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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (SERIOUS ORGANISED CRIME) AMENDMENT BILL 2010

REVISED EXPLANATORY STATEMENT

Circulated by authority of
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Crimes (Serious Organised Crime) Amendment Bill 2010

Outline

In June 2009 the *Government Report to the Legislative Assembly: Serious Organised Crime Groups and Activities* was tabled. The report noted that:

> The ACT is uniquely in the position where it can afford to respond in a timely and informed fashion by examining the legislative responses in all other Australian jurisdictions, and international trends and developments to ensure that the ACT maintains a robust position against serious organised crime groups and activities. [page 46]

The report contains an analysis of the Territory's existing powers to combat serious organised crime as well as an analysis of existing and proposed powers in other jurisdictions. Of particular importance is the consideration of the laws enacted in South Australia in response to the activities of outlaw motorcycle gangs and similar laws in other jurisdictions.

In tabling the Government Report, the Attorney General, Mr Simon Corbell stated that legislators must be considered in tackling organised crime, and that:

> One thing is very clear [is] that any approach to truly combat serious organised crime requires national coordination and collaboration with a multidisciplinary approach covering aspects from intelligence collection and sharing through to prosecutions and sentence outcomes. (*Legislative Assembly for the ACT: 2009 Week 8 Hansard (24 June)*; page 2862)

In the debate on the Government Report, the Attorney General also indicated the Government's intention to introduce amendments to strengthen the Territory's ability to combat serious organised crime, stating that:

> The government's approach to this issue of serious and organised crime is based on a careful and considered assessment of the need to ensure that serious crime is dealt with in a coherent and effective way in our community and is based on respect for important principles of law in a democratic society. We have refused to allow ourselves to be hijacked by an agenda based on fear and have resisted being pushed into some knee-jerk response when it comes to some of the more high-profile media incidents that have occurred in other states. *(Legislative Assembly for the ACT: 2009 Week 8 Hansard (25 June), page 2970***)**

The Government Report contained a number of recommendations aimed at strengthening the Territory's ability to combat serious organised crime. The *Crimes (Serious Organised Crime) Amendment Bill 2010* seeks to implement some of these recommendations.

The Bill introduces the offences of affray, participation in a criminal group and recruiting persons to participate in criminal activity into the *Crimes Act 1900* and the *Criminal Code 2002* (the Criminal Code). The Bill also extends the existing offences relating to the protection of people involved in legal proceedings contained in Division 7.2.3 of the Criminal Code.

The Bill also introduces the criminal liability concepts of 'joint criminal enterprise' and 'knowingly concerned' into the Criminal Code.

Human Rights

In a human rights jurisdiction such as the Australian Capital Territory, legislators must ensure that adequate consideration is given to balancing the rights of individuals against the needs of society.

The Government Report undertook a thorough analysis of the relevant human rights principles engaged by potential laws directed at serious and organised crime groups, which has informed the drafting of this Bill.

The Bill seeks to strike a balance between introducing strong laws to increase the Territory's ability to combat serious organised crime while at the same time ensuring that no human rights are unnecessarily or unreasonably limited.

It is likely that the offence of 'participating in a criminal group' will engage the right to freedom of association under section 15(2) of the *Human Rights Act 2004*.

Section 28 of the *Human Rights Act 2004* states that all rights under this Act may be subject to reasonable limits sets by Territory laws that can be demonstrably justified in a free and democratic society. This section gives statutory effect to the international human rights law concept of "proportionality". In deciding whether a limitation to a human right is reasonable and demonstrably justifiable, a number of factors must be taken into account.

The common law in other human rights jurisdictions states the nature of freedom of association. For example, the Canadian Supreme Court found that freedom of association is the 'freedom to combine together for the pursuit of common purposes or the advancement of common causes.' [*Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211]

It is well established that freedom of association may be limited in the interests of public safety or public order, see for example Article 22(2) of the International Covenant on Civil and Political Rights. The offence of participating in a criminal group only seeks to limit freedom of association where a person knows that a group is a criminal group and knows, or ought to know, that their participation in the group contributes to criminal activity.

The limitation of the right to freedom of association is important in this case as criminal groups, as defined in the Bill, are potentially responsible for serious organised crime within the Territory and other jurisdictions. The offence of

participating in a criminal group assists the Territory in combating serious organised crime.

The nature of the limitation of the right to freedom of association is to disrupt serious organised crime by targeting those who willingly participate in criminal groups that take part in criminal activity. The limitation of freedom of association goes no further than is necessary to combat organised crime groups. There is no declaration relating to either groups or individual members. Further, the conduct prohibited by the offence is conduct that constitutes criminal activity. Innocent association or social interactions, even if between members of a group who have fallen foul of the provisions and who may have been convicted under the provisions, will not amount to a criminal offence.

Crimes (Serious Organised Crime) Amendment Bill 2010

Detail

Part 1 — Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Crimes (Serious Organised Crime) Amendment Act 2010.*

Clause 2— Commencement

This clause enables the Act to commence on the day after it is notified.

Part 2 — Crimes Act 1900

Clause 3— Legislation amended- pt2

This is a technical clause stating that this part of the Bill amends the *Crimes Act 1900* (the Crimes Act).

Clause 4— New section 35A

This clause inserts a new section 35A into the Crimes Act. This new section contains the offence of affray. For a person to commit affray the person must use, or threaten to use, unlawful violence towards a person. The use or threat of unlawful violence needs to be such that it would cause a reasonable person to fear for his of her safety.

Furthermore, the person must intend to use or threaten to use unlawful violence or the person must be, or ought to be, aware that the use of threat of unlawful violence would be likely to cause a reasonable person to fear for his or her safety. If one or more of the aforementioned elements is not present, the offence of affray has not been committed.

Part 3 — Criminal Code 2002

Clause 5— Legislation amended- pt3

This is a technical clause stating that this part of the Bill amends the *Criminal Code 2002* (the Criminal Code).

Clause 6—Section 45(1) to (6)

This clause introduces the criminal liability concept of ‘knowingly concerned in the commission of an offence’ (knowingly concerned) into section 45 of the Criminal Code. This section deals with complicity and common purpose.

The purpose of introducing the concept of ‘knowingly concerned’ into the Act is to extend criminal responsibility covered by the existing concepts of complicity and common purpose.

Where a person's act contributes or may possibly contribute to the furtherance of an offence, the person may be knowingly concerned in that offence: *Nifadopoulos* (1988) 36 A Crim R 137. To be 'knowingly concerned' requires more than mere interest in or concern about an offence, an objective demonstration of connection or involvement with the offence is required: *R v Tannous* (1987) 10 NSWLR 303; 32 A Crim R 301. The concept of 'knowingly concerned' was not included in the Model Criminal Code, which the ACT adopted, on the basis that this form of derivative liability was unnecessary. It was considered that 'knowingly concerned' added nothing to complicity and common purpose.

In *Campbell v R [2008] NSWCCA 214*, Weinberg AJA was critical of the decision to omit 'knowingly concerned' from the Code and stated that the omission created a lacuna in the law that was never intended.

A convenience in being able to charge an offender as being 'knowingly concerned' is that it avoids any possible questions about whether an offender was a principal in the second degree or an accessory after the fact.

Introducing the concept of 'knowingly concerned' overcomes any lacuna in the Criminal Code and extend the charging options where it is alleged that more than one person was involved in the commission of an offence.

Clause 7—New section 45A

This clause introduces a new section 45A into the Criminal Code that extends criminal liability to persons who jointly commit an offence (joint commission).

Joint commission applies when two or more people agree to commit an offence together, and an offence is committed under that agreement. The effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group. Given that joint commission is a provision that extends criminal responsibility for offences, it is being inserted into Part 2.4, alongside other provisions that extend criminal responsibility to persons who were not wholly responsible for committing an offence.

The new joint commission provision addresses a gap in Part 2.4 of the Criminal Code by introducing into the Code the common law principle of 'joint criminal enterprise'.

None of the existing grounds for extending criminal responsibility in Part 2.4 capture circumstances where there is an agreement to commit an offence, and the offence is committed under that agreement. The view that joint criminal enterprise is not available under the Criminal Code has been confirmed in cases prosecuted after the enactment of the Criminal Code. For example, in the unreported case 134 of 145 of *R v Pui Man Liu and Sin Chun Wong*, Justice Keleman of the New South Wales District Court held that joint criminal enterprise did not exist under the Code.

The new section 45A(1) sets out the requirements for joint commission. The requirements are:

- a person and at least one other person enter into an agreement to commit an offence, and either

- an offence is committed in accordance with that agreement, or
- an offence is committed in the course of carrying out that agreement.

Where these requirements are met, the effect of joint commission is to extend criminal responsibility for joint offences to each party to the agreement.
The new section 45A(2) sets out the requirements for how a joint offence may be committed 'in accordance with' an agreement to commit an offence.

The first requirement is that the joint offence that is actually committed must be an offence of the same type as the offence agreed to. The requirement is broad enough to cover situations where the exact offence agreed to may not have been committed by the parties to the agreement, but a joint offence of the same type was committed. For example, where people agree to commit a specific drug offence, but the quantity of the drugs, or the type of drug varies from the offence agreed to, joint commission will apply.

The other requirements that this subsection imposes are:

- the conduct of one or more parties must make up the physical elements consisting of conduct of the joint offence, and
- where an element of the joint offence consists of a result of conduct, that result arises from the conduct engaged in, and
- where an element of the joint offence consists of a circumstance, the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

These other requirements work together to ensure the prosecution is required to demonstrate the existence of all the physical elements of the joint offence. The structure of the subsection is designed to address the three types of physical elements that may be present in an offence as set out in section 14 of the Criminal Code. It also recognises that offences commonly contain more than one physical element.

The new section 45A(3) sets out the requirements for how a joint offence may be committed 'in the course of carrying out' an agreement to commit an offence.

This subsection provides that a joint offence is committed in the course of carrying out the agreement where:

- an offence, other than the offence agreed to, was committed by another party to the agreement
- in the course of carrying out the agreement, and
- the person was reckless as to the commission of that offence by the other party.

Recklessness is a fault element defined in section 20 of the Criminal Code. In accordance with section 20, a person will be reckless with respect to the commission of an offence by another party to the agreement, if he or she is aware of a substantial risk that the offence will be committed, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.

This subsection slightly modifies the common law principle of extended common purpose to ensure consistency with the Criminal Code. The common law principle provides that if a party to an agreement to commit an offence foresees the possibility

that a collateral offence will be committed, and, despite that foresight, continues to participate in the agreement, that party will be held criminally responsible for the collateral offence: *McAuliffe v The Queen* [1995] HCA 37. In this subsection, the possible foreseeability test is replaced with a test of recklessness, as recklessness is the appropriate fault element in the Criminal Code and is most consistent with the common law.

The new section 45A(4) provides that joint commission will apply where a person and at least one other party to the agreement intended to commit an offence under the agreement.

Intention is a fault element defined in section 18 of the Criminal Code. Joint commission will only apply to a party to an agreement to commit an offence, if that person means to engage in conduct that would bring that offence about.

The new section 45A(5) ensures that a non-verbal understanding is covered by the term 'agreement', and provides a temporal requirement for when an agreement to commit an offence can occur for the purpose of joint commission.

'Agreement' is intended to be broad in its meaning and capture any agreement, arrangement or understanding that can be implied or inferred taking into account all of the circumstances. This is consistent with case law on the application of the common law principle of joint enterprise: *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108 at 118 [12]. For example, 'agreement' is intended to include:

- express agreements – verbal or written understandings, communicated in person or through electronic means such as phone or internet, and
- implied agreements – non-verbal understandings communicated through a person's actions, gestures, or implied through other means.

This section also provides that the agreement may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in. This timing ensures that joint commission applies to agreements made before the joint offence was completed and also at the time the joint offence was being committed.

The new section 45A(6) provides that a person cannot be found guilty of a joint offence if, before the offence was committed, the person ended his or her involvement and took all reasonable steps to prevent the commission of the offence.

This section acts as a safeguard to prevent joint commission from applying to a person who genuinely withdraws from an agreement to commit an offence. The withdrawal provision acts a defence to the application of joint commission, since a person 'cannot be found guilty' if they withdraw from the commission of an offence.

The new section 45A(7) provides that a person can be convicted of a joint offence even where the following circumstances exist:

- one other party to the agreement has not been prosecuted or found guilty, or
- where the person was not present when any of the conduct that made up the joint offence occurred.

This section provides that joint commission will apply regardless of the status of criminal proceedings against other parties to the agreement. This reflects the position that criminal responsibility under joint commission is not dependent on whether other parties to the agreement are found guilty of the joint offence.

This section also provides that joint commission will apply regardless of the status of criminal proceedings against other parties to the agreement. This reflects the position that criminal responsibility under joint commission is not dependent on whether other parties to the agreement are found guilty of the joint offence.

The new section 45A(8) provides that any 'special liability provisions' which apply to the joint offence also apply to joint commission.

The Dictionary to the Criminal Code provides a definition of special liability provisions. There are three types of special liability provisions:

- a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence; or
- a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew a particular thing; or
- a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing.

The effect of this subsection is to ensure that any special liability provisions that apply to the joint offence also apply for the purposes of determining whether a person is guilty of that offence through joint commission.

The new section 45A(9) clarifies that if a person is found guilty of committing an offence under section 45A, the offence is punishable as if, apart from the operation of section 45A, the person had committed the offence. This ensures that all parties to an agreement are liable for the same punishment.

Clause 8—Section 46 heading

This clause replaces the current heading to section 46 of the Criminal Code, 'Innocent Agency', with 'Commission by Proxy'. This is a minor and technical amendment which ensures that the heading to section 46 reflects the section's purpose and operation more accurately.

Clause 9—New chapter 6A

This clause introduces a new chapter 6A into the Criminal Code. Chapter 6A contains the offences of participation in a criminal group and recruiting persons to engage in criminal activity in the new sections 650 to 654.

The new section 650 contains the definition of 'criminal activity'. Criminal activity is defined as conduct that constitutes an indictable offence. The Criminal Code contains a number of offences that are indictable and this definition captures all those offences.

The new section 651 contains the definitions of 'criminal group' and 'serious violence offence.' A 'criminal group' is defined as a group of three or more people with either or both of the following objectives:

- to obtain a material benefit from conduct engaged in or outside the ACT (including outside Australia) that, if committed in the ACT, would constitute an indictable offence under a territory law; and
- to commit a serious violence offence (whether within or outside the ACT).

The definition of criminal group recognises the cross-jurisdictional nature of criminal groups, and associated investigations and prosecutions, and ensures that the prosecution of members of a criminal group is still possible even if the commission of an offence occurs in another jurisdiction.

Under this section, an offence is a 'serious violence offence' if it is punishable by imprisonment for a term of five years or more and the conduct constituting the offence involves any of the following:

- loss of a person's life or serious risk of a loss of a person's life;
- serious injury to a person or serious risk of serious injury to a person;
- serious damage to property in circumstances endangering the safety of any person.

Under this definition, there would be a serious risk of a loss of a person's life or serious risk of serious injury to a person if a reasonable person would consider an action to cause such serious risk.

This section also makes it clear that a group can be a criminal group whether or not any of the members of the group are subordinates or employees of others in the group, or if only some of the people in the group participate in planning, organising or carrying out a particular activity or if the group's membership changes from time to time. This ensures that members of groups such as outlaw motorcycle gangs who participate in criminal activities covered under these provisions can still be prosecuted for an offence even though membership of that group may change.

The new section 652 contains the offence of participating in a criminal group. Under this section, a person commits an offence if the person participates in a criminal group and:

- knows that the group is a criminal group and
- knows, or ought to know, that the person's participation in the criminal group contributes to relevant criminal activity.

The offence of participating in a criminal group has three elements. The first element is the requirement for a person to actually participate in a criminal group. The second element is knowledge. A person must know that the group is a criminal group. The third element is knowledge or that a person 'ought to have known'. A person must know that their participation in a criminal group contributed to a criminal activity or the person ought to have known that their participation contributed to a criminal activity.

When proving that a person 'ought to have known' under the proposed section 652(c), it is necessary to establish that had he or she thought about it; the accused and not a hypothetical person, ought to have known that there was a real and not remote chance

that their participation would contribute to a criminal activity. This approach has been confirmed by the High Court of Australia in *Simpson v R* [1998] HCA 46.

Without each of the above elements, the offence of participating in a criminal group cannot be made.

There are two situations in which participating in a criminal group can attract a higher penalty.

The new section 653 makes it an offence for a person to participate in, or intend to participate in, a criminal group and, in the course of participating in or intending to participate in the criminal group, engages in conduct that causes harm to someone else and:

- causes the harm of a person without that person's consent; and
- is reckless about causing harm to that person or another person by the conduct.

This offence has the physical element of causing harm. The mental element of the offence is recklessness. Recklessness is defined in section 20 of the Criminal Code. Under section 20(4) of the Criminal Code, if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element. This is reflected in the Note at section 653(1).

The new section 653 also makes it an offence for a person who is participating in, or intends to participate in, a criminal group to intentionally make to someone else a threat to cause harm to the person or a third party intend for the other person to believe the threat will be carried out. For this offence to be made out, it is not necessary to prove that the person to whom the threat was made actually believed that the threat would be carried out. This offence consists of two mental elements of intention which must be present for the offence to be made.

The new section 654 makes it an offence for a person to participate in, or intend to participate in, a criminal group and, in the course of participating in or intending to participate in the criminal group, causes damage to property belonging to someone else and:

- intends to cause, or is reckless about causing, damage to that property or any other property belonging to the other person.

This offence has the physical element of causing harm. The mental element of the offence is either intention or recklessness. Intention is defined in section 18 of the Criminal Code. Recklessness is defined in section 20 of the Criminal Code.

The new section 654 also makes it an offence for a person who is participating in, or intends to participate in, a criminal group to intentionally make to someone else a threat to damage property belonging to another person and intend for the other person to believe the threat will be carried out. For this offence to be made out, it is not necessary to prove that the person to whom the threat was made actually believed that the threat would be carried out. This offence consists of two mental elements of intention which must be present for the offence to be made.

The new section 654 also contains references to terms that are defined elsewhere in the Criminal Code.

The new section 655 contains the offence of recruiting people to carry out criminal activities. Under this section recruit means counsel, procure, solicit, incite or induce.

A person commits an offence if the person recruits another person to carry out, or assist in carrying, a criminal activity. A person also commits an offence, and is liable for an increased penalty, if the person recruits a child to carry out, or assist in carrying out, a criminal activity. A child is defined as a person under the age of eighteen.

The offence of recruiting a child to carry out a criminal activity attracts a higher penalty to further discourage people exploiting a child's special status under the law in order to further their own criminal interests.

Clause 10—New section 709A

This clause inserts a new section 709A into the Criminal Code. This section makes it an offence to cause or threaten to cause a detriment to someone else with the intention that the other person or a third person will:

- not participate in a criminal investigation; or
- give false or misleading evidence in a criminal investigation; or
- withhold true evidence in a criminal investigation; or
- give a false or misleading interpretation as an interpreter in a criminal investigation; or
- improperly make a decision as a participant in a criminal investigation; or
- improperly influence a participant in a criminal investigation.

Under this section, a person participates in a criminal investigation if the person is a witness, victim or legal practitioner or is otherwise assisting police with their inquiries.

This offence is designed to expand the offences contained in Division 7.2.3 of the Criminal Code which relate to the protection of people involved in legal proceedings. The new section 709A ensures that protection is not only afforded to people when a matter reaches the judicial system, but is afforded to people from the onset of an investigation.

The new section 709A also ensures that a person who is participating in a criminal investigation does not need to be the person who is actually threatened. For example, A is participating in a criminal investigation as a witness. B threatens to harm A's children if A does not give a false report. B can still be charged under the new section 709A even though A was not directly threatened.

The purpose of this new offence provision is to encourage people who may be able to aid in investigations, particularly relating to organised crime, to come forward without a fear of reprisal.

Clause 11—Dictionary, note 2

This is a technical clause that inserts ‘indictable offences’ and ‘summary offences’ in note 2 of the Dictionary of the Criminal Code, indicating that these terms are defined in section 190 of the *Legislation Act 2001*.

Clause 12 —Dictionary, new definitions

This is a technical clause which inserts ‘criminal activity’ and ‘criminal group’ into the dictionary of the Criminal Code and references the relevant sections of the Criminal Code where these terms are defined.