

Dissenting Report of the Australian Labor Party

1.1 While Labor Senators agree with the majority of the report, we have serious concerns about some of the proposed amendments and do not support the Bill being passed in its current form.

1.2 In particular, Labor is concerned about the insertion of 'knowingly concerned' as a secondary form of criminal liability and the introduction of mandatory minimum sentences for firearm trafficking offences. We note the strong opposition held by peak law organisations with regard to these amendments and lack of consultation that has occurred with respect to this Bill.

Introduction of knowingly concerned

1.3 The government has argued that the need has arisen to introduce the concept of knowingly concerned as a secondary form of liability into section 11.2 of the Criminal Code.

1.4 The ability to effectively prosecute alleged offences against Commonwealth law remains the critical objective of the Commonwealth Director of Public Prosecutions (CDPP). It is important that the CDPP have both the resources and powers to achieve this objective.

1.5 However, Labor Senators are not convinced that the provisions in Schedule 5 of the Bill support this objective. We note the evidence provided by the Law Council of Australia (LCA), who strongly oppose the introduction of knowingly concerned:

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.¹

1.6 Not only has the government failed to engage with stakeholders with regard to these amendments, it has also failed to justify the need for an additional form of secondary criminal liability to apply to all offences in the Criminal Code.

1.7 The government has highlighted particular categories of offences where the concept of knowingly concerned is required, including drug and drug importation offences and insider trading offences. However, all of the offences identified have already been drafted in a way that address the concerns raised without the need to include knowingly concerned.² We agree with the recommendation of the LCA that

1 Law Council of Australia, *Supplementary Submission 2*, p. 5.

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

where there is a need to extend criminal complicity, the proposed amendments should be specific to that offence only.³

1.8 Labor Senators are also concerned about the uncertainty surrounding the concept of knowingly concerned. We note the concerns raised by the LCA in relation to how the provisions have been drafted and the dangers arising out of 'vaguely defined laws'.⁴ We believe that the introduction of such a vague and open-ended concept as knowingly concerned is inconsistent with the fundamental principle of the rule of law, which requires that 'the Criminal Code should be precise enough to allow people to readily ascertain prohibited conduct'.⁵

Recommendation 1

1.9 Labor senators recommend that Schedule 5 of the Bill be removed.

Mandatory minimum sentences for firearm trafficking offences

1.10 The Australian Labor Party maintains its position that the introduction of mandatory minimum sentences for those convicted of firearm trafficking offences should be avoided. We note that these provisions have already been considered and rejected by Parliament and that the government has failed to justify the need for such provisions.

1.11 The committee received evidence from a number of submitters who strongly opposed the introduction of these amendments. For example, the LCA referred the committee to a number of unintended consequences of mandatory sentencing, which include 'undermining the community's confidence in the judiciary and the criminal justice system as a whole'.⁶ The Australian Human Rights Commission noted that these amendments give rise to the potential for injustices to occur and 'run counter to the fundamental principle that punishment should fit the crime'.⁷

1.12 We also note the concerns previously raised by state prosecutors, who believe that these provisions 'can lead to unjust results'⁸ and impose a significant burden on the justice system.⁹

1.13 Labor Senators believe that the government has failed to explain the need for mandatory sentencing provisions. We draw attention to the Attorney-General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which specifically stipulates that minimum penalties should be avoided.¹⁰ We also

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

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

5 Law Council of Australia, *Supplementary Submission 2*, p. 8.

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

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

8 Law Council of Australia, *Submission 10*, p. 18.

9 Law Council of Australia, *Submission 10*, p. 18.

10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement*

refer to evidence previously given by the Attorney-General's Department, where it stated that it was 'not aware of specific instances where sentences for the trafficking of firearms or firearm parts have been insufficient'.¹¹

1.14 While we note that the Attorney-General has the power to direct the CDPP to not prosecute an offender in certain circumstances, the government has given no indication that it would consider using this power when cases of injustice occur. Furthermore, the Attorney-General also can revoke an order at any point. We note that the current Attorney-General has already revoked an order introduced by the previous Attorney-General in relation to people smuggling offences.¹²

1.15 Labor Senators are of the view that the government should instead implement a regime of penalties for firearm trafficking offences, similar to the one set out in the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012.¹³ This Bill was introduced in November 2012 by the then Labor Government and proposed the introduction of new aggravated offences for firearm dealing which would attract a higher penalty of life imprisonment. These provisions would still send a strong message to serious criminals while minimising the risk of a miscarriage of justice.

Recommendation 2

1.16 Labor senators recommend that the imposition of mandatory minimum sentences for firearms trafficking offences be replaced with increased penalty provisions, as set out in the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012.

Senator Jacinta Collins
Deputy Chair

Notices and Enforcement Powers, September 2011, p. 38.

11 Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Psychoactive Substances and Other Measures)*, Report, September 2014, p. 24.

12 Mr Robert Bromwich, Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 20 May 2015, p. 40.

13 See the Bill's homepage for further information:

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4928

