Attention:
Peter Hallahan,
Secretary of the Committee
THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Re: Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009

Introduction

In the short time available to us to review the second Bill in relation to Serious and Organised Crime we focus on Schedule 4 of the amendments addressing the association and organisation offences. The attempt to address the facilitation of organised crime in Schedule 4 are in our view, novel and go some way to creating an Australian law on organised crime while recognising that the very concept of organised crime is contentious in practice. In general terms the amendments approach the problem of facilitation in a pragmatic way by focusing on the kind of conduct rather than the types of persons involved in serious and organised crime. In our view this is likely to be more effective in dealing with organised crime than other approaches such as those soon to be before the High Court of Australia.

It is important to acknowledge that the second Bill also addresses some important issues in relation to serious crime in all nine schedules. For the most part the suggested amendments are overdue and put into practice sensible extensions or modification of law enforcement practices such as those recommended by the Trowell Report in respect to contempt of the ACC. It is also essential, given the importance of transnational organised crime, that the Commonwealth continues to work towards creating a seamless web of Australian law that ensures that we meet key treaty obligations and play our part as a bastion of the rule of law and model law enforcement. In this sense the Commonwealth's role in defining and criminalising organised crime is a most vital one and should be the default position in these matters.

In this introduction we make brief comment on each of the other schedules, but recognise that due to constraints in respect to time we are unable to address these in any detail. For example, Schedule 2 warrants closer attention given the complexities of the laws needed to counteract organised and serious crime. Urgent attention must be given to increasing the inter-operability of LEAs information communication technologies. It is especially important that the drafting of this schedule gives greater attention to the need for 'technological neutrality'. This schedule also deals with other matters of great practical interest including access to encryption keys, and the length of time needed to examine computers and other digital devices. Given the likely penetration of organised crime networks into cyberspace it will be important that LEAs be given the same kind of protection for undercover work, 'sting' or honey-pot operations and other forms of digital

investigations. Forensic examination of these devices imposes problems that require a static copy of the contents to be made and the amendments enable continued tracking and indeed presumably 'real time' investigations possible (i.e. by tracking communications as they occur).

Brief observations

Schedule 1 broadens the scope of the proceeds of crime offences and sensibly among other things allows for the electronic production of documents. It is noted that it is apparent that proceeds of crime laws are becoming more complex and there may be the need to provide further specialisation within the judiciary, indeed the task may be best handled by a specialist court.

Schedule 3 enhances the law authorising the National Witness Protection Program (NWPP), however, little information about the extent and nature of such a program is known. A foolproof system of identity change is unlikely so these amendments allow for subsequent new identities to be made when required. The management of a registry of NWPP participants and the increase of penalties relating to disclosure will assist in increasing confidence in such program. Confidence is vital on both sides – by the witness and law officers who may feel that in some cases the issue of a new identity enables a new criminal career. In considering this aspect of the amendments we also note that ancillary programs might also be considered helpful and might draw on aspects of the NWPP as it evolves. For example, in other jurisdictions, schemes should be considered that might provide amnesty (limited) or renunciation for members of organised crime groups (these need not be confined to minor or peripheral players) who wish to detach from these groups. Such schemes enable some actors to exit these organisations or networks with the assistance to the state – some members remain attached to such groups due to fear of the illicit organisation and/or of the state (police).

Schedule 7 makes provision for the prompt use of 'contempt' proceedings in the event that those undergoing special investigation fail to answer as required in order to gain time, and other amendments consistent with the Trowell Report. In relation to the addition of the Commissioner of Taxation to the ACC board we note the necessity, given the importance of monitoring funds from illicit activity, but we also consider that the balance of the board would be well served by the appointment of a reputable person who could serve a public interest function. Given the very great powers afforded the ACC it makes good sense to provide for an oversight body that strengthens both transparency and community interests.

Schedule 8 provides welcome increases in the penalties for bribery including that of foreign officials and persons and government officers. This provision should have a chilling effect on business that includes bribery as part of the costs of doing business and may yet have a role in disrupting "grey" businesses. These increases should be widely publicised and we assume that they will apply to parliamentary officers and members of legislative bodies both in Australia.

In respect to Schedule 9 we note that the amendments clarify problems surrounding the import of illicit goods but the relevant law appears blind to the *export* of illicit goods. It seems, on a quick view of the legislation, that the notion of re-export or re-routing of products of interest may not be sufficiently accounted for in the amendments.

Schedule 4 – Criminal organisation and association offences

Schedule 4 of the Bill inserts a new Part 9.9 into the *Criminal Code* in order to "enhance the legislative response to organised crime" (Explanatory Memorandum p.3). Schedule 4 inserts both association and participation offences. We will deal primarily with the association offence provided in proposed section 390.3, but will begin with some general comments.

Criminal networks
The Explanatory Memorandum to the Bill suggests (pp.129, 134) that an attempt is being made in the provisions of Schedule 4 to move beyond the classic conception of criminal organisation as well-structured, long-lasting and often hierarchical groups, a conception that has informed legislation up till now, and to encompass "the modern nature of organised crime", that is, criminal networks. This attempt is to be applauded. Criminologists investigating organised crime through network analysis have found a prevalence of less integrated criminal group structures with fuzzy boundaries, inherent flexibility and often an opportunistic and temporary nature. Indeed in cyber-space such networks may never meet face-to-face. In these structures, brokers and facilitators often sit outside the network's core (where it has one) and play critical roles not only in enhancing criminal activity but also in structuring the network itself. Much activity is situated in a 'grey zone' between licit and illicit worlds.

However, all of the Bill's participation offences (proposed ss. 390.4-390.6) refer to "organisations". This continuing use of the language of organisations suggests a focus on criminal groups with clear boundaries, defined memberships and exclusively criminal objectives, despite the fact that these forms of organising now seem to be the exception rather than the rule. Proposed subs. 390.1(3) does make clear that a reference to an organisation "is a reference to an organisation however it is organised" but, because this is rather tautological, it begs the question of what constitutes an organisation.

Recent criminological research findings on the multiplicity and flexibility of forms of criminal organising could be incorporated into the Bill's provisions by adopting the language of "networks". To do so would more clearly grant courts the flexibility to recognise co-offending structures that may not amount to 'organisations' when deciding whether particular conduct is an offence under the Act and enable the recognition of organisations as a set of relationships without resort to the criminalisation of the relationships themselves (rather than the activities the relationships make possible). The incorporation of such language would require some careful thought and the advice of experts on criminal networks but would certainly be innovative and a world-first amongst legislative schemes on serious and organised crime.

Section 390.3 Associating in support of serious organised criminal activity

This provision is aimed at deterring people from supporting organised criminal activity (Explanatory Memorandum p.134). The aim of deterrence is usually not achievable unless there is an objective increase in the certainty of arrest or conviction. The amendments may not achieve the specific level of deterrence sought but could enable investigators to increase pressure on players peripheral to an organised or serious crime activity. The provision appears to overcome the widespread objection to association offences such as those included in the South Australian *Serious and Organised Crime (Control) Act 2008* (the SA Act) and New South Wales' *Crimes (Criminal Organisations Control) Act 2009* (the NSW Act) (both enacted in response to the threat of outlaw motorcycle gang activity in those states) that what is being targeted is not criminal activity but personal identity. It achieves this by requiring that the person being targeted in the provision has to be engaged in an act of facilitation before they can be found guilty of an offence; simply associating is not enough.

However, the provision raises some concerns.

Complexity: The provision is very complex. Five and a half pages of the Explanatory Memorandum are required to explain its purpose and operation. There is little chance that a court will be able to apply the provision without recourse to extrinsic material in its interpretation. While such recourse is perfectly acceptable practice in statutory interpretation, it is desirable that legislative provisions be as clear on their face as possible. For example, it is unclear from the provision whether the second person must actually go on to commit the offence that the association between the first person (the accused) and second person facilitates. Subs.(1)(c) refers to facilitation of "engagement or proposed engagement by the second person" in the conduct that constitutes an offence. The Explanatory Memorandum suggests that perhaps an actual offence by the second person is not required (p.137) but even this is not clear. For the purposes of clarification it would be a simple matter to add to s.390.3 a subsection that states that, for the avoidance of doubt, the offence in para.(1)(b) (or (2)(c)) need not be committed by the second person, if that is indeed the case (in a similar vein to s.390.4(3)).

Facilitation: A second concern is over the scope of the term "facilitate". That term is not defined in the proposed Bill so has its ordinary meaning of help, promote or assist. The language of s.390.3(1)(c) is, however, somewhat obscure. It is not clear how one might facilitate a "proposed engagement" in criminal activity, except perhaps by facilitating a conspiracy. Conspiracy is an offence under s.11.5 of the *Criminal Code*, and is therefore in any case covered by the words "facilitate the engagement…by the second person in the second person's conduct." Thus, if the reference to "proposed engagement" is included simply to cover serious cases of conspiracy (those attracting a penalty of imprisonment for at least 3 years), it is unnecessary.

Furthermore, while there must be actual facilitation through the association between the two parties, there is no requirement that the facilitation be of substantial effect. The most

marginal of acts might suffice, so that the connection between the act of association and the ultimate offence by the second person could be quite tenuous and distant. This problem is exacerbated by the fact that, unlike s.44 of the *Serious Crime Act 2007* (UK) where an intention to assist in the commission of an offence is required, under s.390.3 the accused need only have been reckless as to whether their association facilitates the second person's conduct (see s.5.6 of the *Criminal Code*). Furthermore, while the accused must know that the second person engages or proposes to engage in conduct that constitutes an offence, there is no indication in the legislation as to what extent the accused must be aware of the details of that conduct.

The accused may be aware that the second person has a criminal lifestyle (perhaps often having cheap goods to sell) without knowing specific details of the second person's plans. It is easy to imagine circumstances where parties 'ask no questions, hear no lies'. Was it 'reckless' not to ask about possible 'end uses' given the background of the parties? If the accused happens to inadvertently pass the second person information and the second person uses or plans to use the information to commit an offence with a co-offender, would the accused be guilty of an offence under s.390.3? In other words, just how much must the accused know about the second person's conduct or plans to be considered reckless in his or her provision of help or support? Furthermore, it is not clear if the section captures second order effects: for example the security guard who 'witlessly' or 'recklessly' passes information to another party who then enables through such 'inside information' yet another actor to commit an offence.

Defence: A third concern with s.390.3 is over subs.(6). An exhaustive list of specific types of association is provided in subs.(6) to which the section does not apply (defences). No discretion is given to the court to consider other types of associations. Again, a comparison might be made with the *Serious Crime Act 2007* (UK). Under S.50 of that Act a person is not guilty of an offence under Part 2 of the Act (which provides offences for encouraging or assisting crime) if he proves that he knew or had a reasonable belief that certain circumstances existed and it was reasonable for him to act as he did in those circumstances. It would seem clear that there could be associations under s.390.3 of the proposed Bill of a type that the legislature has not envisaged (and therefore not listed in subs.(6)), but yet are sufficiently ambiguous as to the nature of the "facilitation" involved that some allowance should be made for the accused to prove that the association was reasonable in the circumstances and therefore s.390.3 should not apply. Even if a general defence such as is included in the UK Act is not considered to be warranted, the addition of a subparagraph to subs.(6) to the effect of "any other association that the court considers is reasonable in the circumstances" would go some way to allaying this concern.

As previously stated, in order for the association offence to constitute a real deterrent to facilitation of serious criminal offences, it needs to be partnered with an increase in the likelihood of arrest and prosecution. This is unlikely to happen without sustained surveillance and monitoring by law enforcement agents. We note that item 4 of the Schedule will enable telecommunications interception warrants to be granted for offences under Part 9.9 including the association offence in s.390.3. Given that enforcement of

s.390.3 will require intensive resource allocation by law enforcement agencies, it is important that officers involved in undercover work who are merely doing their job are protected against prosecution under s.390.3. For example, some officers involved in controlled operations could fall within s.390.3 as facilitators of crime. Currently subs.(6) does not cover such officers. Either subs.(6) should specifically refer to law enforcement officers engaged in undercover work or an amendment to subs.(6) as suggested in the previous paragraph should be made. The latter is preferable because the court would then be able to assess the reasonableness of the officer's conduct, providing an opportunity to deny the defence to an officer who has overstepped the limits of his or her role and become involved in corrupt conduct or entrapment.

A couple of further observations about subs.(6) can be made. First, it is unclear what conduct para.(a) is intended to cover. Neither the language itself nor the Explanatory Memorandum gives little guidance to the court, either by way of principle or example, as to what type of association (involving facilitation of crime) a person could have with a close family member that could "reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern". There is plenty of scope for argument as a result of the vagueness of this provision. As an extreme example, one might argue that it constitutes a defence to the offence of associating with close relatives to facilitate the conduct of a murder if the murder is part of an ongoing family feud between factions of an organised crime group. It is conceivable that this provision is in place as a recognition that some close family relationships may involve unreasonable pressure that does not amount to duress (duress being available as a defence under the *Criminal Code* s.10.2 in circumstances involving threat) but if this is the case, a general defence of reasonableness would, again, be a more appropriate way to deal with such a situation than this mystifyingly worded defence.

Paragraph (b) of subs.(6) appears to have been adopted from terrorism legislation with little thought given to its applicability to the serious and organised crime context. Members of the IRA were known to use church worship sessions to conduct meetings, and no doubt organised criminals would do the same if given the opportunity to use religious worship as a defence. As with exceptions relating to education, employment and residence (deliberately excluded from this provision), there is a potential for the misuse of this provision. *Where* the association takes place is surely irrelevant to whether the conduct by the accused amounts to an offence under the provision; it is the act of association/facilitation and the intent behind it that is important.

Paragraph (d) of subs.(6) provides a defence to legal practitioners who recklessly facilitate organised criminal behaviour through the provision of legal advice or representation in connection with criminal proceedings (including possible future criminal proceedings). This is a very wide defence. It seems to us that s.390.3 has the potential to catch, among other things, delinquent professionals who facilitate organised crime. Thus to give lawyers such a broadly worded defence defeats one of the key impacts of the provision.

The difficulties in interpretation and application of these three paragraphs of subs.(6) again suggest the desirability of an alternative provision conferring discretion on the part of the court to consider whether certain associations that facilitate an organised crime offence are justified in the circumstances. It seems to us that a more general defence of reasonableness such as is included in the UK *Serious Crime Act* would be a more rational approach to the problem of unforeseen circumstances and leave it to the court to make the judgement in the light of all the evidence before it. If considered necessary, the provision of humanitarian aid and legal advice/representation in the circumstances set out in paragraphs (c), (e) and (f) of subs.(6) and the political communication under subs.390.3(8) could be provided as examples that are not intended to limit the scope of the more general defence of reasonableness.

Sections 390.4-390.6 Criminal organisation offences

We are in general agreement with the thrust of these provisions, subject to our earlier comments about expanding the language used to more clearly encompass criminal networks. In the light of the limited period for comments on the Bill we have not been able to consider these provisions in detail. However, on a brief examination the following issues have arisen:

- S.390.4 (1)(b): it is unclear how an organisation itself might "engage in conduct constituting an offence against any law" – it is its members who will commit offences (on behalf of or for the organisation).
- In both ss. 390.5(2) and 390.6 there is reference to the organisation or a member "directing" conduct by another person. The Explanatory Memorandum makes it clear (pp. 145 and 149) that in both cases 'direction' is not to be read as meaning only specific instruction, but should be read as including 'encouragement' in any way. That 'direction' should be interpreted so broadly and beyond its usual meaning is not obvious on the face of the legislation. The inclusion of a definition of "direct" in s.390.1 would obviate the need for the court to turn to extrinsic material in order to become aware of this intended interpretation.
- The concepts of 'direction' and 'membership' do not include a reference to purporting to be acting as a member or leader of a criminal group. An actor, for example may claim to be a member of an outlaw motorcycle gang or a triad but not actually associated – does the charge against the person providing support or following the directions fail?

We trust the above brief comments assist. The very short time provided for comment, as noted is a regrettable impediment. If required we would consider providing further assistance.

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CEPS ANU
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