CRIMES AMENDMENT (CONSORTING AND ORGANISED CRIME) BILL 2012

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Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [4.25 p.m.], by leave: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Crimes Amendment (Consorting and Organised Crime) Bill 2012. The bill proposes to make a number of amendments to the Crimes Act 1900 to ensure that the provisions of the Act remain effective in combating criminal groups in New South Wales. The Government is determined to ensure that the NSW Police Force has adequate tools to deal with organised crime, and this bill represents part of a suite of reforms aimed at achieving that. The bill introduces a new aggravated form of drive-by shooting, introduces new offences relating to criminal groups, and modernises the offence of consorting, as well as extending and clarifying its application.

I turn to the detail of the bill. Schedule 1, item [1], of the bill will create an aggravated form of firing at a dwelling when the shooting occurs in the course of organised criminal activity. Section 93GA of the Crimes Act currently creates an offence of firing a firearm at a dwelling house or other building with reckless disregard for the safety of any person, punishable by 14 years imprisonment. Sadly, the recent spate of drive-by shootings is nothing new to the people of Sydney and New South Wales. Since 2006 there has been an average of 73 to 78 drive-by shootings annually, and between October 2008 and September 2009 that number peaked, when there were 102 instances of shootings. The primary goal of this new offence is not to reduce the incidence of shootings; police work continues to do that. The primary goal of the new offence is to recognise that a greater degree of criminality is involved where these shootings occur in connection with the activities of criminal groups, and to ensure that this is reflected in appropriately high penalties.

The bill will create an aggravated form of the firing at a dwelling offence, punishable by 16 years imprisonment where it occurs in the course of organised criminal activity. The organised criminal activity may be the act of firing into the dwelling house itself—for example, when it has been the subject of extensive arrangement and planning with others, or is one in a series of related shootings. It may also have been undertaken in the course of another criminal activity such as drug supply, when the shootings are part of a turf war between drug syndicates for example. Schedule 1, items [4] and [5], of the bill will enhance the application of the existing offence of participating in a criminal group and add additional tiers to it. This will help police in combating the offending of criminal groups and extend the application of the provisions.

Section 93T of the Crimes Act 1900 currently creates an offence of participating in a criminal group, which is defined as a group of three or more people who have, as one of their

objectives, obtaining material benefits from conduct that constitutes a serious indictable offence, or committing serious violence offences. Where a person participates in such a group, knowing that it is a criminal group, and knowing or being reckless as to whether the participation contributes to the occurrence of criminal activity, the person commits an offence punishable by five years imprisonment. If the offence involves assault or damage to property, the offence is punishable by 10 years imprisonment.

The bill proposes to amend the basic participation offence so that, rather than requiring a person to have known that the group was a criminal group and to know or be reckless as to whether the participation contributed to criminal activity, a person will commit an offence where he or she ought reasonably to have known those things. This will better allow the offence to be applied not only against members of criminal groups, but against those on the periphery of such groups who nevertheless contribute to the group's criminal activity. Criminal groups do not and cannot function in isolation and this offence sends a strong message out to the community. It is not an excuse to say, "I wasn't told" or "I didn't ask". If a person should have known that the group was a criminal one they should not get involved. These proposed amendments mean that to participate in a criminal group, when a reasonable person would have known that it was a criminal group, risks falling foul of the new form of this offence.

The bill will also add a new offence under section 93T of directing the activities of a criminal group. A person who participates in a criminal group by directing the activities of the group, knowing that it is a criminal group and knowing or being reckless as to whether that participation contributes to criminal activity, will be guilty of an offence punishable by up to 10 years imprisonment. This higher penalty recognises the greater criminality involved of those higher up in the organisation. It is not, however, limited to the Mr Bigs. It will cover anyone who tells a group member what to do or makes the decisions that determine what the group will do. An example will be someone who orders another group member to carry out a drive-by shooting on a rival's home. If a person is responsible for the criminal activities of the group, that greater degree of responsibility should be reflected in the sentence. It is well known that in criminal gangs the senior members with the most to gain are often less likely to personally commit offences. They keep a lower profile and get junior members to do the dirty work. This offence again sends a clear message. The senior members of a criminal organisation will not escape punishment just because they got others to do the work. They will be exposed to severe consequences for being the ones directing behind the scenes.

The bill will also add an offence of directing the activities of a criminal group whose activities are organised and on-going, carrying a maximum penalty of 15 years imprisonment. Section 93T is not limited in its application to sophisticated organisations like outlaw motorcycle gangs. It applies to any gathering of three or more people who have serious criminal activity as a shared purpose. It may capture one-off gang activities such as may be undertaken by juveniles coming together on the spur of the moment. Consequently, there must be a limit on the penalties that can be imposed so as to avoid disproportionate outcomes. The same concern does not apply to more sophisticated organisations, and the new offence

will allow very significant penalties to be imposed on those who direct the activities of such groups.

As well as the additional tiers targeting those who direct criminal groups, item [6] in schedule 1 to the bill will insert a new offence targeting those who receive material benefits from a criminal group, knowing that it is a criminal group and knowing that the benefit resulted from the group's criminal activities, punishable by five years imprisonment. It is intended to capture persons who may not participate in the criminal activity of the group or directly contribute. They may be at arm's length, they may be a passive recipient or they may have a legitimate business, but if they knowingly receive a material benefit they, too, will be committing a criminal offence. This amendment is intended to make it difficult for criminal groups to function by making it hard for them to hand out benefits. For example, if a locksmith changes the locks at a criminal group's meeting place and the locksmith receives payment from someone, knowing it is on behalf of the criminal group, and knowing or being reckless to that benefit having been derived from criminal activity, then the locksmith may be charged with an offence.

These provisions target payments or largesse handed out by criminal groups and do not extend to cover payments by a member as an individual. It will therefore cover purchases made by a member of the gang on behalf of the gang, but it will not cover, for example, that gang member's weekly grocery payments to feed his family. This is to ensure that the offence does not capture people who receive benefits which were derived from the group's criminal activity, but who did not have some direct nexus with the group. These people cannot be said to receive benefits directly from the criminal group itself, even if the benefits may have been derived from the group's criminal activities. In this respect these offences are complementary to, and will be used by police in conjunction with, the existing offences of dealing in the proceeds of crime.

Finally, schedule 2, item [9] of the bill will modernise the offence of consorting. Section 546A of the Crimes Act makes it an offence to habitually consort with persons who have been convicted of indictable offences. This is an old offence, and the NSW Police Force has indicated that it is difficult to use, in part because there is no statutory guidance as to what constitutes "habitual consorting". The bill will modernise the language of this provision and provide more guidance as to when the offence may be enlivened. The bill states that a person does not habitually consort with convicted offenders unless he or she consorts with at least two convicted offenders, whether on the same occasion or separate occasions, and the person consorts with each offender on at least two occasions. The requirement that the person consorts with more than one offender recognises the fact that the goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu. A convicted offender is someone who has been convicted of an indictable offence, other than the consorting offence itself.

The new offence provision also requires that a person be given an official warning in relation to each of those convicted offenders. No form is specified and it may be written or oral. It

must, however, give the person notice that the convicted offender is a convicted offender as defined by the Act and tell the person that consorting with the convicted offender is an offence. When police give notice is a matter for them. What is important is that the person must then consort one more time with the convicted offender before consideration can be given to laying charges. The definition will assist police in knowing the minimum number of meetings that are necessary to trigger the offence. In effect, the number of instances of consorting that a person must have had is at least two each with two different convicted offenders.

It is important to note that the mere fact that the person has met a convicted offender the requisite minimum number of times is not in itself enough to establish the offence. There may be a case where a person coincidentally meets convicted persons regularly, at a bus stop, at the corner shop or while buying coffee. Coincidence is not consorting. The High Court has found that consorting need not have a particular purpose but denotes some seeking or acceptance of the association on the part of the defendant (*Johanson v Dixon* (1979) 143 CLR 376 per Mason J citing *Brown v Bryan* [1963] Tas SR 1). It does not extend to chance or accidental meetings, and it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks. This bill puts police in a position to do what they do best every day and make a judgement about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties. There will, therefore, be prosecutions which involve more meetings or more people than the minimum, as police will be dealing with a wide range of circumstances.

For example: there may be cases where the person only has two meetings, but they involve the same two offenders. If they can be shown to have consorted on these two occasions they could be charged. Police may decide to observe more than the statutory minimum number of meetings, and lead evidence of them, in order to establish that the person is "consorting". Similarly, police may not limit the notification to just two convicted persons and may lead evidence of the person consorting with a higher number of convicted offenders so as to properly reflect his or her immersion in the criminal milieu.

The bill also modernises the offence of consorting by directing police on what relationships should be exempt. The existing offence has been criticised for its potential application to everyday, innocent relationships which should not be the subject of prosecution. The bill will amend the Act to specify certain relationships which may be raised as a defence to a prosecution. The exemptions include associations with family members, consorting in the course of lawful employment, or business, training and education, the provision of health services, legal advice and in the context of lawful custody or complying with a court order. These terms are not further defined, as for the defence to be made out the defendant must establish that the consorting was reasonable in the circumstances. Consorting with extended family may therefore be reasonable in circumstances where the defendant is heavily reliant on, or lives in a community based on, extended kinship. It may not however be reasonable in

other situations. The onus will be on the defendant to bear and one for the court to determine on a case-by-case basis.

The bill also modernises the offence of consorting by extending its application to include consorting by any means including electronic or other forms of communication. This will include electronic forms of communication which have become everyday parts of our lives but which we must ensure cannot be exploited by criminals to avoid prosecution. These amendments will ensure that networks established via Facebook, Twitter and SMS will not be immune from these provisions. The existing offence is a summary offence punishable by six months imprisonment or a fine of four penalty units. This bill will make the offence punishable by imprisonment of up to three years and a fine of 150 penalty units. It can, however, continue to be dealt with in the Local Court unless the prosecution elects to have the matter heard on indictment in the District Court.

Schedule 1, item [11] of the bill proposes that the operation of the consorting provisions be reported on by the Ombudsman after a period of two years. The old provision has fallen into disuse and has been criticised in the past. This report will provide an opportunity after two years of operation to review the use of the new provision and to consider any further amendments or repeal of the provisions as necessary. Schedule 2 of the bill contains consequential amendments to related legislation. The amendments contained in this bill represent an aggressive signal to criminal groups in New South Wales: their continued operation will not be tolerated and members of such groups will be dealt with severely when they are called to account for their actions. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.