

CHAPTER 7

COMMITTEE VIEW

7.1 The committee recognises that this Bill makes a large number of changes which either correct anomalies or drafting errors, or are technical in nature. However, evidence to the committee raised substantive issues about the provisions of the Bill:

- creating organised crime offences;
- expanding search and information gathering powers under the Crimes Act;
- enhancing the powers of the ACC to deal with uncooperative witnesses; and
- amending the POC Act.

Organised crime offences

7.2 The committee supports the intention of the proposed organised crime offences in the Bill to provide a mechanism through which law enforcement agencies can specifically target people who are involved in serious and organised criminal activity. Nevertheless, the committee considers that the association offences and the offence of providing support to a criminal organisation require some changes to ensure they do not operate more broadly than is necessary to achieve this purpose.

Association offences

7.3 The committee has particular reservations about offences which criminalise who a person associates with rather than specific conduct. The committee therefore welcomes the fact that the association offences proposed by the Bill require not only an association but also that the association facilitates criminal conduct or proposed conduct. Despite this, submissions to the inquiry raised legitimate concerns about the breadth of these offences.

7.4 The example of an association offence provided by the Explanatory Memorandum refers to meetings between the accused and a person proposing to illegally import drugs through an airport, for the *purpose* of the accused providing advice on how airport security could be circumvented as part of the operation.¹ In other words, the example is one in which there would almost certainly be an *intention* to facilitate criminal activity. The committee agrees that this is precisely the type of behaviour which ought to be captured by the proposed association offences. However, the association offences as currently drafted require only recklessness not an intention to assist the criminal conduct. By contrast, the offences of associating with a terrorist organisation, under section 102.8 of the Criminal Code, require not only that the association provides support to the organisation but also that the accused intended that the support would assist the organisation to expand or to continue to exist.²

1 Explanatory Memorandum, p. 135.

2 These offences are punishable by imprisonment for three years as are the offences under proposed section 390.3 of the Criminal Code.

7.5 The committee can imagine many individuals who knowingly associate with people engaged in a criminal lifestyle, whose actions may facilitate the commission of offences, even though they have no intent to do so and may indeed hope to dissuade those people from further criminal activity. For example, a legitimate employer may technically fall foul of the association offences by paying wages to a person he or she knows has been involved in criminal activities with a drug trafficking gang, if there is a substantial risk those wages may be used to assist the commission of further offences. It is difficult to see how an individual could ever renounce a criminal lifestyle if the law exposed his or her employers to the risk of criminal prosecution for taking a chance that the person genuinely wished to reform.

7.6 The Acting Deputy Commissioner of the AFP suggested to the committee that, while there may be an infinite number of scenarios which would arguably be captured by the association offences, the aim of the provisions is to target the core of serious organised criminality not the margins.³ It might also be argued that the DPP will not pursue prosecutions when a person is only tenuously connected to organised crime but good legislation does not rely on the appropriate exercise of discretion by government officials: it is justified in its own terms. In short, the committee considers that the association offences in proposed section 390.3 of the Criminal Code are drafted so broadly that they could capture a range of conduct which ought not to be criminal.

7.7 Moreover, the defences in proposed subsection 390.3(6) of the Criminal Code are drafted too narrowly to remedy this. For example, it is difficult to see why an association which is only for the purpose of providing legal advice in relation to a property conveyance should render a legal practitioner criminally liable if the property acquired facilitates the commission of an offence and the practitioner is reckless about this possibility. People who are involved in organised crime are still entitled to legal advice and representation and the committee cannot accept that practitioners should only be protected in relation to specific types of advice and representation. Even if this is not accepted, the Law Council rightly points out that a legal practitioner will not be able to make out the 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.

7.8 A further example is that the defence for associations that take place in the course of practising a religion applies only if the association occurs in a place used for public religious worship. Yet there are likely to be many circumstances in which religious practitioners associate with people involved in organised criminal activity, in private settings, in the course of practising their religion.

7.9 It seems that assistance provided by counsellors and medical practitioners would be protected by the defence for associations that are for the purpose of providing humanitarian aid. However, this defence does not appear to be broad enough to protect a person who provides accommodation, employment or education,

3 *Committee Hansard*, 29 October 2009, p. 15.

to someone involved in organised criminal activity, in circumstances that do not warrant criminal sanction.

7.10 Rather than seeking to identify every potential association which ought to be excluded from these offences, the committee agrees with the submission of Professor Broadhurst and Ms Ayling that there should be a general defence of reasonableness which confers a discretion on the court to consider whether an association that facilitated criminal conduct or proposed conduct was justified in the circumstances.

Recommendation 1

7.11 The committee recommends that proposed section 390.3 of the Criminal Code be amended by limiting its application to circumstances where the accused intended that the association would facilitate the criminal conduct or proposed criminal conduct.

Recommendation 2

7.12 The committee recommends that the defences in proposed subsection 390.3(6) of the Criminal Code be amended by:

- **replacing the existing defences for legal practitioners with a more general defence that the association was only for the purpose of providing legal advice or representation; and**
- **adding a general defence where the association was reasonable in the circumstances.**

Criminal organisation offences

7.13 The committee is also concerned about the breadth of the proposed offence of supporting a criminal organisation. The committee notes the requirement that the support be ‘material’. This will ensure that trivial resources or support are not captured by proposed section 390.4 of the Criminal Code but it does not address other issues raised in evidence before the committee. Once again this offence does not require that the accused knew or intended that the provision of support would aid the criminal organisation to commit an offence: it requires only recklessness in relation to this element. In addition, there need only be a *risk* that that the support would aid the criminal activity. The combination of these factors means the offence would capture people in circumstances where the person is aware of a substantial risk that there is a risk that the provision of support will aid criminal activity. This layering of risk upon risk makes the offence too broad. The committee recommends the offence should instead apply in circumstances where the accused intends that the provision of the resources or support will aid the organisation to engage in criminal activity.

7.14 Furthermore, it seems incongruous 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 committee considers that the offence should be punishable by a term of imprisonment equivalent to the penalty for the offence the support could have aided.

Recommendation 3

7.15 The committee recommends that proposed paragraph 390.4(1)(b) of the Criminal Code be amended to provide that 'the person intended the provision of the support or resources would aid the organisation to engage in conduct constituting an offence against any law.'

Recommendation 4

7.16 The committee recommends that the maximum penalty for an offence under proposed section 390.4 of the Criminal Code should be the maximum penalty for the offence the accused intended to support.

Search and information gathering powers

7.17 While the committee is generally supportive of the proposed amendments to the Crimes Act, it considers that some minor changes should be made to these provisions. Firstly, the committee is concerned about the impact the proposed changes to subsections 3K(3A) and 3K(3B) of the Crimes Act would have where equipment used by a business is moved for examination. The Bill would increase the initial time period that equipment may be moved to another place for examination from 72 hours to 14 days. While it is clear that the current time limit of 72 hours creates significant operational difficulties for the AFP, this must be balanced against the consequences for the owner of removing equipment for an extended period of time. The committee considers that increasing the initial period to seven days, with provision for an issuing officer to approve extensions of up to seven days, would strike an appropriate balance between these competing concerns.

7.18 Secondly, the committee acknowledges the issues raised by the Law Council in relation to the proposed amendments to section 3L of the Crimes Act which would make it easier for officers executing a warrant to operate electronic equipment at the warrant premises and to copy data accessible from the equipment. The Bill proposes to remove the additional test for searches of electronic equipment at warrant premises on the basis that, just as a warrant authorises searches of filing cabinets on the warrant premises, it should be sufficient to authorise searches of electronic equipment.⁴ However, to compare searching a filing cabinet with searching a computer is fallacious because subsection 3L(1) permits not only a search of the computer itself but of data accessible from it. This could include data stored on servers at multiple locations. As such, these searches are potentially much more intrusive and wide ranging than a physical search of the warrant premises. The committee considers that an additional threshold test should have to be satisfied before such searches are permitted. That test should clearly be less onerous than the test for seizing material which is reasonable grounds to believe a thing constitutes evidential material.⁵ As a result, the committee believes that the appropriate test is that there are reasonable grounds to suspect that data accessible from the equipment constitutes evidential material.

4 Explanatory Memorandum, p. 84.

5 Paragraph 3F(1)(d) of the Crimes Act; Explanatory Memorandum, p. 84.

7.19 The committee is not persuaded that the proposed test under subsection 3L(1A) for copying data of, reasonable grounds to suspect that the data constitutes evidential material, is significantly broader than the existing test of, reasonable grounds to believe that the data *might* constitute evidential material. Furthermore, it will often be preferable from an occupier's perspective for data to be copied and searched off site rather than a search having to be carried out on the warrant premises. As a result, the committee does not oppose this change.

Recommendation 5

7.20 The committee recommends that subsections 3K(3A) and 3K(3B) of the Crimes Act should provide for equipment to be moved for examination for an initial period of no longer than seven days.

Recommendation 6

7.21 The committee recommends that subsection 3L(1) of the Crimes Act should require that, before operating electronic equipment at warrant premises to access data, an officer executing the warrant must have reasonable grounds to suspect that the data constitutes evidential material.

Australian Crime Commission Act 2002 amendments

7.22 The committee welcomes the proposed amendments related to the procedures ACC examiners must follow when issuing a summons or notice to produce and providing for five yearly reviews of the ACC.

7.23 The committee acknowledges the concerns raised by submitters in relation to the proposed amendments which would strengthen the powers of the ACC to deal with uncooperative witnesses. However the committee received compelling evidence from the ACC about the difficulties the ACC confronts when dealing with uncooperative witnesses and the potential for this behaviour to frustrate ACC investigations and operations. The committee accepts that the ACC is facing a concerted campaign of non-cooperation by some organised crime groups. The committee is also mindful that the power to summon witnesses for examination is limited to special investigations and operations which are subject to specific approval by the ACC Board and that these amendments are consistent with recommendations of both the Trowell report and the PJC. The committee considers that the changes proposed by the Bill are necessary to ensure that the ACC is able to effectively exercise the powers Parliament has invested it with in order to tackle serious organised crime.

Proceeds of Crimes Act 2002 amendments

7.24 The committee notes the concerns raised by the NSW Attorney-General and Liberty Victoria regarding the broadening of the definition of 'unlawful activity' under the POC Act. One effect of this amendment would be to narrow the tests for exclusion of property from restraint or forfeiture so that property which is the proceeds of state or territory summary offences would not be excluded. The committee considers that the amendment is justified given that it returns to the position under the *Proceeds of Crime Act 1987* and would treat the proceeds of state

and territory summary offences in the same way as the proceeds of Commonwealth summary offences.

Conclusion

7.25 The committee wishes to specifically acknowledge that the work of law enforcement officers and prosecutors in tackling serious and organised crime is difficult and dangerous. While the committee is entirely supportive of efforts to strengthen the legislative regime targeting those who direct and profit from organised crime, the provisions in the Bill should not go further than is required to achieve this end nor should they unnecessarily intrude on the rights of individuals. The committee has sought through its recommendations to limit the scope of some provisions in the Bill which are unnecessarily broad without compromising the fundamental purpose of those provisions.

7.26 Overall the committee considers that the Bill in combination with the amendments proposed by the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 represents a significant enhancement of the Commonwealth's ability to target organised criminal activity. In addition, both bills will rationalise and improve many aspects of Commonwealth legislation governing investigative powers and the confiscation of proceeds of crime.

Recommendation 7

7.27 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Patricia Crossin

Chair