The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 [Provisions]

June 2015

ISBN 978-1-76010-238-8

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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

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.

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.

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,

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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

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.
>
> 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.
>
> 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

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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.
>
> 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

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.
>
> 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–

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

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

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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

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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

Dissenting Report of the Australian Greens

1.1 The Australian Greens do not support the enactment of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 as currently drafted and have particular concerns with certain features of Schedules 1, 5, 6, 7, 9 and 10 of the Bill.

1.2 The Australian Greens recommend that these Schedules be removed from the Bill and subject to further consultation with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

1.3 The Australian Greens have particularly strong concerns with the introduction of mandatory minimum sentences of five years imprisonment for firearm trafficking offences in Schedule 6 and recommend that these provisions be removed from the Bill.

1.4 The Australian Greens support the passage of Schedule 4 of the Bill relating to forced marriage, and support Recommendation 2 of the Majority Report, relating to the need for Commonwealth, state and territory governments reviewing underage sex offences to ensure there is consistency with the federal offences of forced marriage.

Issues of Concern

1.5 This is a large and complex Bill that amends 14 separate Acts and contains 17 separate Schedules of amendments.[1] The Bill represents an increasingly ad-hoc approach to Commonwealth criminal law reform that threatens the progression towards a uniform criminal law across Australia and undermines a number of established common law principles designed to protect against unjustified or disproportionate intrusion into individual rights.

1.6 The Australian Greens are pleased that the Majority Report includes discussion of a number of key concerns raised by stakeholders with respect to this complex and lengthy Bill. These concerns include:

(a) expanding the principles of secondary criminal liability in Chapter 2 of the Criminal Code, by inserting the concept of being 'knowingly concerned' in the commission of an offence as an additional form of secondary criminal liability;

(b) introducing mandatory minimum sentences of five years imprisonment for firearm trafficking in identical terms as those pursued by (but

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1 *Crime Commission Act 2002*, *Australian Postal Corporation Act 1989*, *Classification (Publications, Films and Computer Games) Act 1995*, *Crimes Act 1914*, *Criminal Code Act 1995*, *Law Enforcement Integrity Commissioner Act 2006*, *Mutual Assistance in Criminal Matters Act 1987*, *Privacy Act 1988*, *Proceeds of Crime Act 2002*, *Radiocommunications Act 1992*, *Surveillance Devices Act 2004*, *Taxation Administration Act 1953*, *Telecommunications (Interception and Access) Act 1979* and the *Transfer of Prisoners Act 1983*.

ultimately removed) from the Crimes Legislation Amendment (Psychoactive Substances and Other Measures) Bill 2014;

(c) removing a court's discretion to issue a recognizance release order in relation to a sentence that exceeds three years imprisonment;

(d) expanding the circumstances in which the privilege against self-incrimination cannot be claimed in the context of examinations by AUSTRAC; and

(e) introducing a new information sharing regime between the Commonwealth DPP and the states and territories that fails to contain adequate protections for personal privacy and legal professional privilege.

1.7 The Australian Greens are also pleased that the Majority Report notes that the Parliamentary Joint Committee on Human Rights examined the Bill in its *Twenty-second Report of the 44th Parliament* and 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 also raised concerns about the amendments proposed in Schedule 10 of the Bill.

1.8 The Majority Report also expresses concern about the lack of consultation between the government and stakeholders prior to the drafting of this Bill – noting the particularly concerning inconsistency between the views expressed by the Commonwealth Attorney-General's Department and the NSW DPP and Victorian DPP with respect to the amendments proposed in Schedule 9 of the Bill.

1.9 It is of great concern, however, that despite making these observations and acknowledging the concerns of legal experts, state and territory Attorney-Generals' Departments and DPPs, the Majority Report reaches the view that the Bill should proceed unchanged.

1.10 Unlike the Majority of the Committee, the Australian Greens are not prepared to give the government a blank cheque when it comes to amending the criminal law in the name of national safety. The Australian Greens consider that it is of paramount importance that laws that: impose criminal sanctions; restrict liberty; or remove traditional common law privileges, are subject to rigorous scrutiny to ensure that they are necessary and effective – as well as being proportionate in terms of their impact on individual rights.

1.11 This Bill seeks to make changes to fundamental features of the criminal law – from the mental element required to attract criminal liability, to the court’s discretion to impose appropriate sentences and the sharing of information between prosecutors. It is not good enough to acknowledge that these changes 'impact on an individual's freedoms and liberties' and should have been subject to consultation. These concerning features of the Bill must be removed and considered further.

1.12 Further consideration of whether the changes proposed are necessary, effective and proportionate should occur with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights

concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

1.13 The Australian Greens are particularly concerned about the changes proposed in Schedule 6 that seek to introduce mandatory penalties for firearms trafficking offences. As the Australian Human Rights Commission observes in its submission:

> Mandatory minimum sentences run counter to the fundamental principle that punishment for criminal offences should fit the crime. By arbitrarily establishing a minimum penalty in advance for all cases of a particular type, mandatory minimums risk disproportionate outcomes in individual cases where the specified minimum is not warranted by the gravity of the offence. If the circumstances of the particular offence and offender suggest that a lesser penalty is appropriate, mandatory minimums will result in unjust outcomes.[2]

1.14 In addition to these in-principle concerns is the fact that the need for such penalties has not been established. As the Commission notes, the Attorney-General's Department has confirmed that it is not aware of any cases where the sentences for trafficking of firearms or firearm parts have been insufficient.[3]

1.15 The 'safeguards' outlined in the Explanatory Memorandum relating to the mandatory sentencing provisions (relating to child offenders and non-parole periods) fail to overcome the in-principle and practical concerns described above.

1.16 Mandatory sentences are also contrary to policy guidance issued by the Attorney-General's Department on the framing of Commonwealth offences.[4]

Recommendations

1.17 In light of the above concerns, the Australian Greens make the following recommendations.

Recommendation 1

1.18 That the Bill not be passed in its current form.

Recommendation 2

1.19 That Schedule 6 be removed from the Bill.

Recommendation 3

1.20 That Schedules 1, 5, 7, 9 and 10 be removed from the Bill and subject to further consultation with the states and territories and other relevant stakeholders, with a view to addressing the rule of law and human rights concerns raised by the Law Council of Australia and the Australian Human Rights Commission in the course of this inquiry.

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2 Australian Human Rights Commission, *Submission 4*, p. 1.

3 Australian Human Rights Commission, *Submission 4*, p. 7.

4 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 37.

Recommendation 4

1.21 That Schedule 4 of the Bill (relating to forced marriage) be passed.

Senator Penny Wright
Australian Greens

Appendix 1

Public submissions

1 The Law Society of New South Wales

2 Australian Drug Law Reform Initiative

3 Sporting Shooters Association of Australia (SSAA)

4 Australian Human Rights Commission

5 Australian Securities and Investments Commission

6 Australian Lawyers for Human Rights

7 Australian Crime Commission

8 Director of Public Prosecutions Victoria

9 NSW Director of Public Prosecutions

10 Law Council of Australia

11 Liberty Victoria

12 Commonwealth Director of Public Prosecutions (CDPP)

13 Anti-Slavery Australia

14 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia

15 The Law Reform Commission of Western Australia

16 Director of Public Prosecutions South Australia

Appendix 2

Public hearings and witnesses

Wednesday, 20 May 2015—Sydney

ADSETT, Mr David, Deputy Director, Commonwealth Director of Public Prosecutions

BROMWICH, Mr Robert, Director, Commonwealth Director of Public Prosecutions

COLES, Mr Anthony, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

DIXON, Ms Jane Alison QC, Immediate Past President, Liberty Victoria

EDGERTON, Mr Graeme, Senior Lawyer, Australian Human Rights Commission

HEARD, Mr Jim, Acting General Counsel, Legal and Policy Branch, Attorney-General's Department

MCKENZIE, Mr Kirk Stewart, Chair, Human Rights Committee, Law Society of New South Wales

MOLT, Dr Natasha, Senior Policy Lawyer, Law Council of Australia

NEAL, Dr David, SC, Member, National Criminal Law Committee, Law Council of Australia

SMITH, Ms Catherine, Assistant Secretary, Crime Prevention and Federal Offenders Branch, Attorney-General's Department

TCHAKERIAN, Mr Berdj, Assistant Director, Commonwealth Director of Public Prosecutions

TRIGGS, Professor Gillian, President, Australian Human Rights Commission

YOUNG, Ms Courtney, Member, Australian Drug Law Reform Initiative

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Wednesday, 20 May 2015—Sydney

1 Commonwealth Director of Public Prosecutions – response to questions taken on notice at a public hearing on 20 May 2015 (received 1 June 2015)