

Organised Crime (Penalties and Sentencing) Bill

27 August 2007

Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Organised Crime
(Penalties and Sentencing) Bill

Our Ref: ATT395/47

1. We have reviewed the Organised Crime (Penalties and Sentencing) Bill ("the Bill") for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that the Bill is to be considered by Cabinet Legislation Committee on Thursday, 6 September 2007. A copy of the Bill is **enclosed** for ease of reference.
2. Our view is that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered potential issues of inconsistency with section 17 of the Bill of Rights Act.

Background

3. Section 98A of the Crimes Act 1961 currently imposes liability to a term of imprisonment not exceeding 5 years for every person who participates (whether as a member or an associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group, and either knowing or being reckless as to whether his or her participation contributes to the occurrence of criminal activity.
4. The Bill proposes two substantive amendments. Firstly, an increase to the maximum penalty for the offence under section 98A to 10 years' imprisonment. Secondly, to amend section 9 of the Sentencing Act 2002 (which sets out the aggravating and mitigating factors to be taken into account by the Court on sentencing) to provide that it is an aggravating factor when an offence is committed partly or wholly because of the offender's participation in an organised criminal group.
5. The proposed amendments are part of a broader strategy aimed at tackling increasing manifestations of gang activity.

Section 17: Freedom of Association

6. Section 17 of the Bill of Rights Act provides that "everyone has the right to freedom of association". This provision recognises that persons should be free to enter into consensual arrangements with others and to promote the common interests and objectives of the associating group.

7. Section 98A of the Crimes Act was the subject of a report to you for vetting purposes, dated 16 August 1996. That report concluded that while section 98A made inroads into the freedom of association (section 17), this was balanced against the fact that the offence is committed when the offender intentionally promotes or furthers the criminal conduct by members of the criminal group. We note that in *R v Caro* [2005] 1 NZLR 823, the Court found that section 98A included sufficient safeguards, especially the requirement for knowledge, to make it compliant with section 17 of the Bill of Rights Act.^[1]
8. We do not consider that the proposed amendment extending the maximum term of imprisonment impacts on the conclusions expressed in this Office's earlier advice. Nor do we consider that the proposed section 9(1)(hb) infringes on section 17. That is because the proposal specifically links back to the requirements of, and the safeguards contained in, section 98A(2) of the Crimes Act.

Conclusion

9. We consider that the provisions in the Bill appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.
10. This advice has been peer reviewed by Val Sim, Crown Counsel, in accordance with Crown Law's usual practice.
11. We **attach** a copy of this opinion for referral to the Minister of Justice, if you agree.

Christina Inglis
Crown Counsel

Footnote

1 Refer p 842, para 154.

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