Senate Standing Committee on Legal and Constitutional Affairs
By online submission

13 October 2009

Dear Committee Secretary

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

Thank you for the opportunity to make a submission to this inquiry. In principle, efforts to strengthen Australia's legislative framework in response to transnational organised crime are welcome. The United Nations Convention against Transnational Organised Crime (TOCC), which entered into force in September 2003, reflects a recent international consensus on the measures necessary to respond to transnational organised crime. Australia ratified the TOCC on 27 May 2004 and is bound by its obligations.

The TOCC aims to unify national approaches to organised crime to eliminate 'safe havens' for transnational criminal groups and to ensure more effective preventive strategies at the international level. As the UN Office on Drugs and Crime observes: " When offenders, victims, instruments and products of crime are located in or pass through several jurisdictions, the traditional law enforcement approach, focused at the local level, is inevitably frustrated." Any national measures of implementation adopted must, however, be consistent with Australia's obligations under the TOCC and under international human rights law.

This submission makes two points concerning the new offences in Schedule 4 of the Bill. First, insofar as those offences relate to 'foreign offences', they establish wider criminal liabilities than those provided for under the TOCC. The TOCC only applies to criminal offences attracting a penalty of four or more years imprisonment, whereas the offences in the Bill apply to offences attracting three years imprisonment. In addition, the TOCC defines an 'organized criminal group' as a:

Structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

In contrast, the Bill applies to associations of only two or more people, which need not be 'structured' and nor exist 'for a period of time'. Further, the TOCC authorises the domestic criminalization of conspiracy or participation in transnational organized crime, whereas the Bill's offences appear to establish wider liability. The Bill consequently lowers the threshold of the TOCC so far as the Bill applies to transnational organised crime. In consequence, the Bill is overly punitive and goes beyond what international law

requires in dealing with the threat of transnational organised crime. It may also raise constitutional law issues.

Secondly, some of the Bill's offences are too wide and vague and raise potential incompatibilities with Australia's obligations under the International Covenant on Civil and Political Rights 1966, in particular, with the freedom from retrospective criminal punishment under article 15. Freedom from retroactive punishment requires that penal provisions are to be restrictively interpreted (X v Belgium (1962) 5 YB 168 at 190) and not construed extensively to an accused's detriment, for instance by analogy: EK v Turkey (2002) 35 EHRR 41 at para. 51. An offence must be clearly defined by law, as stated in Kokkinakis v Greece (1993) 17 EHRR 397 at para. 52:

... [freedom from retroactive punishment] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable.

The Bill's offence of providing material support or resources to an organisation is highly problematic in this regard. In the United States, comparable offences of providing material support or resources to a terrorist organisation (under 18 United States Code 2339A(b)) were found to be unconstitutionally vague by a US superior court: see Humanitarian Law Project v Reno, 205 F.3d 1130, 1137-138 (9th Cir. 2000). In particular, the failure to define what actual conduct was within the scope of the concept of providing material support or resources rendered the offence too vague and uncertain for the purposes of criminal liability, since individuals are unable to prospectively know the scope of their liabilities.

In response to that decision, amendments to the US offences sought to clarify more precisely the scope of liability, but litigation challenging the definitions continues in the US courts. As it currently stands, the offence in 18 USC 2339A(b) provides the following definitions:

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

No such specificity or particularity is found in the proposed Australian Bill, which contains no further definition whatsoever of the key concepts of providing material support or resources. In my view, it is highly likely, following the US jurisprudence, that the proposed offence is too vague and ill-defined to enable a person to know the scope of

their criminal liability and as such, the offence may infringe Australia's obligation not to retrospectively punish any person under the ICCPR.

The inclusion of the word 'material' to qualify 'support or resources' does not cure the essential indeterminacy of the offence. The vagueness is aggravated by the element of the offence that a mere 'risk' of aiding the organisation suffices to establish liability (as opposed to, for instance, a 'substantial' risk). The offence may ultimately capture relatively harmless and unintended conduct which is too remote from the commission of serious criminal harm to warrant special extended liability.

For similar reasons, the 'association' offence in the Bill may also be insufficiently certain to satisfy the principle of legality underlying the freedom from retrospective criminal punishment, including because its exceptions are so narrowly and unjustifiably drawn (excluding, for instance, associations involving education, employment and residence). Australia should be wary of over-reacting to the problem of serious organised crime by extending criminal liabilities too far and in an unjustifiable manner.

Please be in touch if you require any further information.

Yours sincerely