



New South Wales

ATTORNEY GENERAL



Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

19 OCT 2009

Dear Mr Hallahan,

I am writing in relation to the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (No. 2) (the Bill). NSW supports strong Commonwealth measures to deal with the threats posed by serious and organised crime, and these laws will complement criminal organisation control legislation in place in NSW. I note the following points in relation to the Bill.

Criminal asset confiscation

The Bill amends the definition of "unlawful activity" so that it includes State and Territory summary offences. It is not clear if consideration has been given to the potential breadth of this amendment. There are a broad range of summary offences, many of which involve a very low degree of criminality. If concerns relate to particular types of summary offences (for instance prostitution or bookmaking offences, as referred to in the Sherman Report), then the definition of "unlawful activity" could be amended to specifically refer to the types of summary offences that are of concern.

Definition of 'criminal organisation'

It would appear that the nature of the new offences, the tiered approach, and the case-by-case determination of what constitutes a criminal organisation, are all modelled on the Canadian model as set out in 467.1 of the *Canadian Criminal Code*. Under the proposed new offences, a criminal organisation is an organisation, consisting of two or more people, whose aims or activities include the engagement in conduct that constitutes an offence that is both punishable by at least three years imprisonment and benefits the organisation. I note that the Canadian approach also includes an additional safeguard of specifically excluding "a group of persons that forms randomly for the immediate commission of a single offence."

"State offences that have a federal aspect"

Under the proposed amendments, "constitutionally covered offence" includes "a State offence with a federal aspect." A state offence will have a federal aspect if the Commonwealth could have enacted a valid provision covering the State offence or specific conduct involved in committing the State offence. It therefore purports to include state offences which involve Commonwealth matters such as telecommunications, postal services or trade and commerce.

The same usage of "state offences that have a federal aspect" occurs in other Commonwealth legislation, most notably under s.4A of the *Australian Crime Commission Act 2002*, s.4AA of the *Australian Federal Police Act 1979*, and s.3AA of the *Criminal Code 1914*. Under these acts, "state offences that have a federal aspect" are relevant to determining the authority of the Commission and the AFP to investigate certain offences, and the authority of law enforcement officers to conduct controlled operations in respect of certain offences. The

proposed offences under the Bill appear to be the first time that “state offences that have a federal aspect” have been relevant to the actual commission of an offence.

As existing usage of the term revolves around the authority to conduct certain investigations, the nature of “state offences that have a federal aspect” have yet to be robustly questioned in the courts. However, given the large penalties applicable to the proposed offences, when contrasted to those that may apply to the underlying offending conduct, it is possible that where prosecutions for the new offences relate to a state offence with a federal aspect, lengthy legal arguments will ensue regarding questions of constitutionality and Commonwealth authority.

The inclusion of the phrase also has the potential consequence of significantly increasing the coverage of the proposed offences and their incursion into state based activity. This is an issue given the lack of definition of organisation and the level of penalties involved. There is already an existing offence in NSW which targets state based gang related offending in section 93T of the *Crimes Act NSW*.

Drafting issues

The explanatory memorandum states that under s.390.3(7), a person who is convicted of an offence under subsections 390.3(1) or (2) will not be liable to be punished for an offence under those sections for other conduct of the person that takes place at the same time as that conduct or within 7 days before or after any of those occasions. However, the provision as it is currently drafted only specifically covers offences under 390.3(1). It does not appear specifically to preclude a charge for an offence under 390.3(2) being brought for conduct occurring during the 7-day period following conduct that lead to a conviction under 390.3(1).

Thank you for the opportunity to comment on the Bill.

Yours faithfully

(John Hatzistergos)