

Other Issues

Organised fraud

- 3.1 One of the more questionable inclusions in the Bill is the offence of organised fraud. The MCCOC expressed its opposition to such an offence and did not include it in its Model Criminal Code.¹
- 3.2 This offence, as defined in proposed s.135.3, imposes a maximum penalty of 25 years for a person who derives a substantial benefit from the commission of three or more public fraud offences. Public fraud offences are essentially the offences in the Bill of general dishonesty, conspiracy to defraud, and obtaining property or financial advantage by deception.²
- 3.3 The main argument in favour of inclusion of the offence of organised fraud is that it is necessary because it ensures 'that there are significant penalties for people that commit...a series of' frauds.³ It is also argued that the proposed offence of organised fraud is necessary as a trigger for the automatic forfeiture provisions in the *Proceeds of Crimes Act 1987*.⁴ However, there may be other and perhaps better ways by which automatic forfeiture could be triggered, such as by linking it to a penalty.⁵
- 3.4 Secondly, it may be argued that the current law is capable of ensuring that persons who commit multiple frauds are adequately punished: a judge, in sentencing, has the discretion to impose cumulative sentences, if necessary, to reflect the true criminality of the particular case. A

1 *Exhibit No. 11: MCCOC, Chapter 3, p. 183*

2 The current Commonwealth offence of organised fraud is contained in s.83 of the *Proceeds of Crimes Act 1987*. There are, however, no equivalent state or territory offences.

3 AG's, *Transcript*, p. 10. See also Explanatory Memorandum, p. 59

4 *Transcript*, pp. 10-11

5 *Transcript*, pp. 10-11

cumulative sentence for multiple fraud offences, ironically, also has the potential to lead to a more severe maximum penalty than the maximum penalty under the proposed organised fraud offence.⁶

- 3.5 Also, it should be noted that the only element of organisation required in the offence is that the defendant has organised to do several frauds rather than just one. This means the proposed offence could potentially provide inappropriate coverage, catching persons such as social security recipients who commit multiple frauds due to financial desperation, rather than people with serious criminal intent. There may be other more useful indicators of 'organised crime' such as the number of people involved and the use of sophisticated methods or techniques.⁷
- 3.6 The Committee is of the view that the proposed offence of organised fraud is, apart from its current role in triggering forfeiture, unnecessary. That is, if forfeiture is the only reason for its existence, then proposed s.135.3 should be deleted from the Bill and efforts should be made to seek other means by which the automatic forfeiture provisions can be activated.

Recommendation 2

- 3.7 **The Committee recommends that the offence of organised fraud in proposed s.135.3 be deleted from the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999*.**

Identity fraud

- 3.8 A submission⁸ noted that during the course of a House of Representatives Committee inquiry on the management of tax file numbers,⁹ identity fraud had been raised by a number of organisations as a significant issue. Concerns were expressed in relation to identity fraud in the use of tax file numbers and more broadly. Anecdotal evidence, received during that inquiry, suggested that problems had arisen in investigating and prosecuting identity fraud due to there being only agency-specific legislation as opposed to general application national identity fraud

6 *Exhibit No. 11: MCCOC, Chapter 3, p. 181*

7 *Exhibit No. 11: MCCOC, Chapter 3, p. 177*

8 David Hawker MP, Chairman, House of Representatives Standing Committee on Economics, Finance and Public Administration (Chairman, House Economics Committee), *Submissions*, pp. S18-19

9 Review of the ANAO Audit Report No. 37 1998-99 on the Management of Tax File Numbers

legislation. The penalties for these various agency specific offences were also inconsistent.¹⁰

- 3.9 The Attorney-General's Department argued that the Bill will resolve the dilemma with agency specific identity fraud offences. The Bill repeals a number of these offences and provides a variety of general application offences that can deal sufficiently with identity fraud. By replacing a number of similar agency specific offences with general application offences the Bill eliminates a number of inconsistent penalties, providing consistent penalties for such criminal conduct across government agencies.¹¹
- 3.10 Provisions in the Bill that provide coverage against identity fraud include obtaining by deception and general dishonesty offences, the false information offences, and the forgery and false document offences. In light of this information provided by the Attorney-General's Department, the Committee considers that the offences in the Bill will deal adequately with criminal conduct related to identity fraud.

False or misleading information

- 3.11 Proposed s.137.1 in the Bill makes it an offence for a person to give information to another, knowing that the information is false or misleading, if the recipient of the information is a Commonwealth entity; or the recipient is a person exercising powers or performing functions under, or in connection with, a law of the Commonwealth; or the information being given is being given in compliance or purported compliance with a law of the Commonwealth. For this offence to be made out the information must also be found to be false or misleading in a material particular.
- 3.12 The Attorney-General's Department acknowledged the width of this offence and noted that it had 'carefully considered how this offence could be limited' but had 'found it very difficult to appropriately draw a line between lies that can be said to matter and those that do not.'¹² It did note, however, that it thought that it would:

...be unfortunate to water the offence down as it would reduce the number of offences that can be repealed by the proposed Bill and create the need for a further scattering of offences and the almost

10 Chairman, House Economics Committee, *Submissions*, pp. S18-19

11 AG's, *Transcript*, pp. 3-4

12 AG's, *Submissions*, p. S9

certain continuation of fragmentation in relation to this type of offence.¹³

- 3.13 The Department's submission suggested that one possible way to narrow this offence would be to insert a defence in proposed s.137.1 that provides that:

...the offence does not apply unless the person requesting the information draws attention to the offence prior to asking for the information. If the person cannot tell the truth, then they will be on notice that they can take the option of not answering the question. If the request for information is in writing, the warning can be included in writing.¹⁴

- 3.14 Notwithstanding the practical difficulties with taking this approach, the Committee believes that it is warranted. There could be many cases where people do not consider that by providing false information they may be committing a criminal offence. Generally, the provision of false or misleading information is not a criminal offence.

Recommendation 3

- 3.15 **The Committee recommends that a defence similar to that suggested by the Attorney-General's Department at paragraph 30 of Submission No. 1 be added to proposed s.137.1 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999*.**

Giving information derived from false documents

- 3.16 Proposed s.145.5 makes it an offence for a person to give information to another person derived, directly or indirectly, from a document that, to the knowledge of the first-mentioned person, is false or misleading in a material particular, with the intention of obtaining a gain or causing a loss. This offence is based on s.19.7 of the Model Criminal Code.¹⁵
- 3.17 Proposed s.145.4 in the Bill, which is also based on s.19.7, complements s.145.5.¹⁶ Section 145.4 makes it an offence for a person to dishonestly damage, destroy, alter, conceal or falsify a document with the intention of

13 AG's, *Submissions*, p. S9

14 AG's, *Submissions*, p. S9

15 AG's, *Submissions*, p. S10

16 AG's, *Submissions*, p. S10

obtaining a gain or causing a loss. Both these offences carry a maximum penalty of seven years imprisonment.

- 3.18 The fault element of ‘dishonesty’ was not included in the proposed s.145.5 offence as it was thought that knowledge that the document was false or misleading in a material particular was sufficient.¹⁷
- 3.19 The Attorney-General’s Department noted, it is however arguable that to be consistent with s.145.4 and the other provisions in the Bill and given the level of penalty in s.145.5 of seven years, that the fault element of ‘dishonesty’ should be included.¹⁸ This would mean that for the offence in 145.5 to be made out the defendant must have dishonestly given information believing it to have been derived from a document that is false or misleading in a material particular.
- 3.20 The Committee supports these arguments and recommends that the element of dishonesty be added to proposed s.145.5.

Recommendation 4

- 3.21 **The Committee recommends that the element of ‘dishonesty’ be added to proposed s.145.5 of the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999* directly before the word ‘gives’ in clauses 145.5(1)(a) and (2)(a).**

Burglary

- 3.22 There are three burglary offences in proposed s.132.4 of the Bill. The first of these is in clause 132.4(1). It makes a person guilty of burglary if they enter, or remain in, a building, as a trespasser, with intent to commit theft in the building.
- 3.23 The offence of theft requires that the property that the defendant intends to steal must belong to a Commonwealth entity.¹⁹ The offence of theft makes it clear though that the defendant does not need to be aware that the property belongs to a Commonwealth entity.²⁰ The offence of burglary,

17 AG’s, *Submission*, p. S10

18 AG’s, *Submission*, p. S10

19 See proposed s.131.1(1)(b)

20 See proposed s.131.1(3)

however, requires that the defendant knew that the property he or she intended to steal belonged to such an entity.²¹

3.24 The reason for this is that the current focus of burglary in the Bill is on prosecuting:

...people who break in with specific plans aimed against the Commonwealth – to steal an important document, a piece of sensitive technology or to destroy something that is incriminating.²²

3.25 The Committee questions whether such an approach should be taken. People who would otherwise be guilty of burglary would escape conviction merely because they were unaware or did not care whether the property they intended to steal belonged to the Commonwealth or not.²³ It is also arguable that a person who enters or remains in a building as a trespasser, with intent to commit theft, though recklessly indifferent as to whose property it is they are trying to steal, is equally culpable as someone who commits the same acts knowing that the property belongs to a Commonwealth entity.

3.26 For these reasons, the Committee recommends that proposed s.132.4 be amended so that knowledge that the property in question belongs to a Commonwealth entity is not a requirement of the offence of burglary. This could be done simply by deleting clause 132.4(11).

Recommendation 5

3.27 **The Committee recommends that clause 132.4(11) be deleted from the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999*.**

Repealed provisions

3.28 Enactment of the Bill will lead to the repeal of 250 Commonwealth offences and the replacement of these with the offences in the Bill.²⁴ There are a number of policy reasons for doing this. Firstly, the repeal will cause a number of general application offences in the *Crimes Act 1914* to be

21 See proposed s.132.4(11)

22 AG's, *Submissions*, p. S9

23 AG's, *Submissions*, p. S9

24 AG's, *Transcript*, p. 2

replaced by equivalent general application offences in the Bill. The argument for this is partly based on the need to simplify and modernise the law. The proposed offences in the Bill, it is argued, will achieve this by providing ‘...clearer terminology than the existing *Crimes Act 1914* offences, many of which rely on obscure common law terms which are often argued about and varied by the courts...’²⁵ They will do this by making changes to the current offences so that they can meet advances in technology. This is of particular relevance to the fraud related offences.²⁶ The argument for replacing these *Crimes Act 1914* offences is also based more broadly on the policy of uniting the criminal law in one defining document, the *Criminal Code*.

- 3.29 Secondly, the Bill will lead to the repeal of a number of government agency-specific offences and replacement with the Bill’s general application offences. Replacing these offences with the Bill’s general application offences is aimed at making the criminal law more consistent and avoiding unnecessary duplication. Currently there are many agency-specific offences that cover similar criminal conduct but they have varied penalties and fault elements. For example, there are a number of agency specific misleading statement offences with penalties ranging from six months to two years. These will be replaced by a few general application misleading statement type offences that will provide consistent penalties and fault elements for such conduct throughout the Commonwealth.²⁷ Greater consistency and reduced duplication, it is argued, will lead to criminal law that is fairer and easier to understand and apply.²⁸
- 3.30 The Attorney-General’s Department indicated that all Government Departments facing the repeal of their specific offences had been consulted about the proposed new offences in the Bill.²⁹
- 3.31 The Committee accepts the arguments for replacing these agency specific offences with the general application offences in the Bill. At the same time the Committee is concerned to see that this process will occur smoothly and with minimum problems.
- 3.32 Clearly one means of contributing to a smooth transition is to ensure adequate preparation of the agencies involved. The DPP told the Committee that the various government agencies would have to be educated as to how these changes in the criminal law would affect them. It

25 AG’s, *Transcript*, p. 2

26 AG’s, *Transcript*, p. 2

27 AG’s, *Transcript*, p. 6. The general application offences in the Bill that will replace these agency specific misleading statement offences are proposed ss. 136.1, 137.1, and 137.2.

28 See *Appendix D* for an example of an agency specific provision and the general application offence in the Bill it would be replaced with.

29 AG’s, *Transcript*, p. 6

also indicated that this could be done successively and that it would play its role in putting such measures into place.³⁰

- 3.33 While it acknowledges this assurance from the DPP, the Committee calls on the Attorney-General to oversee this implementation process to ensure that agencies are educated adequately about the operation of the Bill and to ensure that each repealed provision is replaced with an appropriate *Criminal Code* offence.

Conclusion

- 3.34 While the Committee acknowledges the exhaustive consultation leading to development of the Bill, and the fact that some adjustment to the Model Criminal Code is necessary for the Commonwealth jurisdiction, it considers that there is some room for improvement. By noting its concerns in this report the Committee aims to contribute to such improvement.

Kevin Andrews MP
Chair

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