



Australian Federal Police Association

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009

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Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

9 October 2009

Dear Madam Chair,

RE: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009.

It is with pleasure that we present this submission to this Committee's Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009* on behalf of the members of the Australian Federal Police Association.

The Australian Federal Police Association Branch (AFPA) of the Police Federation of Australia (PFA) strives to enhance the operational capability of the Australian Federal Police (AFP) through representing its people, the law enforcement professionals themselves. Although the AFPA has industrial coverage of all AFP employees, our role is greater than mere industrial representation. The AFPA has an obligation to ensure that the AFP operates to the best of its capabilities.

The AFPA has an obligation to our members and the Australian people to ensure that the Commonwealth can effectively protect the public from criminal attack, especially by organised crime groups.

Over the past two years, the AFPA has been active in presenting evidence before the Parliamentary Joint Committee on the Australian Crime Commission and the Senate Legal and Constitutional Affairs Committee in support of organised crime fighting legislation including criminal organisation and association offences, reforms to the *Proceeds of Crime Act 2002 (Cth)* and anti-corruption and anti-bribery measures.

The AFPA made a submission to the Inquiry into the first moved *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* which addressed the assets used to fund, and derived from, organised crime. This second Bill deals with different aspects of organised crime including the structure of criminal organisations and associations therewith, for the purpose of further developing a comprehensive strategy against organised criminal activity.

The AFPA supports the measures proposed in this Bill. Nonetheless, we have recommended further reforms to enhance Commonwealth law in our commentary on Schedules 4 and 8 of the Bill in relation to criminal organisation and association offences, and penalties for bribery.

Yours faithfully,

A handwritten signature in black ink that reads 'Jon Hunt-Sharman'.

Jon Hunt-Sharman
National President
Australian Federal Police Association

Schedule 1 – Proceeds of crime

The AFPA supports the amendments in proposed Schedule 1 of the Bill. These amendments address a number of operational concerns raised by the AFPA on behalf of our members in various forums including the 2006 review of the *Proceeds of Crime Act 2002 (Cth)* by Mr Tom Sherman AO, the 2008 Commonwealth Criminal Justice Forum, the 2008 & 2009 Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups, and the recent Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*.

On 6 April 2006 Mr Tom Sherman AO was engaged to conduct an independent review under section 327 of the *Proceeds of Crime Act 2002 (Cth)*. The Report on the independent review of the operation of the *Proceeds of Crime Act 2002 (Cth)* was tabled in July 2006.

In 2008 the AFPA's submission to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups the AFPA stated:

That as a matter of urgency the *Proceeds of Crime Act 2002 (Cth)* is amended to include all recommendations from the Report on the independent review of the operation of the *of Crime Act 2002 (Cth)* conducted by Mr Tom Sherman AO and tabled in Parliament in October 2006, some two years ago.

The introduction of some of the recommendations from the Report as outlined in Schedule 1, although delayed by over three years, are strongly supported by the AFPA.

Schedule 2 – Search warrants

The AFPA welcomes the amendments to the Search Warrant provisions in the *Crimes Act 1914 (Cth)* as these amendments address current inhibitors to operational efficiency in relation to examining electronic equipment and for documents and material lawfully seized under warrant being used by and shared with law enforcement partners nationally and internationally. These amendments will remove the duplication of effort that currently exists.

Schedule 3 – Witness protection

The AFPA strongly supports the amendments to the *Witness Protection Act 1994 (Cth)*. The AFPA applauds the decision to increase protection for current and former participants and police officers that are involved in its operation. AFPA members working within the AFP Witness Protection programme perform an important and dangerous role on behalf of national and international law enforcement agencies. These amendments strengthen protections for those AFP employees and are welcomed by our membership.

Schedule 4 - Criminal organisation and association offences

Criminal Organisation Offences

Schedule 4 of this Bill creates an offence for:

- supporting a criminal organisation
- committing an offence for the benefit of or at the direction of a criminal organisation
- directing activities of a criminal organisation

The AFPA welcomes these criminal organisation offences. They go a long way in addressing crime emanating from organised crime groups that adapt, diversify, and have flexible non-hierarchical structures.

Organised crime groups often have 'sub contract' type arrangements. They can be transient in nature with some members not even being aware of the existence of other persons. This allows the higher level members of the activity to distance themselves from the overt elements of the crime, thus creating difficulties for investigating officers to charge the leaders of the crime groups. Compartmentalisation remains one of the distinguishing characteristics of these organised crime groups.

For example, several levels may be used during an importation of illegal drugs, with members sent from overseas to clear a shipment through Customs or to receive a courier parcel. The illegal drugs will sometimes be passed to another person who will store them before delivery to a further party responsible for distribution. Often, participants in the various levels are insulated from one another, making it difficult for law enforcement to gain meaningful assistance from those arrested. The group could be controlled from Australia or overseas. The AFP is aware of transnational and organised crime organisations utilising these less structured crime groups to expand their activities in a collaborative approach.

The provisions of this Bill are consistent with the AFPA's submission to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups which stated:

The *Crimes Act 1914 (Cth)* [should] be immediately amended to create harmonisation of legislation between Canada, New Zealand, NSW and the Commonwealth by mirroring ss. 93S and 93T of the *Crimes Act 1900 (NSW)* in relation to Participation in criminal groups.

The provisions are similar to the Canadian Criminal Code provisions for involvement in a criminal organisation in terms of the hierarchy of offences created. The Canadian model was also recommended by Dr Andreas Schloenhardt of the University of Queensland in his submissions to this Committee's Inquiry into the first Serious and Organised Crime Bill and the Parliamentary Joint Committee's Inquiry.

It is also important to note the June 2009 Government Report to the ACT Legislative Assembly, authorised by the ACT Attorney General Simon Corbell MLA, where the authors considered whether the NSW participation in criminal groups offence would prima facie limit an individual's rights under s15(1) of the *ACT Human Rights Act (HRA)*. It found:

The NSW offence of participation in criminal groups requires that the defendant knew the group they were associating with had criminal objectives, and that the defendant knew or was reckless as to whether their participation in that group contributes to the commission of an offence. Arguably, if enacted in the ACT, this offence would be found to impose reasonable and proportionate limitations on section 15(1).

Although aggravated offences are not consistent with the principles entrenched in the ACT Criminal Code, the Territory would benefit from consideration of the inclusion of a legislative amendment to criminalise both participation in criminal groups and recruiting people to carry out, or assist in carrying out, criminal activities.¹

The AFPA submits that it is essential that the Commonwealth introduces an offence for 'participating in a criminal organisation' based on the model set out in the *Convention Against Transnational Organised Crime*, which has been adopted in this Bill.

Each of these proposed offences will be invaluable in the fight against organised crime, and we commend them to the Committee for the purposes of its inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009*.

Association Offences

Schedule 4 of this Bill creates an offence for:

¹ Department of Justice and Community Safety, *Government Report to the ACT Legislative Assembly: serious organised crime groups and activities* (ACT Government: Canberra 2009) 44.

- associating in support of serious organised criminal activity

The AFPA welcomes this reform. It is essential for the Commonwealth to utilise consorting or similar provisions that prevent a person associating with another person who has been involved in organised criminal activity as an individual or as part of an organisation.

This measure is consistent with the AFPA's submission to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the legislative arrangements to outlaw serious and organised crime groups:

As a minimum, the *Criminal Code (Cth)* should be immediately amended to include the offence of 'consorting' to ensure harmonisation of legislation between NSW, Victoria, South Australia, Western Australia, Tasmania, Northern Territory and the Commonwealth.

In that inquiry, the AFPA, by way of an in camera attachment, set out some actual AFP scenarios where specific Commonwealth Organised Crime legislation, such as presented in Schedule 4 of this Bill, would have assisted the AFP in disrupting and dismantling transnational and Australian organised criminal enterprises.

The AFPA again reiterates its support of greater harmonisation of organised crime laws across jurisdictions within Australia and internationally. Schedule 4 of this Bill presents one step towards this goal, but SCAG must ensure that organised crime frameworks in the states and territories are implemented, and reflect the purpose of the *Convention Against Transnational Organised Crime* to improve standardisation. The Commonwealth has a leadership role to play in this process, including by improving its own legislation in consultation with SCAG and multilateral international agreements.

Inadequacy of the Bill in relation to recruitment of persons to engage in criminal activity

Recommendation

The *Criminal Code (Cth)* should be immediately amended to include a provision for Recruiting persons to engage in criminal activity based on Section 351A of Crimes Act 1900 (NSW) or similar to Division 270 and 271 of the *Criminal Code (Cth)*.

There is no specific higher level offence for recruiting people to engage in criminal activity. Commonwealth legislation is grossly inadequate in addressing this insidious behaviour. This Bill could address this deficiency in the Commonwealth legislation.

In the June 2009 Government Report to the ACT Legislative Assembly, authorised by the ACT Attorney General Simon Corbell MLA, the authors considered the inclusion of a provision for Recruiting persons to engage in criminal activity based on Section 351A of *Crimes Act 1900 (NSW)*. Importantly, it found 'the Territory would benefit from consideration of the inclusion of a legislative amendment to criminalise...recruiting people to carry out, or assist in carrying out, criminal activities'.²

There are provisions in the *Criminal Code Act 1995 (Cth)*, Division 270- Slavery, sexual servitude and deceptive recruiting; and Division 271 – Trafficking in person and debt bondage. However, servitude and debt bondage equally applies to drug addicts recruited to participate in narcotic importations, or vulnerable people who are recruited for other offences such as fraud on the Commonwealth, organised crime, terrorism, theft etc.

A recruitment offence is also important for the protection of juveniles. A recent example is the recruitment of the 'Bali Nine' teenagers.

² Department of Justice and Community Safety, *Government Report to the ACT Legislative Assembly: serious organised crime groups and activities* (ACT Government: Canberra 2009) 44.

Schedule 5 – Money laundering

The AFPA has previously raised police operational concerns in relation to investigating and prosecuting money laundering offences in Division 400 of the *Criminal Code*. On behalf of our operational members we welcome these amendments as they will enhance the effectiveness of money laundering provisions and address many of the concerns raised by our membership.

Schedule 7 – Amendments relating to the Australian Crime Commission

The AFPA represents a large number of members either attached to, or employed by the Australian Crime Commission (ACC). The AFPA has previously raised concerns in relation to deficient legislation in dealing with witnesses who refuse to cooperate with the ACC examiners. The AFPA welcomes these amendments that enhance the ACC's operational effectiveness, by enabling ACC examiners to refer uncooperative witnesses to the Federal Court or a Supreme Court to be dealt with as if the conduct was in contempt of court.

Schedule 8 – Penalties for bribery

The AFPA supports the proposed amendment contained in Schedule 8 of the Bill which increases the penalties for individuals and body corporate that bribes a foreign official or a Commonwealth public official under Sections 70.2 and 141.1 of the *Criminal Code*.

However, the AFPA is of the belief that an increase in penalty alone will not sufficiently deter persons from engaging in bribery, and especially organised crime groups corrupting public officials to expedite their criminal activities.

Inadequacy of the Bill in relation to illicit enrichment of Commonwealth public officials

Recommendation

The Government should introduce an illicit enrichment offence for Commonwealth public officials as recommended in Article 20 of the *United Nations Convention Against Corruption*.

The Senate Legal and Constitutional Affairs Legislation Committee recently reviewed the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* which sought to introduce a form of 'Unexplained Wealth' with a link to a Commonwealth Offence, a State Offence with a Federal Aspect, or a Foreign Indictable Offence. The AFPA argued that this link would not improve upon ss17-19 of the *Proceeds of Crime Act 2002 (Cth)* which also require links to a Commonwealth Offence before asset forfeiture can take place. The Government has argued that this is a requirement of the Commonwealth Constitution based on advice it has received from the Attorney General's Department.

The AFPA's recommendation in light of the Constitutional constraints facing the Commonwealth, was to incorporate an 'illicit enrichment' offence into Australian law in relation to public officials. This is recommended by the *United Nations Convention Against Corruption*³ to which Australia is a party, and which would be supported under s51(xxix) of the Constitution.

Article 20 of the *United Nations Convention Against Corruption* encourages participating parties to the Convention to consider creating an 'illicit enrichment' offence for public officials:

³ United Nations Convention Against Corruption, done at New York on 31 October 2003 [2006] ATS 2;

Article 20. Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

The AFPA sees this law as an important tool in the fight against organised crime. Illicit enrichment is essentially an ‘unexplained wealth offence’.

While the offence for bribery of a Commonwealth public official under s141.1 of the *Criminal Code* currently exists, illicit enrichment provides investigators with a charge where s141.1 bribery is not possible to prove on the facts, but where there is evidence of ‘unexplained wealth’. The penalties for illicit enrichment, as a lesser offence, would not be as harsh as the offence of bribery for which the penalties are increased in this Bill.

Moreover, Unexplained Wealth provisions under in the *Proceeds of Crime Act 2002* if amended under the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* could be used in conjunction with illicit enrichment to seize those unlawful assets held by public officials where there is reasonable grounds to suspect that that they have been illicitly enriched. Therefore, such a package of reforms would ensure that deterrence also occurs through the confiscation of criminal proceeds emanating from illicit enrichment, as well as Bribery, providing the Commonwealth with a more comprehensive approach to anti-corruption and related organised crime.

Schedule 9 – Drug importation

The AFPA supports the extension of the definition of ‘import’ in Division 300 of the *Criminal Code* to include ‘deal with a substance in connection with its importation’. This important amendment addresses real operational examples of transnational organised crime modus operandi previously presented in camera by the AFPA before the Parliamentary Joint Committee on the Australian Crime Commission’s Inquiry into the legislative arrangements to outlaw serious and organised crime groups.

Conclusion

The measures contained in the Bill, and particularly Schedule 4, form the second part of a package of new reforms which as a whole are designed to tackle the multi-faceted aspects of the serious and organised crime problem at the Commonwealth level.

The AFPA believes that the measures outlined in this Bill significantly improve current crime fighting legislation through contemporising it to address the sophisticated measures now being utilised by organised crime and transnational criminal enterprises.

This Bill appropriately balances law enforcement needs with the liberties of individuals whilst addressing society’s expectation of protection against organised crime.