CHAPTER 2

CHANGES TO THE CRIMINAL CODE

Provisions in the Bill

2.1 The Bill contains provisions which would introduce new organised crime offences into the Criminal Code as well as altering the existing offences relating to money laundering, bribery and drug importation.

Organised crime offences

2.2 Schedule 4 of the Bill would amend the Criminal Code to create new organised crime offences to:

> ...target persons who associate with those involved in organised criminal activity, and those who support, commit crimes for, or direct the activities of, a criminal organisation.[1]

2.3 The specific proposed offences are:

- associating in support of serious and organised criminal activity (proposed section 390.3);
- supporting a criminal organisation (proposed section 390.4);
- committing an offence for the benefit of, or at the direction of, a criminal organisation (proposed section 390.5); and
- directing the activities of a criminal organisation (proposed section 390.6).[2]

2.4 Proposed subsection 390.1(1) would define various terms used in relation to these offences.[3]

Association offences

2.5 Proposed section 390.3 would create two offences targeting association in support of serious and organised criminal activity. Under proposed subsection 390.3(1), it would be an offence:

(a) to associate on two or more occasions with another person;

(b) where:

(i) the accused knew that the other person engages, or proposes to engage, in conduct that is an offence against any law;

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1 The Hon Robert McClelland MP, Attorney-General, *House Hansard (Proof)*, 16 September 2009, p. 11. See also Explanatory Memorandum, pp 3 and 129. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the Criminal Code.

2 The submission from the Commonwealth Director of Public Prosecutions provides a very useful outline of the elements of each offence: *Submission 8*, pp 5-9.

3 Explanatory Memorandum, p. 129.

(ii) the associations facilitate the engagement, or proposed engagement, by the other person in the conduct that is an offence;

(iii) the offence involves two or more persons; and

(iv) the offence is a constitutionally covered offence punishable by imprisonment for at least 3 years.[4]

2.6 Proposed subsection 390.3(2) would create a repeat offence which would apply where a person has already been convicted of an offence under proposed subsection 390.3(1). It would require proof of the same elements as the offence under proposed subsection 390.3(1), except that the accused need only have associated with the other person once or more. Both offences would be punishable by a maximum penalty of three years imprisonment.[5]

2.7 The term 'associate' would be defined to mean 'meet or communicate (by electronic communication or otherwise).'[6] Under this definition, it would not be necessary for the association to be in person, for example, the association could occur through mobile phone text messages or via email.[7]

2.8 Proposed subsection 390.1(1) would define 'constitutionally covered offence punishable by imprisonment for at least 3 years'. This phrase is used to ensure that:

- there is a connection between the new association offences and Commonwealth constitutional power; and
- conduct will only be captured by these offences where a person associates with persons who are involved in committing serious organised crime (that is offences punishable by imprisonment for at least three years or for life).[8]

2.9 The term 'constitutionally covered offence' would include Commonwealth offences, state offences that have a federal aspect, territory offences and foreign offences that are constituted by conduct that would constitute an Australian offence, if it occurred in Australia. 'State offences that have a federal aspect' would be defined by proposed section 390.2 and essentially means state offences that involve Commonwealth matters such as telecommunications, postal services or trade and commerce.[9]

2.10 The proposed association offences would require, not only proof that the person associated with a person involved in serious organised criminal activity, but also proof that the association in some way helped, or enhanced the ability of, the

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4 Explanatory Memorandum, p. 135.

5 Explanatory Memorandum, pp 134-135.

6 Proposed subsection 390.1(1); Explanatory Memorandum, p. 130. See also the definition of 'electronic communication' in proposed section 390.1(1).

7 Explanatory Memorandum, p. 136.

8 Explanatory Memorandum, p. 131.

9 Explanatory Memorandum, pp 131 and 134; New South Wales Attorney-General, *Submission 13*, p. 1.

second person to engage in the criminal activity.[10] The Explanatory Memorandum gives the following example of the type of conduct which would be captured by proposed subsection 390.3(1):

> Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs... Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A's meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.[11]

2.11 Proposed paragraph 390.3(6)(a) would create a defence to the new association offences where the association is with a close family member and relates only to a matter that could reasonably be regarded as a matter of family or domestic concern.[12] There would also be defences under proposed paragraphs 390.3(6)(b) to (f) where the association occurs:

(a) in a place being used for public religious worship and takes place in the course of practicing a religion;

(b) only for the purpose of providing aid of a humanitarian nature;

(c) only for the purpose of providing legal advice or legal representation in connection with:

  (i) criminal proceedings;

  (ii) proceedings relating to the declaration of an organisation under state and territory criminal organisation laws; or

  (iii) proceedings for a review of a decision relating to a passport or other travel document.[13]

2.12 Finally, to ensure a person does not face a multiplicity of charges concerning the same course of conduct, proposed subsection 390.3(7) would provide that a person who is convicted of an offence under proposed subsection 390.3(1) is not liable to be punished for an offence under that subsection for other conduct that takes place at the same time, or within 7 days before or after, the conduct the conviction relates to.[14]

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10 Explanatory Memorandum, pp 128 and 136.

11 Explanatory Memorandum, p. 135.

12 Explanatory Memorandum, pp. 130, 131, 132-134 and 138. See also the definitions of 'close family member', 'child', 'de facto partner', 'parent', 'stepchild' and 'step-parent' in proposed subsection 390.1(1).

13 Explanatory Memorandum, pp 138-139. See also *Answers to questions on notice*, 9 November 2009, pp 3-6.

14 Explanatory Memorandum, pp 139-140.

Criminal organisation offences

2.13 Proposed sections 390.4, 390.5 and 390.6 would create offences related to criminal organisations. The Explanatory Memorandum notes that the intent of the provisions creating criminal organisation offences is to criminalise varying levels of involvement in a criminal organisation, with penalties that reflect the spectrum of less to more serious involvement.[15] Unlike the criminal organisation offences under New South Wales and South Australian legislation, the offences are not based on involvement in particular declared or prescribed organisations.[16] Instead, the offences will require a determination by the court on a case-by-case basis that the particular group is a criminal organisation.[17] The Explanatory Memorandum explains the rationale for this approach:

> While traditionally organised crime groups have been tightly structured, hierarchical groups, modern organised crime groups are increasingly loose, fluid networks who work together in order to exploit new market opportunities. Given this trend towards looser, more transient networks, it can be difficult to declare or proscribe criminal groups with any degree of certainty.[18]

2.14 The criminal organisation offences have the following common elements:

(a) the organisation must consist of two or more members;

(b) the aims or activities of the organisation must include facilitating the engagement in, or engaging in, conduct constituting an offence against any law, where that offence is:

  (i) for the benefit of the organisation; and

  (ii) punishable by imprisonment for at least 3 years; and

(c) the activities of the accused must relate to an offence which is a constitutionally covered offence punishable by imprisonment for at least 12 months.[19]

2.15 Proposed subsection 390.1(1) would define: 'constitutionally covered offence punishable by imprisonment for at least 12 months'. Once again, the use of this phrase is intended to ensure that:

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15 Explanatory Memorandum, pp 129 and 140.

16 Criminal organisation offences have been introduced in New South Wales by the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* and in South Australia by the *Serious and Organised Crime (Control) Act 2008 (SA)*. Note that in *Totani v State of South Australia* [2009] SASC 301, the South Australian Supreme Court held that subsection 14(1) of the *Serious and Organised Crime (Control) Act 2008 (SA)*, which requires the Magistrates Court to make control orders against members of declared organisations, is invalid.

17 Explanatory Memorandum, pp 128 and 129.

18 Explanatory Memorandum, p. 129. See also proposed paragraph 390.1(3)(a); Explanatory Memorandum, p. 134.

19 Explanatory Memorandum, p. 141, 144 -145 and 148-149. The phrase 'for the benefit of' the organisation is defined in proposed subsection 390.1(1) and is discussed below.

- there is a connection between the new criminal organisation offences and Commonwealth constitutional power; and
- conduct will only be captured by these offences where, for example, a person is supporting a criminal organisation to commit *serious* offences (that is offences punishable by imprisonment for at least 12 months or for life).[20]

Supporting a criminal organisation

2.16 In addition to these common elements, proposed section 390.4 would require proof that:

- the accused intentionally provided material support or resources to the organisation or a member of the organisation; and
- the provision of the support or resources aided, or there was a risk that the provision of the support or resources would aid, the organisation to engage in an offence.[21]

2.17 Under proposed section 390.4, a person may be convicted of supporting a criminal organisation where there is a risk that the provision of support or resources will aid the organisation to commit a crime, even if the support or resources does not actually aid the commission of a crime.[22]

2.18 The Explanatory Memorandum gives the following example of conduct that would constitute this offence of supporting a criminal organisation:

> Person A is a financial expert. Persons B, C and D are members of a criminal organisation. Person A provides significant advice and training to persons B, C and D on how they might go about engaging in the money laundering of specific illicit profits of crime...[23]

2.19 The offence of supporting a criminal organisation would be punishable by a maximum of five years imprisonment.[24]

Committing an offence for the benefit of, or at the direction of, a criminal organisation

2.20 Proposed section 390.5 would create offences where a person commits an offence:

- for the benefit of a criminal organisation; or
- at the direction of a criminal organisation or a member of the organisation.[25]

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20 Explanatory Memorandum, pp 130-131.

21 Explanatory Memorandum, pp 140-141. This offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months. See also *Answers to questions on notice*, 9 November 2009, p. 7.

22 Proposed subsection 390.4(3); Explanatory Memorandum, p. 142.

23 Explanatory Memorandum, p. 140. See also *Answers to questions on notice*, 9 November 2009, p. 8.

24 Explanatory Memorandum, p. 140.

2.21 An offence is 'for the benefit of' of an organisation if the offence results, or is likely to result, in the organisation or at least one of its members receiving directly or indirectly a significant benefit of any kind.[26] The Explanatory Memorandum notes that the definition is not limited to where an actual benefit is received and that:

> Examples of a significant benefit may include, but are not limited to, direct benefits such as financial benefits or profits from the trafficking and sale of drugs, or more indirect benefits such as instances where a criminal organisation provides protection or security for illegal activities such as illegal gambling or illegal brothels.[27]

2.22 The Explanatory Memorandum suggests that:

> For the offence to be at the direction of a criminal organisation, it will not be necessary to prove that the organisation (or member of the organisation) has specifically instructed that the person commit the underlying offence. It will be sufficient to prove that the organisation or member of the organisation encouraged, in any way, the commission of the underlying offence.[28]

2.23 Both the offences under proposed section 390.5 would be punishable by a maximum of seven years imprisonment.[29]

2.24 The rules against double jeopardy would apply so that a person cannot be convicted of both the underlying offence and an offence under proposed subsection 390.5.[30]

Directing a criminal organisation

2.25 The most serious criminal organisation offences would relate to directing the activities of the organisation. Under proposed section 390.6, it would be an offence to direct one or more activities of a criminal organisation where:

- the activities aid, or there is a risk that they will aid, the organisation to engage in conduct constituting an offence; or
- the activities constitute an offence.[31]

2.26 The Explanatory Memorandum states that to show that a person directed the activities of the organisation it would be sufficient:

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25 Explanatory Memorandum, pp 143-144. The offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months.

26 Proposed subsection 390.1(1); Explanatory Memorandum, pp 131-132.

27 Explanatory Memorandum, p. 132. See also pp 145 and 147; subsection 390.5(7).

28 Explanatory Memorandum, p. 145.

29 Explanatory Memorandum, p. 143.

30 Explanatory Memorandum, p. 147. Proposed subsection 390.5(6) would ensure that this is the case in relation to a foreign offence, while section 4C of the Crimes Act prevents a person being punished twice under two Australian offences for the same conduct.

31 Explanatory Memorandum, pp 147-148. In either case, the offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months.

> ...to prove that the activities were encouraged in any way, for example, where the direction was implied. This element will be satisfied whether the person directs one or more specific members of the organisation, or directs the organisation generally (such as by sending an email or text message to many or all members of an organisation).[32]

2.27 The offence of directing the activities of a criminal organisation would be punishable by a maximum of 10 years imprisonment where the activities may aid the organisation to commit an offence, and a maximum of 15 years imprisonment where the activities constitute an offence.[33]

Telecommunications interception warrants

2.28 Finally, Item 4 of Schedule 4 would amend the definition of 'serious offence' in section 5D of the *Telecommunications (Interception and Access) Act 1976* (TIA Act) so that telecommunications interception warrants are available for the investigation of the proposed organised crime offences.[34]

Other proposed changes to the Criminal Code

2.29 In addition to inserting the new organised crime offences, the Bill proposes changes to existing offences under the Criminal Code relating to money laundering, bribery and drug importation.

Money laundering

2.30 Part 1 of Schedule 5 of the Bill would remove limitations on the scope of money laundering offences:

- to enable them to apply to the full extent of the Commonwealth's constitutional power in this area; and
- to extend the geographical jurisdiction of the offences.[35]

2.31 In particular, these proposed changes include repealing the application provisions with respect to offences relating to the laundering of proceeds of crime. At present, the money laundering offences under Division 400 of the Criminal Code are limited to conduct that has a link to a constitutional head of power because:

- the money or property is proceeds of crime, or could become an instrument of crime, in relation to an indictable offence with a constitutional link;[36] or
- the dealing with the money or property occurs in the course of importation or exportation, by means of a postal, telegraphic or telephonic service, or in the course of banking.[37]

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32 Explanatory Memorandum, p. 149.

33 Explanatory Memorandum, p. 148.

34 Explanatory Memorandum, pp 129 and 151-152.

35 Explanatory Memorandum, p. 3.

36 Specifically, a Commonwealth, territory or foreign offence, or a state offence to the extent that it is a law with respect to external affairs: subsections 400.2(1) and (3).

2.32 The Explanatory Memorandum notes that these limitations are not necessary in relation to offences relating to the laundering of proceeds of crime because these offences are wholly supported under the external affairs power by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[38] However, an application provision would be retained with respect to money laundering offences related to dealing with instruments of crime because these offences are not covered by that convention.[39]

2.33 Item 23 of Schedule 5 would extend the geographical jurisdiction applicable to the money laundering offences in Division 400 by replacing existing section 400.15. This section already applies extended geographical jurisdiction - category B (as set out in section 15.2 of the Criminal Code) to money-laundering offences.[40] The new section 400.15 would replicate the extended jurisdiction currently applicable to the money laundering offences. In addition, new section 400.15 would provide that a person is guilty of the money laundering offences in situations where the person engages in money laundering outside Australia, and the money or other property is the proceeds of crime, or could become an instrument of crime, in relation to an Australian offence.[41] This amendment would enable the prosecution of a person who launders money or property related to Australian offences overseas, even if the person is not an Australian citizen or resident, provided there is a corresponding offence in the overseas country.[42]

2.34 The Australian Federal Police (AFP) submitted that the current more limited geographical jurisdiction for money laundering offences has frustrated the prosecution of people involved in drug related, money laundering activities:

> A number of money laundering investigations have revealed overseas based persons and syndicates who are aiding and abetting the laundering of money generated by criminal activity in Australia by moving cash generated from criminal activity out of Australia. These overseas based individuals provide the means for criminal groups in Australia to move proceeds of crime generated in Australia out of the country. These

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37 Paragraphs 51(i), (v) and (xiii) of the Constitution; section 400.2 and subsection 400.9(3); Commonwealth Director of Public Prosecutions, *Submission 8,* p. 10.

38 CETS No.141 at: http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm (accessed 13 October 2009). See particularly article 6 which relates to laundering offences.

39 Explanatory Memorandum, pp 154 and 156; Item 4 and 19 of Schedule 5. See also Commonwealth Director of Public Prosecutions, *Submission 8,* p. 10.

40 The geographical jurisdiction of offences under section 15.2 includes where, for example, the conduct constituting the offence occurs outside Australia but the accused is an Australian citizen or resident at the time of the offence.

41 More specifically, the offence must be a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence, or a Northern Territory indictable offence. These terms are all defined in subsection 400.1(1).

42 Explanatory Memorandum, pp 156-157; AFP, *Submission 10*, p. 13.

individuals currently achieve this with little risk of prosecution to themselves in Australia or in their home country.[43]

Penalties for bribery offences

2.35 Schedule 8 would increase the penalties under the Criminal Code for the offences of bribing a foreign public official, bribery of a Commonwealth public official and a Commonwealth official receiving a bribe.[44] The existing penalties for these offences are a maximum of 10 years imprisonment or a maximum fine of $66,000 for an individual, and $330,000 for a body corporate, or both imprisonment and a fine.[45]

2.36 The Bill would not alter the maximum terms of imprisonment for these offences but would increase the maximum fines. In the case of individuals, the maximum fine would be 10,000 penalty units ($1,100,000).[46] In the case of a body corporate, the maximum fine would be the greatest of:

- 100,000 penalty units ($11,000,000);
- three times the value of any benefit that was directly or indirectly obtained from the conduct constituting the offence; or
- if the court cannot determine the value of the benefit, 10% of the annual turnover of the body corporate.[47]

2.37 The Explanatory Memorandum explains that the inclusion of significant monetary penalties is intended to deter and punish bribery of public officials in both the international and domestic spheres and that the existing financial penalties may be perceived as 'a cost of doing business' when transactions worth millions of dollars are involved.[48]

Drug importation

2.38 Schedule 9 of the Bill would extend the definition of 'import' in Division 300 of the Criminal Code to include not only bringing a substance into Australia but also 'dealing with a substance in connection with its importation'. The Explanatory Memorandum explains that the effect of this amendment would be to allow Commonwealth drug importation offences to capture a broader range of criminal

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43 *Submission 10*, p. 13. See also Mr Roman Quaedvlieg, Acting Deputy Commissioner, AFP, *Committee Hansard*, 29 October 2009, p. 3.

44 Explanatory Memorandum, pp 3, 184 and 186.

45 Sections 70.2 and 141.1; section 4B of the Crimes Act; Explanatory Memorandum, p. 184. Section 4B of the Crimes Act allows a court to impose a pecuniary penalty for a Commonwealth offence. The penalty is calculated according to the formulas set out in that section and may be in addition to, or instead of, a penalty of imprisonment.

46 Items 1, 3- 6, of Schedule 8; Explanatory Memorandum, pp 184 and 186.

47 Items 1, 3, 4 and 6 of Schedule 8; Explanatory Memorandum, pp 185 and 186.

48 Explanatory Memorandum, pp 184 and 186. See also *Answers to questions on notice*, 9 November 2009, p. 1.

activity.[49] The proposed amendments are a response to a decision of the New South Wales Court of Criminal Appeal which gave a narrower interpretation to the term 'import' than to the term 'importation' as it was used in relation to the previous drug importation offences in the *Customs Act 1901*.[50]

2.39 The Explanatory Memorandum gives examples of the type of conduct it is intended the new definition of 'import' would capture including:

- packaging the goods for importation into Australia;
- transporting the goods into Australia;
- recovering the imported goods after landing in Australia;
- clearing the imported goods;
- unpacking the imported goods; and
- arranging for payment of those involved in the importation process.[51]

Issues raised in submissions

Organised crime offences

2.40 Several submissions to the inquiry related to the proposed organised crime offences with some supporting the offences and others raising concerns about them. The Australian Federal Police Association and the Police Federation of Australia (the Police Associations) supported the proposed organised crime offences and noted that:

> [The offences] 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.
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> ...Often, participants in the various levels are insulated from one another, making it difficult for law enforcement to gain meaningful assistance from those arrested.[52]

2.41 However, the Police Associations argued that the Criminal Code should also be amended to include an offence of recruiting persons to engage in criminal activity based on section 351A of the *Crimes Act 1900 (NSW)* or similar to the offences in Division 270 and 271 of the Criminal Code which deal with slavery, sexual servitude,

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49 Explanatory Memorandum, pp 3 and 188.

50 *Campbell v R* [2008] NSWCCA 214 at paras 101-102 and 123-128; Commonwealth Director of Public Prosecutions, *Submission 8*, pp 12-13; Explanatory Memorandum, p. 188.

51 Explanatory Memorandum, p. 189. See also AFP, *Submission 10*, p. 13.

52 *Submission 3*, pp 3-4.

deceptive recruiting, people trafficking and debt bondage.[53] The Police Associations argued that servitude and debt bondage are equally applicable to drug addicts recruited to participate in narcotic importations and other vulnerable people recruited to commit offences.[54]

2.42 In contrast to the position of the Police Associations that the organised crime offences should be more expansive, the Law Council of Australia (Law Council) argued that the proposed offences:

> ...are unnecessary and potentially expose people to sanction not on the basis of their individual conduct but on the basis of their associations or proximity to an offence or offender.[55]

2.43 The Law Council submitted that the existing provisions in the Criminal Code providing for extended criminal liability and creating money laundering offences, combined with the civil forfeiture regime under the POC Act, 'already provide law enforcement agencies with sufficient scope for targeting the activities of those who finance, facilitate and/or profit from organised crime.'[56] For example, the Law Council noted that when the money laundering offences under section 400.3 are combined with the conspiracy provision in section 11.5 of the Criminal Code:

> ...the result is that it becomes possible to successfully prosecute a person for conspiring to handle or transfer money where there is a risk that the money may be used to facilitate an offence and the person is reckless or negligent as to that risk.[57]

2.44 The Law Council argued that the proposed organised crime offences 'alter the very principles of criminal responsibility' and submitted that:

> If every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised.[58]

2.45 The New South Wales (NSW) Attorney-General supported 'strong Commonwealth measures to deal with the threats posed by serious and organised crime' but raised some specific issues about the organised crime offences. One of these related to the inclusion of 'State offences that have a federal aspect' within the definitions of 'constitutionally covered offence'. The Attorney-General submitted that,

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53 *Submission 3*, p. 5. Section 351A of the *Crimes Act 1900 (NSW)* creates offences where a person recruits another person to carry out, or assist in carrying out, a criminal activity.

54 *Submission 3*, p. 5.

55 *Submission 12*, p. 4.

56 *Submission 12*, p. 6. Sections 11.1 to 11.5 in Part 2.4 of the Criminal Code extend criminal liability to where a person attempts or conspires to commit an offence, or urges, aids, abets counsels or procures the commission of an offence.

57 *Submission 12*, p. 6.

58 *Submission 12*, p. 7.

while this term appears in other Commonwealth legislation, it is the first time this term will be 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.[59]

Government response

2.46 Contrary to the argument of the Law Council that the existing provisions of the Criminal Code and the POC Act are adequate to combat organised crime, Mr Roman Quaedvlieg, Acting Deputy Commissioner of the AFP argued that the proposed organised crime offences address gaps in existing criminal responsibility provisions:

> The proposed offences are specialised offences designed to combat organised crime that is not fully covered by the current existing criminal responsibility provisions such as conspiracy, complicity, and association. These offences are designed to target the structure, the organisation, the members and the associates of organised crime.[60]

2.47 Furthermore, an officer of the Attorney-General's Department rejected the contention that the offences alter the principles of criminal responsibility:

> ...all of the criminal organisation and association offences in this bill have very clear elements of the offences with significant fault elements that have to be proved, and what will have to be proved for all of them is not a departure from the ordinary principles of criminal law. In fact, the case that will have to be put to a court is quite significant in every case.[61]

Association offences

2.48 Some submitters expressed particular concern about the breadth of the offences that would be created by proposed section 390.3 of the Criminal Code. For example, Dr Andreas Schloenhardt submitted that proposed section 390.3 'risks creating guilt by association' because it does not require some type or degree of involvement of an accused in a criminal organisation:

> An [offence] based on mere association with 'a second person' does not articulate clear boundaries of criminal liability and does not conclusively answer the question as to how remotely a person can be connected to a criminal group and still be liable for participation. Neither the offence description nor the legislative material conclusively explains where association begins and ends. Moreover, nothing in the Bill suggests that it is

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59 *Submission 13*, p. 2.

60 *Committee Hansard*, 29 October 2009, p. 3.

61 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5.

> not possible to charge a person with attempted association, thus creating liability for acts even further removed from any actual criminal activity, any actual harm, or any potential social danger.[62]

2.49 Dr Schloenhardt contrasted the association offence under proposed section 390.3 with the criminal organisation offences under proposed sections 390.4 to 390.6:

> It is ...more sensible to differentiate the various roles and duties a person may occupy in a criminal organisation and also recognise any special knowledge or intention that person may have — as has been done in proposed ss 390.4–390.6 Criminal Code (Cth). These provisions provide specific offences which criminalise selected key functions within the organisation. Simultaneously, they exclude from liability those types of associations that are seen as too rudimentary to warrant criminalisation. By avoiding the use of broad and uncertain terms, these offences may also escape criticism of vagueness and overbreadth and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges.[63]

2.50 In a similar vein, the Law Council submitted that:

> ...in shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction. In essence, this offence provision assumes that clear lines can and should be drawn between a certain criminal class and the rest of society. However, this does not reflect the reality of our community where in extended family groups, public housing, the workplace, pubs, clubs and other formal and informal community organisations the lives of many and varied people intersect. Some people have greater choice than others about the extent to which their interaction may include contact with people potentially engaged in criminal activity. ...[P]rovided that such people do not themselves plan, assist or participate in the commission of any particular offence, they should not have to live in the shadow of offence provisions such as these.[64]

2.51 The Law Council identified several specific concerns about the drafting of proposed section 390.3 including that:

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62 *Submission 1*, p. 16. The Attorney-General's Department confirmed that it would be possible to charge a person with attempted association: Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 6.

63 *Submission 1*, pp 16. See also Dr Ben Saul, Sydney Centre for International Law, *Submission 5*, p. 3.

64 *Submission 12*, p. 9.

- the term 'facilitate' is not defined and may therefore encompass 'a wide range of activity which is only of peripheral or minimal relevance to the commission of an offence';[65] and
- there is no requirement that the person charged with the offence know or intend that his or her association with the second person will facilitate the commission of an offence.[66]

2.52 Very similar points were made by Professor Roderic Broadhurst and Ms Julie Ayling who noted that:

> ...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...[67]

Defences to association offences

2.53 Some submitters raised concerns that the defences under proposed subsection 390.3(6) are framed too narrowly.[68] For example, Professor Broadhurst and Ms Ayling noted that proposed subsection 390.3(6) provides an exhaustive list of specific types of association to which the section does not apply and thus does not give the court any discretion to consider other types of associations:

> 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.[69]

2.54 They suggested that a more rational approach to the problem of unforeseen circumstances would be to create a general defence of reasonableness which conferred a discretion on the court to consider whether an association that facilitated an offence was justified in the circumstances. Professor Broadhurst and Ms Ayling noted that

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65 *Submission 12*, p. 9. Under proposed subparagraphs 390.3(1)(c) and 390.3(2)(d), to constitute an offence, the associations must 'facilitate' the other person engaging in crime.

66 *Submission 12*, pp 9-10. It is sufficient if the person is aware of a substantial risk that the association will facilitate criminal conduct.

67 *Submission 6*, pp 4-5. Section 44 of the *Serious Crime Act* 2007 *(UK)* provides that a person commits an offence if he does an act capable of encouraging or assisting the commission of an offence; and he intends to encourage or assist its commission.

68 Dr Saul, *Submission 5*, p. 3; Professor Broadhurst and Ms Ayling, *Submission 6*; p. 5; Law Council, *Submission 12*, p. 10.

69 *Submission 6*, p. 5.

section 50 of the *Serious Crime Act* 2007 *(UK)* creates a defence to similar offences where the accused proves that:

- he knew or reasonably believed certain circumstances existed; and
- it was reasonable for him to act as he did in those circumstances.[70]

2.55 The Law Council identified two specific concerns with the proposed defences. Firstly, in relation to the defence for family associations under proposed paragraph 390.3(6)(a), the defence does not extend to relationships with extended family such as aunts, uncles and cousins.[71] Secondly, the Law Council was concerned that the defences for legal practitioners under proposed paragraphs 390.3(6)(d), (e) and (f) are limited to providing advice in relation to particular types of matters. The Law Council submitted that it will be difficult for a legal practitioner to make out these defences if his or her client refuses to waive legal professional privilege to allow the practitioner to lead evidence about the type of advice provided to the client.[72]

2.56 Conversely, Professor Broadhurst and Ms Ayling argued that it would be possible for the specific exceptions in proposed subsection 390.3(6) to operate too broadly in some circumstances and suggested that this was a further reason for replacing the specific exceptions with a more general defence of reasonableness.[73]

Drafting issue

2.57 The NSW Attorney-General submitted that there is a drafting error in proposed subsection 390.3(7) which aims to prevent a person facing multiple charges under the association offences for what is essentially the same course of conduct. The Attorney-General pointed out that:

> ...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 led to a conviction under 390.3(1).[74]

Government response

2.58 An officer from the Attorney-General's Department rejected the view that the association offence is drafted too broadly:

> ...the association offence in this suite of provisions in the bill not only requires association where the individual knows that the other person is engaged in serious criminal activity but also requires that that person be aware of a substantial risk that their association with that individual will

70 *Submission 6*, pp 5 and 7.

71 *Submission 12*, p. 10.

72 *Submission 12*, p. 10.

73 *Submission 6*, pp 6-7.

74 *Submission 13*, p. 2. See also *Answers to questions on notice*, 9 November 2009, pp 6-7.

> facilitate that person's engagement in serious criminal activity. Those are significant elements to prove.[75]

2.59 The department also rejected the argument that the term 'facilitate' is uncertain or too broad and noted that the term will be given its ordinary meaning of 'assist or support in some way.'[76] In addition, the department submitted to the committee that 'recklessness' is the appropriate fault element to apply in relation to whether the associations facilitate criminal activity:

> ...'recklessness' is defined in the Criminal Code in a way that is actually quite a high threshold. It is below knowledge but it requires awareness of a substantial risk of that result or circumstance occurring and also awareness that it is unjustifiable in ...all the circumstances to take that risk. It is a two-step threshold and not easily satisfied. ...'[R]ecklessness' is the standard fault element that applies to physical elements of offences that are results or circumstances of conduct. It would be the common and default fault element that applies under the Criminal Code to just these kinds of elements of offences.[77]

2.60 The committee queried whether a person providing employment to a person who has been convicted of offences in the past might potentially be caught by the association offences. In response, an officer from the Attorney-General's Department stated that knowledge of the employee's criminal past would not be sufficient to make out the offences:

> ...it is all set against a background of a prosecution needing to prove the case beyond reasonable doubt and prove that the individual that they are prosecuting was aware of a substantial risk. So, in a situation where an employer gives an ex-convict a job without a significant amount of additional information that ...suggested they were aware of a substantial risk that giving them that employment would enable them to engage in crime, merely knowing about their criminal background would be nowhere near enough information for a court to be satisfied beyond reasonable doubt.[78]

2.61 Mr Roman Quaedvlieg, Acting Deputy Commissioner of the AFP, noted that, while there are probably an infinite number of conceivable scenarios where the elements of the association offences could be argued to apply, the aim of the new provisions is to target the upper echelons of organised crime groups:

> ...[A]s senior law enforcement officials we have seen over the last decades any number of individuals that have been promoted through the echelons of criminality to positions they now occupy where they effectively control large numbers of resources and criminal identities and yet remain

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75 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5. See also *Answers to questions on notice*, 9 November 2009, pp 2-3.

76 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5.

77 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 6. See also p. 5; *Answers to questions on notice*, 9 November 2009, pp 2-3.

78 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 15. See also pp 5-6.

> sufficiently removed from that activity, which makes it difficult for us to try and target them. These provisions may give us some extension of our reach to actually target those higher echelon criminals.[79]

2.62 In addition, the ACC noted that the association offences are intended to target 'trusted insiders' who facilitate organised criminal activity:

> Organised criminals rely on a lot of assistance of professionals such as accountants and other people to assist them with finances and structuring funds and so forth. We have also unearthed a lot of intelligence about the use of, for example, trusted insiders in various business sectors, which is the acquisition of information that might otherwise be confidential or secure to help an organised group in some way, or the provision of particular knowledge or expertise that would assist an organised criminal group defeat law enforcement in their efforts to investigate them. ...Quite often trusted insiders are called 'trusted insiders' because there is a relationship and an element of recklessness or sometimes even absolute intent and knowledge to assist, but they are not actually a party to the offence that might ultimately be committed.[80]

2.63 The Attorney-General's Department responded to concerns that the defences to the association offences are drafted too narrowly. In relation to the defence for family associations, the department submitted that:

> This defence does not come into play until the prosecution can prove beyond reasonable doubt the stringent fault elements of the offence...
>
> Even if the close relative was culpable on all these counts, the defence is available to exempt certain associations in certain scenarios, where the association relates to a matter of family or domestic concern. In practical terms, a mother could know that she is aiding her son's involvement in organised crime by providing food and lodging for her son. The Government has taken the view that it should not intrude on families to that extent. However, to extend the exception to the whole extended family would open a loophole that would significantly reduce the effectiveness of the offence.[81]

2.64 Contrary to the view of the Law Council, the department argued that legal practitioners 'may be able to adduce evidence in order to make out the defence under proposed section 390.3(6) notwithstanding that a client refuses to waive legal professional privilege.'[82] The department submitted that:

> ...any refusal by a client to waive legal professional privilege would not prevent a defendant from adducing evidence of a general nature about the existence of such a relationship between the practitioner and client and the general purpose for which the advice was provided.[83]

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79 *Committee Hansard*, 29 October 2009, p. 7.

80 Mr Michael Outram, Executive Director, *Committee Hansard*, 29 October 2009, p. 7.

81 *Answers to questions on notice*, 9 November 2009, pp 3-4.

82 *Answers to questions on notice*, 9 November 2009, p. 5.

83 *Answers to questions on notice*, 9 November 2009, p. 5.

Criminal organisation offences

2.65 Some submissions received by the committee raised specific issues in relation to the proposed criminal organisation offences. Professor Broadhurst and Ms Ayling supported the aim of the criminal organisation offences to 'move beyond the classic conception of criminal organisation[s] as well-structured, long-lasting and often hierarchical groups' to encompass criminal networks. They noted that:

> 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.[84]

2.66 Professor Broadhurst and Ms Ayling suggested that the Bill would more effectively achieve this aim if it adopted the language of 'criminal networks' so that it would more clearly grant courts the flexibility to recognise structures that may not amount to 'organisations'. They argued that:

> [The] 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.[85]

2.67 On the other hand, some submitters suggested that the definition of 'criminal organisation' is too broad. For example, while Dr Schloenhardt was generally supportive of the criminal organisation offences in proposed sections 390.4, 390.5 and 390.6, he argued that the definition of 'criminal organisation' implicit in these provisions does not require the group to have any formal structure nor that it exist for any period of time.[86] Similarly, Dr Ben Saul of the Sydney Centre for International Law pointed out that the United Nations Convention against Transnational Organised Crime (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.[87]

2.68 Dr Saul noted that:

> In contrast, the Bill applies to associations of only two or more people, which need not be 'structured' ...nor exist 'for a period of time'.[88]

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84 *Submission 6*, p. 3.

85 *Submission 6*, p. 3.

86 *Submission 1*, pp 14-15.

87 *Submission 5*, p. 1; Article 2, TOCC, [2004] ATS 12.

88 *Submission 5*, p. 2.

2.69 To address this issue, the NSW Attorney-General suggested that 'a group of persons that forms randomly for the immediate commission of a single offence' should be specifically excluded from the definition of 'criminal organisation'.[89]

2.70 Dr Saul raised more specific concerns that the offence of providing material support or resources to a criminal organisation is too vague and ill-defined to enable a person to know the scope of their criminal liability.[90] He compared proposed section 390.4 with United States offences of providing material support or resources to a terrorist organisation which were found to be unconstitutionally vague by a United States superior court.[91] The United States offences defined the term 'material support or resources'.[92] Despite this, Dr Saul noted that

> ...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.[93]

2.71 By contrast, he noted:

> 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. ...
>
> 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.[94]

2.72 The Law Council also raised concerns about the proposed offence of supporting a criminal organisation under proposed section 390.4. Firstly, the Law Council noted that this offence does not require that the accused knew or intended that his or her provision of support or resources would aid, or was likely to aid, the recipient organisation in committing an offence. The accused need only be reckless about this result. The Law Council submitted that:

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89 *Submission 13*, p. 1.

90 *Submission 5*, p. 3.

91 *Submission 5*, p. 2. The case is the decision of the United States Court of Appeals for the Ninth Circuit Court in *Humanitarian Law Project v Reno* [2000] USCA9 114 at http://www.worldlii.org/us/cases/federal/USCA9/2000/114.html (accessed 20 October 2009).

92 'Material support or resources' was defined as 'currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials': *Humanitarian Law Project v Reno* [2000] USCA9 114.

93 *Submission 5*, p. 3.

94 *Submission 5*, p. 3.

> As currently drafted, under the proposed section a person may be subject to sanction because he or she provides support to an organisation in circumstances where there is a risk that the support may aid the organisation to commit an offence. ...[T]his extends the reach of the section too far.[95]

2.73 The Law Council suggested amending this offence so that it provides that the support must be *intended* to aid the organisation to commit an offence.[96]

2.74 Secondly, the Law Council pointed out that a person guilty of the offence of supporting a criminal organisation is liable to a maximum penalty of five years imprisonment when the offence the support could have aided may only carry a maximum penalty of 12 months imprisonment. The Law Council suggested that the offence under proposed section 390.4 should be limited to supporting the commission of *serious* offences.[97]

Government response

2.75 The Attorney-General's Department rejected the argument that the proposed criminal organisation offences could capture a group that formed randomly for the commission of a single offence:

> The term 'organisation' requires there to be a form of organisation, so it would never encompass, for example, a group that randomly formed to commit an offence and then disbanded. Also, our view is that 'organisation' is not a term of art—it is an ordinary term that a court would be able to interpret—and that it is not too broad. The nature of the term 'organisation' requires that there be some sense of structure and a group coming together for a purpose, rather than people who might happen one evening to run into each other on the street or a mob attack, for example. It would not cover that.[98]

2.76 The department also submitted that limiting the offence of supporting a criminal organisation to circumstances where the accused intended that the support would aid the organisation to commit an offence would significantly restrict the application of the offence:

> Application of the higher fault element of intention would mean that the offence would not apply where a person is aware that it is highly likely that their support will (or could) aid the organisation's criminal activities.[99]

2.77 In response to concerns that the maximum penalty for the offence of supporting a criminal organisation may exceed the penalty for the offence the support might have aided, the department submitted that:

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95 *Submission 12,* pp 11-12.

96 *Submission 12,* p. 12.

97 *Submission 12,* p. 12.

98 Ms Sarah Chidgey, *Committee Hansard,* 29 October 2009, p. 9.

99 *Answers to questions on notice,* 9 November 2009, p. 8.

> ...it is appropriate that where a person aids an organisation to commit a criminal offence, where the organisation's aims involve committing serious criminal offences (ie with maximum penalties of three or more years imprisonment), that the specific offence/s which is/are aided be one or more of a wider pool of offences (ie those carrying a maximum penalty of 12 months imprisonment or more). The maximum penalty of five years imprisonment is appropriate to punish those who aid the criminal activities of serious and organised crime groups through the provision of support or resources.[100]

Increased penalties for bribery offences

2.78 The joint submission from Make Poverty History and Micah Challenge strongly supported the increased penalties for bribery offences which would be introduced by Schedule 8 of the Bill.[101] The submission noted that corruption in developing countries has a diverse range of negative consequences such as:

- undermining progress in reducing child mortality and fighting diseases;
- allowing exploitative work conditions; and
- permitting poorly constructed buildings that collapse with deadly consequences.[102]

2.79 These organisations argued that corruption in the developing world is sustained by bribes paid by western countries and that:

> ...bribery fosters a culture of impunity and repeat corruption, undermines the functioning of public institutions and fuels a [public] perception that governments and bureaucracies are up for sale to the highest bidder.[103]

2.80 The Police Associations also supported the increased penalties for bribery offences but argued that this would not be sufficient to deter people from engaging in bribery, especially organised crime groups which corrupt public officials to assist their criminal activities. As a result, the Police Associations argued that an unjust enrichment offence in relation to Commonwealth public officials should be introduced.[104]

Drug importation

2.81 Finally, the NSW Department of Premier and Cabinet submitted that the proposed amendments to the definition of 'import' may narrow the definition rather than broaden it. This was on the basis that the definition includes 'bring the substance into Australia *and* deal with the substance in connection with its importation.' The department argued that 'and' should be replaced with 'or' to ensure the intention of broadening the definition is achieved.[105]

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100 *Answers to questions on notice*, 9 November 2009, p. 9.

101 *Submission 2*, p. 1. See also Professor Broadhurst and Ms Ayling, *Submission 6*, p. 2.

102 *Submission 2*, pp 2-4.

103 *Submission 2*, pp 3-4.

104 *Submission 3*, pp 6-7.

105 *Submission 14*, pp 1-2.