. On a first reading it does appear to me that the reverse onus of proof in this legislation is aligned with, for instance, the similar underage sex provisions in the Victorian legislation and I think in the other states. It was just that we thought there ought to be a check to make sure that for these offences, which are analogous in many ways with underage sex offences and may involve prosecutions both for this offence and for those offences, there is a level of consistency across that suite of offences.[18]

2.17 In its submission, the LCA expanded on what such a review would encompass:

> …non-consensual sexual intercourse and other related offences may accompany an offence of forced marriage in many cases…it may be prudent to give consideration to any potential amendments that may be needed in regards to the framing of non-consensual sex and other offences that may accompany forced marriage.[19]

2.18 The LCA also proposed 'that consideration be given to criminalising the procuring of an underage marriage, which would not need to rely on a presumption that a person under the age of 16 has been unable to consent to a marriage'.[20]

2.19 Liberty Victoria, while supportive of the proposed change to the definition of forced marriage, raised concerns about the creation of a reverse burden of proof.[21] They noted that the reverse onus provisions may give rise to a number of issues:

> Liberty Victoria maintains concerns about reverse onus provisions, in particular, that the right to silence cuts away at the requirement for the prosecution to prove guilt by an effect of casting an onus on the accused and forcing the accused into the witness box or to give evidence in circumstances where they have a right to silence. That may be problematic if it is a joint trial where there are other charges as well, because if they have to go into the witness box to give their defence about the circumstances of the marriage and there are a number of other charges as well then they might have to be severed because of the potential unfairness of the reverse onus provision.
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> In addition, there is the problem that they may need to perhaps call the child or other members of the child's family to produce the relevant evidence and, in doing so, create more problems than it solves.[22]

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18 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 9.

19 Law Council of Australia, *Submission 10*, p. 15.

20 Law Council of Australia, *Submission 10*, p. 15.

21 Liberty Victoria, *Submission 11*, pp 11–12.

2.20 The minister has previously provided detailed justification for the introduction of these amendments:

> The importance of these amendments is illustrated by a recent matter investigated by the Australian Federal Police and referred to the Commonwealth Director of Public Prosecutions…for consideration. The matter involved a 12 year old girl who swore on oath that she fully consented to her marriage to a 26 year old man, which had been arranged by her family. The girl presented as articulate, confident and well-educated, and was adamant that she entered into the marriage of her own volition notwithstanding her age. The [CDPP] was unable to find anyone from within the girl's family or community prepared to attest to the ceremony, and ultimately determined not to prosecute the matter for forced marriage offences as there were no reasonable prospects of success.
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> With a presumption that conferred only an evidential burden, in this case example the girl's 'husband' and relatives could have easily pointed to evidence of her apparent maturity. With the evidential burden discharged and without a witness that knew the girl, it would be extremely difficult for the COPP to prove beyond reasonable doubt that she was not capable of understanding the nature and effect of a marriage ceremony.[23]

2.21 The Explanatory Memorandum argues that these amendments are necessary to 'align the forced marriage offences with the most serious slavery-related facilitation offence of deceptive recruiting for labour or services'.[24]

2.22 The Attorney-General's Department (department) noted the suggestions put forward by submitters regarding the need to increase community awareness in the area of forced marriage.[25] The department advised the committee about a number of education and awareness raising initiatives the government has undertaken. These have included the launch of the Forced Marriage Community Pack; workshops on forced marriage issues for front-line workers in both government and non-government organisations; and programs developed by Anti-slavery Australia, the Australian Muslim Women's Centre for Human Rights and the Australian Catholic Religious Against Trafficking in Humans.[26]

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22 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, p. 11.

23 Senate Standing Committee for the Scrutiny of Bills, *Report No. 5 of 2015*, 13 May 2015, p. 327.

24 Explanatory Memorandum, p. 23.

25 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 27.

26 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 27.

2.23 The department also informed the committee that since 2013 'there have been 42 referrals of forced marriage to the Australian Federal Police, of which they have investigated 34, with the youngest girl aged 12'.[27]

Schedule 5—Knowingly concerned

2.24 Submitters were most concerned with the provisions in Schedule 5 which, if passed, would insert knowingly concerned as a secondary form of criminal liability into section 11.2 of the Criminal Code. As discussed in chapter 1, section 11.2 already lists aids, abets, counsels and procures as grounds of secondary liability.

2.25 The LCA strongly opposed the proposed amendments on a number of grounds. It noted that while the concept of knowingly concerned was originally included in the previous Crimes Act, it has since been rejected:

> …the proposal to introduce the concept of 'knowingly concerned' was considered by the Gibbs committee in the late 1980s and in some detail by the Model Criminal Code Committee. With very few exceptions, none of the jurisdictions which presently have the provisions already found in chapter 2—namely that the test of the liability for these cases is whether that person has aided, abetted, counselled or procured an offence—was the test that was settled on. The concept of 'knowingly concerned' was rejected on the basis that it was too vague.[28]

2.26 The LCA submitted that the Model Criminal Code Officer's Committee (MCCOC) also rejected proposals to include knowingly concerned in 2008 and again in 2012.[29] The LCA compared the extensive consultation process that was undertaken by the MCCOC with the lack of consultation that has occurred on the proposed amendments.[30]

2.27 The LCA noted that the concept of knowingly concerned currently only exists in the Australian Capital Territory and that its introduction into the Criminal Code may lead to confusion for a jury where an accused has been charged with both federal and state offences:

> …the ambition to have uniform criminal laws across the country is a very valuable one for reasons of principle—the same standards of liability should extend across the nation—but it also introduces complexities into trials that involve both state offences and Commonwealth offences, where there are different tests of liability for the same offences. If the test for aiding and abetting operates in a trial for some state offences and we have knowingly concerned for other states, the complexity that that introduces to

27 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 27.

28 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, pp 1–2.

29 Law Council of Australia, *Supplementary Submission 2*, p. 1.

30 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, pp 1–2.

> trials involving lay members of the jury is a very significant problem in the administration of justice—both for the judges who direct the juries and for the juries themselves, who have to cope with fairly complex concepts in an already difficult environment.[31]

2.28 The LCA also raised concerns about how the proposed amendments have been drafted, arguing that the proposed physical and fault elements could not fit well within Chapter 2 of the Code.[32]

2.29 The LCA noted that the physical element for the offence of knowingly concerned would not actually require the accused to be knowingly concerned in an offence committed by another person, as suggested by the Bill.[33] As 'knowingly' is a mental state as opposed to a physical act, the physical element would actually involve being 'concerned' in an offence committed by another person.[34] The LCA submitted that the term 'concerned' was vague and uncertain and that 'there is nothing to explain why or what it adds to a simple term like "aid"'.[35]

2.30 The LCA also raised concerns with how the Bill has defined the fault element for the offence of knowingly concerned:

> There is also a conceptual problem. Under paragraph 11.2(3)(a) the prosecution would have to prove that the defendant intended to be knowingly concerned. While an intent to aid, abet, counsel or procure some offence has some sensible meaning, an intent to be "knowingly concerned" in it introduces a confusion between the concepts of "intention" and "knowledge" which are separate concepts under the Criminal Code and in common usage. Paragraph 11.2(3)(a) would require the prosecution to prove that the defendant "intended" that his or her conduct would result in the person (i.e. the defendant him or herself) being knowingly concerned in the commission of an offence. This does not appear to make sense. The general principles of criminal liability are difficult enough—for lawyers and juries alike—without additional confusions.[36]

2.31 At the public hearing, Dr Neal SC, appearing on behalf of the LCA, discussed 'the dangers of framing offences in very nebulous terms'.[37] He referred to:

> …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

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31 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 2.

32 Law Council of Australia, *Supplementary Submission 2*, pp 6–7.

33 Law Council of Australia, *Supplementary Submission 2*, p. 6.

34 Law Council of Australia, *Supplementary Submission 2*, p. 6.

35 Law Council of Australia, *Supplementary Submission 2*, p. 7.

36 Law Council of Australia, *Submission 10*, p. 13.

37 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 7.

> would be that it was impermissible (which was the ruling)—amounted to an act of preparation. He was sentenced to 18 years imprisonment.[38]

2.32 The LCA later submitted that:

> …this offence was designed to capture lone wolf offenders where a 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.[39]

2.33 Finally, the LCA reasoned that the department had failed to justify the need to extend criminal liability for all offences in the Code:

> The case for this reform has particularly identified drug and drug importation offences, insider trading drug offences, and competition law offences. However, the offences specific to these areas already address the issues identified as supporting change.[40]

2.34 The LCA recommended that, where there is a need to extend criminal complicity, the proposed amendments should be specific to that offence only.[41]

2.35 The AHRC took a similar view, noting that knowingly concerned has been included in other Commonwealth legislation only where the need arose:

> As described by the Commonwealth Director of Public Prosecutions in evidence given to the Committee, the concept of being "knowingly concerned" is currently part of a number of Commonwealth Acts dealing with both civil contraventions and criminal offences (one example of a current criminal provision at the Commonwealth level is s 79 of the *Competition and Consumer Act 2010* (Cth) which deals with criminal liability for cartel conduct, although the Commission understands that there have not been any prosecutions under this section to date).[42]

2.36 The AHRC stated that 'it is difficult to anticipate the impact of extending this form of liability to all offences'.[43]

2.37 Liberty Victoria discussed a number of examples that may lead to a person being considered to be knowingly concerned, including: a journalist going undercover; family members present when someone commits euthanasia; parents of a

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38 Law Council of Australia, *Supplementary Submission 2*, p. 7.

39 Law Council of Australia, *Supplementary Submission 2*, pp 7–8.

40 Law Council of Australia, *Supplementary Submission 2*, p. 6.

41 Law Council of Australia, *Supplementary Submission 2*, p. 6.

42 Australian Human Rights Commission, *Supplementary Submission 1*, p. 4.

43 Australian Human Rights Commission, *Supplementary Submission 1*, p. 4.

child engaging in terrorism offences; watching an online video or a YouTube clip of a particular thing as it is happening; or downloading information from the internet.[44]

2.38 At the public hearing, Ms Jane Dixon QC, on behalf of Liberty Victoria, discussed how the introduction of knowingly concerned, combined with the amendments proposed in Schedule 6 of the Bill, might have a particularly harsh outcome:

> …for example, if a husband and wife are travelling together and the husband is a mad keen sporting shooter and he is taking his guns over to New Zealand, for example—stupidly, but perhaps not with any really dangerous plans—and his wife fills out the card. She is perhaps knowingly concerned: even though she is only very peripherally involved in what he does, she could end up, because of the extension of 'knowingly concerned' and the further potential provision of mandatory sentencing, in prison for a substantial period of time. This is the problem: there is a double whammy there, and that is why we oppose what we say are unnecessary changes when the current code is quite comprehensive.[45]

2.39 Ms Dixon also argued that these amendments may result in members of the public not coming forward with information regarding potential threats:

> …with some offences—for example, people being suspicious that a member of their family or a housemate might be in contact with someone from ISIS overseas, and you are not exactly sure; you might want to go and sneak into their bedroom and start looking at some material on their computer, and then perhaps you might intend to question them about it, find out a bit more about it and what is actually going on. Now parents, family members, and housemates might feel very reluctant to go into the bedroom and attempt that kind of search or investigation—because of the risk of being knowingly concerned by that preliminary inquiry. So it is easier to take a blind-eye approach, "I will just turn away from it, not get involved, be passive".[46]

2.40 The CDPP addressed a number of these concerns in its submission. It submitted that the concept of knowingly concerned was included in the Crimes Act when it was first enacted in 1914:

> 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". To prove

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44 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, pp 12–13.

45 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, p. 12.

46 Ms Jane Dixon QC, Immediate past president, Liberty Victoria, *Committee Hansard*, 20 May 2015, p. 15.

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.[47]

2.41 The CDPP argued that the concept of knowingly concerned was not at all vague and in some ways more straight-forward than other forms of secondary liability:

> 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.[48]

2.42 At the public hearing, the CDPP informed the committee that the absence of a provision dealing with knowingly concerned has resulted in 'real and substantial gaps in federal criminal law':

> The first gap is for persons who are not hands on for offending and were only involved by being in fact knowingly concerned in the offence committed by others. This gap is notable in drug importing but also for fraud and commercial offences such as insider trading. It has significant potential application to organised child exploitation rings and would greatly assist also with organised commercial online sexual offending where the person sought to be prosecuted is not the person actually directly dealing with, for example, the child pornography but is knowingly concerned in that dealing. "Knowingly concerned" catches arm's length financiers and organisers who cannot be shown to have committed the principal offence and are not caught at all or are poorly caught by the concepts of "aid, abet, counsel or procure". So that is one broad category.
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> The second category—and it is probably numerically the greater category—is what I would call the next-in-line offences such as those who collect drugs or receive delivery of drugs immediately after importation. That is a category that is very common and one that is often not captured by "aid, abet, counsel or procure". They have not committed the before offence of aiding or abetting the principal offence—that is the counselling or procuring the principal offence. They have not committed the counselling or procuring, nor have they committed the…offence of aiding or abetting. They are next in line. They are the recipients after, particularly, the importation has taken place. They cannot be shown—or at least it is very difficult to show but often not all—to have helped or encouraged or induced the principal offender to commit the offence, which is what the language of the High Court in *Giorgianni* deals with in terms of aid, abet, counsel or procure. But they are involved in acts that implicate or involve them in the

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47 Commonwealth Director of Public Prosecutions, *Submission 12*, p. 6.

48 Commonwealth Director of Public Prosecutions, *Submission 12*, p. 6.

> offence committed by others. There is the practical connection. Mere knowledge is not enough and the full test in *Tannous* can apply.[49]

2.43 The CDPP advised that currently the only way to address these gaps is to pursue conspiracy charges, which he described as a 'most undesirable' alternative:

> It is harder and much more expensive to investigate and it is harder and much more expensive to prosecute, because the focus must necessarily be on the entire group and the entirety of the criminal enterprise. You have to show the existence of the agreement, which constitutes the conspiracy, and you have to show participation in it before the co-conspirators rule can work.
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> Importantly, conspiracy is also harsher on the individual defendant, because they are fixed with responsibility for what the entire group has done rather than for what they alone have done, including on sentence, and sentences in those circumstances can be harsher.[50]

2.44 The CDPP submitted that these types of charges are detrimental to the justice system more generally, as they '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 guilty...'.[51]

2.45 The CDPP also informed the committee of a number of other Commonwealth Acts that have already introduced the concept of knowingly concerned, either as a criminal offence or a civil penalty provision:

> There is section 79 of the *Competition and Consumer Act*, which was the *Trade Practices Act*; section 48 of the *Building and Construction Industry Improvement Act 2005*, which I think has now been renamed as the *Fair Work (Building Industry) Act 2012*; section 45 of the *Criminal Code 2002* in the ACT; section 79 of the *Corporations Act 2001*, which deals with civil matters not criminal matters; section 484 of the *Environment Protection and Biodiversity Conservation Act 1999*; section 94X of the *Income Tax Assessment Act 1936*; section 126-264 of *the Income Tax Assessment Act 1997*; and three different sections of the *Migration Act 1958*—140ZC, 140ZF and 255AO. There was a string of other acts that also had it, but they seem to be the core ones that were worth raising for the committee's knowledge and attention.[52]

2.46 The department rejected concerns raised by submitters over whether the amendments would result in confusion in matters involving both state and federal offences:

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49 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, pp 29–30.

50 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, p. 29.

51 Commonwealth Director of Public Prosecutions, *Submission 12*, pp 6–7.

52 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, p. 34.

> The reality of the model code process is that, notwithstanding that it was a long-running process, only the Commonwealth, the Northern Territory and the ACT have adopted the model code, and even chapters 1 and 2 of the model code, which set out the general principles of criminal responsibility that were endorsed by Standing Council of Attorneys-General more than a decade ago, have not been enacted by the majority of jurisdictions. In the meantime, the reality is that the Commonwealth and operational agencies including the DPP need to be able to respond to the day-to-day challenges that the director has outlined.[53]

Schedule 6—Penalties for firearm trafficking offences

2.47 Generally, submitters were opposed to the introduction of these amendments.

2.48 While acknowledging the 'potential for serious social harms associated with firearms trafficking' and the safeguards included in the Bill, the LCA submitted that it 'unconditionally opposes mandatory sentencing as a penalty for any criminal offence'.[54] The LCA cited a number of grounds, including:

- restrictions on judicial discretion and inconsistency with rule of law principles;
- the potential for disproportionate sentences;
- the inability of the judge to take into account the particular circumstances of the case;
- potentially increasing the likelihood of reoffending;
- undermining the community's confidence in the judiciary and the criminal justice system as a whole; and
- potentially unjust outcomes for vulnerable groups.[55]

2.49 The AHRC raised similar concerns, noting that mandatory sentencing laws 'run counter to the fundamental principle that punishment should fit the crime'.[56] The AHRC also argued that the department has failed to justify the need for mandatory minimum penalties for firearm trafficking offences:

> The Attorney-General's Department has confirmed that it is not aware of any cases where sentences for firearms trafficking have been insufficient as a matter of fact or as a matter of their observation. There does not seem to be any demonstrated need for mandatory minimums.[57]

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53 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 35.

54 Law Council of Australia, *Submission 10*, p. 16.

55 Law Council of Australia, *Submission 10*, pp 16–17.

56 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 18.

57 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 18.

2.50 The AHRC included in its submission examples of where Canadian courts 'have found mandatory minimum sentences for certain firearm offences to be unconstitutional because they have the potential to produce grossly disproportionate outcomes'.[58]

2.51 Along with recommending that the government not introduce a minimum head sentence, the AHRC also recommended that the government repeal mandatory minimum sentences for those convicted of people smuggling offences noting that this is the only other offence 'in Commonwealth law that sets a mandatory minimum custodial sentence'.[59]

2.52 The AHRC argued that these penalties had originally been applied unjustly to a boat crew, who had limited culpability for the offence:

> ...almost everybody charged with people-smuggling offences were charged with an aggravated form of the offence. And that aggravated form of the offence applied to circumstances where there were more than five people on a boat coming to Australia. There was a basic offence that applied to bringing a person to Australia who did not have a lawful right to come. It was an aggravated form of the offence if there were five or more people on the boat. And the offence applied both to people who organised the venture and to people who facilitated the venture.
>
> Almost all of the people charged with that offence were facilitators. There were very few organisers charged. People charged with facilitating were typically crew members on a boat who had been paid a relatively small amount of money to steer the boat to Australia.[60]

2.53 The AHRC informed the committee that in 2012 the then Attorney-General issued a directive to the CDPP, pursuant to section 8 of the *Director of Public Prosecutions Act 1983*, 'not to prosecute first time offender, lower culpability crew under s 233C of the Migration Act and to consider prosecution under a lesser offence that does not attract a mandatory minimum penalty'.[61]

2.54 The Law Society of New South Wales submitted that the safeguards included in the Bill do not go far enough:

> The committee notes the suggestion in the Explanatory Memorandum that the mandatory minimum sentencing provisions are human rights compatible as the provisions do not apply to children, and that judicial discretion is preserved because there is no minimum non-parole period proposed [119–

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58 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 18.

59 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, pp 18-19.

60 Mr Graeme Edgerton, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 21.

61 Australian Human Rights Commission, *Submission 4*, p. 16.

> 124]. However…a mandatory minimum sentence by definition fetters judicial discretion.[62]

2.55 The Explanatory Memorandum explains the need for these amendments:

> There are clear and serious social and systemic harms associated with firearms trafficking, and the introduction of a mandatory minimum penalty of five years' imprisonment for offences under Division 360 and the new Division 361 reflect the gravity of supplying firearms and firearm parts to the illicit market. The entry of even a small number of illegal firearms into the Australian community can have a significant impact on the size of the illicit market, and, due to the imperishable nature of firearms, a firearm can remain within that market for many years. This provides a growing pool of firearms which can be accessed by groups who would use them to commit serious and violent crimes, such as murder. For example, in 2012, firearms were identified as being the type of weapon used in 25% of homicides in Australia (Australian crime: Facts and figures 2013, Australian Institute of Criminology). Failure to enforce harsh penalties on trafficking offenders could lead to increasing numbers of illegal firearms coming into the possession of organised crime groups who would use them to assist in the commission of serious crimes.[63]

2.56 The department informed the committee that 'there is strong support within law enforcement for stronger laws in relation to dealing with firearms due to the size of the illicit market and the concerns they have'.[64] The department noted that the introduction of mandatory minimum penalties would act as 'a strong deterrent against the illegal trafficking of firearms'.[65]

2.57 In respect of safeguards, the Explanatory Memorandum states that 'the mandatory minimum term of imprisonment will only apply if a person is convicted of an offence as a result of a fair trial in accordance with such procedures as are established by law'.[66] The Explanatory Memorandum clarifies that the amendments do not apply mandatory minimums to persons under the age of 18 and do not impose a minimum non-parole period on offenders.[67] These safeguards help preserve the court's discretion in sentencing and ensure that sentences imposed by the courts are proportionate.[68]

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62 The Law Society of New South Wales, *Submission 1*, p. 2.

63 Explanatory Memorandum, p. 26.

64 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 38.

65 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 37.

66 Explanatory Memorandum, p. 26.

67 Explanatory Memorandum, p. 26.

68 Explanatory Memorandum, p. 26.

Schedule 9—Information sharing arrangements

2.58 The amendments proposed in Schedule 9 of the Bill were not of concern to most submitters. However both the New South Wales Director of Public Prosecutions (NSW DPP) and the Victorian Director of Public Prosecutions (Victorian DPP) provided submissions raising concerns about the breadth of the proposed provisions.[69]

2.59 The Victorian DPP noted that:

> The information likely to be sought under the amendments potentially raises conflict with state law on questions of privacy and legislative restrictions on the sharing or reporting of certain types of information, especially in relation to victims of crime. Any potential conflict of laws could have an adverse effect decision making by the DPP or OPP.[70]

2.60 The Victorian DPP also argued that 'the DPP and OPP would not be the primary sources of the types of information likely to be sought in relation to the functions of the Attorney-General'.[71]

2.61 The NSW DPP stated that it remains to be seen how the provisions would operate in practice:

> It appears to me that in practice…any exchange of information between this agency and the Commonwealth, that each request should be considered on its merits and that the form and content of the information should be negotiable, not least of which to preserve orders made to protect an individual's safety or uphold legitimate claims of privilege.[72]

2.62 The NSW DPP also observed that the Explanatory Memorandum remains silent on the potential conflicts of laws when such a request for information would 'preclude a claim of legal professional privilege and compliance with non-publication orders'.[73]

2.63 The department reassured the committee that the Bill contains sufficient safeguards to protect personal privacy and legal professional privilege:

> ...I am satisfied that the bill as drafted does provide necessary protections and that, in the end, these decisions are about giving natural justice to offenders and ensuring that the decision makers have all of the necessary information in front of them so that there is no detriment to any of the decisions of parole boards in the case of the states or in the case of the Attorney-General's Department in making a decision.[74]

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69 NSW Director of Public Prosecutions, *Submission 9*; Victorian Director of Public Prosecutions, *Submission 8*.

70 Victorian Director of Public Prosecutions, *Submission 8*, pp 1–2.

71 Victorian Director of Public Prosecutions, *Submission 8*, p. 2.

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

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

74 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 39.

2.64 The department also informed the committee that every case would be considered on its merits:

> As you would appreciate, every federal offender has a completely different case to each other. Often the kind of information that we are after may be medical information—psychiatric reports et cetera—and it would be important for us to seek that information. But that is not just a blanket approach that we have; for other offenders, we are more interested in finding out the nature of their offence, the nature of the parole that they are actually considering and suchlike. Certainly, privacy is paramount in any of our dealings with our state and territory counterparts, so, without doubt, we do consider every case on its merits. With regard to the idea that a notice may be issued and may override legal professional privilege, we would consider that an order would only ever be issued where it has been put to us that, under the provisions, it is not possible to pass information over. In those cases it would be very unlikely that legal professional privileged information would need to be provided, unless of course there is a case where a prisoner themselves has concerns about their legal practitioner and they want that information passed over to us. Every case would be considered on its merits.[75]

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

2.65 Both the LCA and the AHRC raised concerns about the proposed amendments in Schedule 10 of the Bill. In particular, they were concerned with the proposed amendment to paragraphs 169(2)(c) and (d) of the *Anti-Money-Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) which would 'widen the circumstances in which the protection of the privilege against self-incrimination is removed'.[76]

2.66 In its submission, the AHRC explained how the privilege against self-incrimination operates:

> In its current form in Australia, the right to claim the privilege against self-incrimination in criminal law and against self-exposure to penalties in civil and administrative law is a "basic and substantive common law right" and entitles a natural person to refuse to answer any questions or produce any document if it would tend to incriminate them.[77]

2.67 The AHRC noted that while this privilege might be abrogated by statute, this could only occur where there was a legitimate aim and the abrogation proposed would be reasonable or proportionate to this aim.[78] The AHRC, while not having 'a

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75 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 39.

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

77 Australian Human Rights Commission, *Submission 4*, p. 95.

78 Australian Human Rights Commission, *Submission 4*, p. 96.

particularly defined and clear view' about the proposed amendments,[79] requested that the department provide further information about why there is a need for these amendments:

> The proposed amendments in the bill mean that a person could be required by AUSTRAC to give information and produce documents, and the privilege to self-incrimination would not apply in relation to civil proceedings instituted for any offence under the acts, or criminal proceedings for any offence under the act or any offence against the Criminal Code that relates to that act. So it is a significant extension of the current position that applies in relation to the Australian Crime Commission, ASIC and the ACCC. That, at least, needs to be explained we suggest. There is no explanation in the memorandum as to why the reduction of the privilege against self-incrimination is necessary and proportionate.[80]

2.68 The LCA agreed that the proposed amendment 'significantly further abrogates the common law privilege against self-incrimination', noting that the department had provided 'little or no justification or reasoning…to substantiate any need for the proposed amendment'.[81] The LCA also submitted that 'having regard [to] the very serious consequences for liability, insufficient consultation has been conducted'.[82]

2.69 At the public hearing, the LCA noted that the AML/CTF legislation was currently being reviewed and that the introduction of the proposed amendments seemed 'a very odd way to proceed':

> It would seem to us that a far better process…if there is going to be a specific review of that legislation, then changes as sweeping as these should be considered in the context of that legislation, and it should be fully articulated why this is necessary at this time. We see nothing of that in the explanatory material accompanying this bill.[83]

2.70 The department confirmed that a review of the AML/CTF Act was indeed being conducted by the department, in close cooperation with AUSTRAC.[84] The department advised that while there was no set time for the report to be delivered, it expected that it may be finalised by the middle of the year.[85]

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79 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 19.

80 Professor Gillian Triggs, President, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 19.

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

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

83 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 8.

84 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

85 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

2.71 The department explained to the committee the need for these amendments to be passed ahead of the review being finalised. AUSTRAC has two compulsory notice powers, one under section 169 of the AML/CTF Act (the subject of the proposed amendments) and one under section 202 of the AML/CTF Act.[86] Mr Jim Heard, on behalf of AUSTRAC, explained how these powers currently interact:

> The general intent of the amendment is to align the permitted use of material obtained under a 167 notice with the permitted use of material obtained under a section 202 notice. At present, there is an anomaly between the two. Section 202 can be used to obtain extensive information relating to transactions undertaken by a business that is regulated by AUSTRAC, which are known as reporting entities. However, section 167 can be used to obtain information that relates to the entity's compliance with mandatory requirements under the anti-money laundering and counter-terrorism financing regime.[87]

2.72 Mr Heard gave a case example of where this anomaly between the two notices has had a direct impact on AUSTRAC's supervision and regulatory activities:

> There was a large reporting entity. Intelligence and transaction information suggested that there was a considerable amount of illicit funds being transacted through this reporting entity. The clear difficulty for AUSTRAC was that it suggested that the reporting entity's anti-money laundering and counter-terrorism financing programs, policies, procedures and practices were deficient and were failing to detect and deal with this apparent illicit activity. The scale of the activity suggested that there may be a considerable problem there. AUSTRAC utilised a section 202 notice to obtain further information about the transactions that were regarded as suspicious. But the real questions from the regulatory perspective were what were the entity's internal systems, what was their staff training, why was it that they were failing to detect this sort of activity and why were they failing to deal with it? In order to find out those matters, we really needed to ask the entity to provide further documents and to answer questions. The only feasible method to do that was to issue a 167 notice. However, the restrictions that exist in section 169 prevent that material from being used in any civil proceedings under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.[88]

2.73 Due to the impediment caused by this anomaly, AUSTRAC therefore sought the proposed amendment in order 'to bring the usability of the material of the two notices into line'.[89]

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86 Mr Jim Heard, Acting General Counsel, Legal and Policy Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

87 Mr Jim Heard, Acting General Counsel, Legal and Policy Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

88 Mr Jim Heard, Acting General Counsel, Legal and Policy Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

89 Mr Jim Heard, Acting General Counsel, Legal and Policy Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, p. 36.

Committee comment

2.74 The committee is grateful for the number of detailed submissions it received, noting the length and complexity of the Bill. It has considered the concerns raised by submitters, particularly relating to Schedules 1, 5 and 6 of the Bill. While the committee understands that some of these provisions may have some impact on an individual's freedoms and liberties, the committee acknowledges that the government's first priority is to keep our nation safe.[90] Recent events, such the Martin Place siege, have deeply affected the community and demonstrate that stronger laws to protect the community are needed.

2.75 The committee also notes the findings of the Australian Crime Commission in its *Organised Crime in Australia 2015* report which demonstrate that 'organised criminal gangs represent an ongoing threat to this country' and are relying on new technologies to escape prosecution.[91] The law must keep pace with modern technology and the way in which criminals operate. The committee notes that the majority of provisions contained in the Bill have been drafted at the request of the CDPP. The committee agrees that the passage of the Bill would remove impediments currently faced by the CDPP when prosecuting offenders for serious crimes. The proposed amendments would ensure that offenders are no longer being charged with offences that do not reflect their true level of criminality. The committee is of the view that overall both the minister and the department have provided sufficient justification for these measures. The committee therefore recommends that the Bill be passed.

Recommendation 1

2.76 Subject to the following recommendation, the committee recommends that the Senate pass the Bill.

2.77 With regard to the proposed amendments to strengthen forced marriage offences, the committee agrees that these amendments would result in additional protection for children and persons with a disability who do not have the capacity to consent to marriage. The committee is persuaded by the evidence of the LCA that it would be beneficial for the government to conduct a review of other underage sex offences that may accompany a forced marriage offence.[92] This would ensure that where the prosecution brings charges for forced marriage and underage sex offences, the same onus of proof would apply to all charges.

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90 The Hon Michael Keenan MP, Minister for Justice and the Minister Assisting the Prime Minister on Counter-Terrorism, 'Organised crime remains a significant threat to Australia', Media release, 20 May 2015.

91 The Hon Michael Keenan MP, Minister for Justice and the Minister Assisting the Prime Minister on Counter-Terrorism, 'Organised crime remains a significant threat to Australia', Media release, 20 May 2015.

92 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 9.

Recommendation 2

2.78 The committee recommends that the Commonwealth and state and territory governments consider reviewing underage sex offences to ensure there is consistency with the federal offences of forced marriage.

2.79 In relation to the evidence provided regarding mandatory minimum sentences, the committee, while noting concerns raised by submitters, believes that the government has introduced sufficient safeguards to ensure that no injustices result. Further, as identified by the AHRC,[93] there is a safeguard afforded by section 8 of the *Director of Public Prosecutions Act 1983* which empowers the Attorney-General to issue directions or guidelines to the CDPP which 'relate to the circumstances in which the Director should institute or carry on prosecutions for offences'.[94] The committee is aware that past Attorney-Generals have issued section 8 directives in relation to the application of mandatory minimum sentencing.

2.80 The committee is concerned about the apparent lack of consultation between the government and stakeholders prior to the drafting of this Bill. The committee is of the view that, due to the technical nature of the amendments proposed in the Bill and the number of schedules, it would have been beneficial had the government engaged in a consultation process with stakeholders and state and territory DPPs. For example, evidence from the Attorney-General's Department that the amendments would be welcomed by its state and territory counterparts[95] was at odds with submissions from both the NSW DPP and Victorian DPP raising concerns over the amendments in schedule 9 of the Bill. The LCA also advised the committee that, whilst it had met with the department, it had not been consulted on the explicit amendments in the Bill.[96] The LCA noted that:

> …the size and the complexity of [the Bill] itself gives rise to a concern about whether certain aspects of the Bill have been properly considered or can be properly considered in the context of such a large Bill'.[97]

2.81 The committee believes there is value in the government consulting with relevant stakeholders during the development of proposed legislation. This is particularly so with technical amendments such as those in the Bill where the considerable expertise and practical experience of legal practitioners and specialist legal bodies could have assisted with identifying and resolving potential issues prior to the Bill's introduction and passage. The committee therefore welcomes the

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93 Mr Graeme Edgerton, Senior Lawyer, Australian Human Rights Commission, *Committee Hansard*, 20 May 2015, p. 21.

94 *Director of Public Prosecutions Act 1983*, paragraph 8(2)(a).

95 Ms Catherine Smith, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department, *Committee Hansard*, 20 May 2015, pp 38-39.

96 Dr Natasha Molt, Senior Policy Lawyer, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 5.

97 Dr David Neal SC, Member, Law Council of Australia, *Committee Hansard*, 20 May 2015, p. 1.

suggestion of the LCA that, in future, such consultation could be undertaken by the relevant department or the Law, Crime and Community Safety Council.

Senator the Hon Ian Macdonald
Chair