THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

SUBMISSION TO CONSULTATION PAPER 12 'CHEATING AT GAMBLING'

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New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA
nsw_lrc@agd.nsw.gov.au

Authors:
Alexander Edwards and Emma Bayley, members of the NSW Young Lawyers Criminal Law Committee

Introduction

We refer to the Cheating at Gambling consultation paper ("the Paper") provided for public comment by the New South Wales Law Reform Commission ("the Commission").

NSW Young Lawyers is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. The Young Lawyers Criminal Law Committee ("the Committee") provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

In this submission, the Committee will direct itself mainly to the issues of codification and the suggested need for a new offences for cheating at gambling, fixing and insider gambling. As a general comment, the Paper has been written and researched to a very high standard. The Committee is grateful for the Commission's thorough work in an area of much contemporary interest.

Summary of the Committee's position

The Committee supports:

- **the introduction of a Gaming and Wagering Act and general consolidation of the existing gambling provisions and departments; and**
- **the introduction of a 'fixing' provision in the language in the proposed subsection (1).**

The Committee does <u>not</u> support:

- **a new cheating at gambling offence without significant reconsideration and research on the adequacy of the existing offences;**
- **an insider information prohibition in the language currently expressed in the proposed subsection (2); or**
- **a maximum penalty of 10 years for any of the proposed offences.**

Questions 6.1, 6.5, 6.6 and 6.7

Codification

The Commission has undertaken a Herculean effort in drawing together the disparate sources of gambling and fraud legislation. The Committee generally supports attempts at codification and simplification of law. It suggests that grouping offences and administrative provisions under a single Gaming and Wagering Act would:

- create a simpler reference point for investigators, prosecutors, defendants and Magistrates to become more familiar with the legislation;
- allow more useful and comprehensive sentencing statistics to be compiled;
- assuming there is evidence to suggest that persons engaged in one form of gambling also engage in other forms, duplicated intelligence and investigation costs could be avoided; and
- streamline consolidation of the appropriate responsibility under the portfolio of the relevant Minister though the usual *Allocation of the Administration of Acts* regulations.

A new specific cheating offence in relation to sports and event betting?

The Committee does not oppose the introduction of a new 'cheating at gambling' offence in principle. However, it does oppose the introduction of such an offence until adequate consideration has been given to the arguments outlined below.

Does the general fraud offence cover cheating at gambling?

One factor apparently in favour of a new offence identified in the Paper at 5.91 is that the general fraud offence in s 192E of the *Crimes Act 1900* ("Crimes Act') is not specifically directed to cheating in the context of gambling on sporting or other events.

The Committee is of the view that a new offence would only be warranted if the general fraud offence could not be charged in respect of fraudulent conduct involving gambling. The fact that s 192E does not specifically refer to gambling does not preclude it being charged in respect of such conduct, so long as the evidence establishes the requisite elements. The general fraud offence is intended to be applied to a wide variety of conduct. Before a new offence is introduced, further evidence should be obtained regarding whether any charges have been laid under s 192E regarding cheating at gambling but have later been withdrawn or dismissed on the basis that the offence was not directed to cheating at gambling.

Complexity of overlapping offences

A second factor in favour of a new offence identified in the Paper at 6.2 is the apparent complexity of potentially overlapping offences. However, the existence of potentially overlapping fraud related offences is not unusual. To give a range of examples:

- fraud involving a false statutory declaration could be the subject of a charge under s 25 of the *Oaths Act 1900* (NSW) as well as a charge under s 192E;
- fraud involving the first home owner grant could potentially be the subject of a charge under s 44 of the *First Home Owner Grant Act 2000* (NSW) as well as a charge under s 192E; and
- fraud involving holding out as an architect could potentially be the subject of a charge under s 9 of the *Architects Act 2003* (NSW) as well as a charge under s 192E.

Assuming that prosecutors are sufficiently aware of the available offences and the evidence required to establish the different elements, the existence of potentially overlapping offences is not necessarily negative. Where there are potentially overlapping offences, prosecutors are able to select which charge best reflects the criminality involved and, subject to the rule against duplicity, more than one charge may be laid in respect of the same conduct. Further evidence regarding any actual difficulties faced by prosecutors in selecting the appropriate charge(s) may be useful before introducing a new offence.

Cheating at illegal casinos and at illegal gambling

A third factor in favour of a new offence identified in the Paper at 5.171 and 6.58 is that cheating at illegal casinos and cheating at illegal gaming apparently fall outside the reach of existing legislation including the *Unlawful Gambling Act 1998* (NSW) and the *Casino Control Act 1992* (NSW) ("Casino Act"). This assumes that the criminality involved in cheating in illegal gaming is not adequately addressed by the criminality involved in *participating* in illegal gaming.

Investigating alleged cheating at illegal gaming would involve significant evidentiary difficulties. For example, assuming investigators located an illegal poker game and their powers extended to investigating it, investigators would also need:

- to establish the identity of the participants;
- establish the rules of the illegal poker game, which could well differ from the rules of a legal poker game;
- establish whether a participant breached those rules; and
- presumably also obtain witness statements from other participants or organisers of the illegal poker game.

The time and expense involved in such an investigation may be better spent on investigating and prosecuting all the participants in the illegal game rather than any particular participants who cheated during the game. As a matter of public policy, it is important that legal gaming is regulated and alleged cheating is investigated and prosecuted but it is doubtful whether public funds should be spent to ensure the integrity of illegal gaming. Further evidence regarding the nature and prevalence of illegal gaming may be useful before a new offence is introduced.

The maximum penalties

A fourth factor in favour of a new offence identified in the Paper at 6.34, 6.55 and 6.8 is that the maximum penalties for the existing offences apparently vary significantly and are inadequate. However, different maximum penalties for different offences regarding similar conduct is neither unusual nor necessarily

negative. Investigators are able to charge the offence which carries a maximum penalty which provides the best scope for addressing the criminality involved. Whilst the risk of detection, conviction and penalty are clearly a deterrent to persons engaging in cheating at gambling, it is not clear whether increasing maximum penalties for these offences would have an increased deterrent effect. The more general offences (such the prohibition on minors gambling at the casino under s 93 of the Casino Act) would already be regarded by a large proportion of the population as wrongful conduct and arguably do not require enhanced general deterrence. In addition, the more specific offences targeting more sophisticated cheating practices (such as unlawful interference with gaming machines under s 80 of the *Gaming Machine Act 2001* (NSW)) would not necessarily be of greater deterrence value if they carried increased maximum penalties because such offences are unlikely to ever attract great community attention.

Consideration should be given to the other avenues for increasing public awareness of the consequences of cheating such as media releases and signage (gaming machines are already required to display certain signage under the *Gaming Machines Regulation 2010* (NSW)). Those consequences include not just the potential maximum penalty but also potential ancillary orders (such as exclusion orders under s 79 of the Casino Act) and restitution orders (s 43 of *Criminal Procedure Act 1986* (NSW)) which could also be a strong deterrent. Any potential benefit to having an increased maximum penalty should be considered alongside the potential delays and increased costs involved in prosecuting indictable offences in the District Court rather than prosecuting summary offences in the Local Court. An increased maximum penalty would also remove the efficient and cost effective option of issuing penalty notices. Further evidence regarding whether the increased frequency and scope of cheating at gambling justifies greater deterrence should be obtained before introducing a new offence with a maximum penalty of significant length.

The use of telecommunications interception and surveillance devices

A fifth factor in favour of a new offence identified in the Paper at 6.35 is that an offence with an increased maximum penalty would allow investigators to use telecommunications interception and surveillance devices (including access to stored communications data and data surveillance). However, the unavailability of certain investigation tools which may be useful in investigating some (but by no means all) alleged offenders, is not a sufficient justification for increasing the maximum penalty applicable to all offenders. If further evidence establishes that investigations or prosecutions have failed due to the unavailability of telecommunications interception and surveillance devices, then consideration could be given to amending the powers of investigators, rather than amending the maximum penalty applicable to the offence.

In any event, telecommunications interception and surveillance devices are a specialised and necessarily rare investigative tool. Although telecommunications interception and surveillance devices could conceivably assist in investigating any offence, their use is properly confined to more serious offences. Unlike the power to interview or the power to subpoena, which are subject to safeguards, the power to use telecommunications interception and surveillance devices allows investigators to obtain a potentially vast amount of material without the defendant being afforded any opportunity to object. Further evidence is required in order to establish whether cheating at gambling is sufficiently serious to warrant the availability of telecommunications interception and surveillance devices.

Question 6.2

(1) Should an offence or offences to the effect of the proposed draft provision in paragraph 6.36, or some variation of it, be adopted?

The Committee supports the proposed 'fixing' offence in proposed subsection (1). The Committee notes the inadequacy of the corrupt commissions statutory offence especially in this regard.

The Committee does not support the proposed 'insider trading' offence in proposed subsection (2). The Committee agrees that insider gambling is undesirable. However, Committee members expressed unease at the policy behind creating new criminal sanctions for the use of insider information in relation to gambling. Members were not entirely satisfied that the public policy rationale was equivalent to that for insider trading, or that the language of the new offence was satisfactory. The Committee sets out its argument below.

Public policy

The precedent for the concept and structure of the proposed subsection (2) is the current ban on insider trading in financial markets. The policy basis for the prohibition of insider trading has been expressed consistently over a number of decades. The 1989 Parliamentary Committee Report on insider trading endorsed the following principles adopted in the 1981 Report of the Committee of Inquiry into the Australian Financial System:

> 'The object of restrictions on insider trading is to ensure that the securities market operates freely and fairly, with all participants having equal access to relevant information. Investor confidence, and thus the ability of the market to mobilise savings, depends importantly on the prevention of the improper use of confidential information.'

The Explanatory Memorandum to the 1991 amendments to the *Corporations Act 1989* (Cth) stated:

> '[I]t is necessary to control insider trading to protect investors and make it attractive for them to provide funds to the issuers of securities, for the greater and more efficient development of Australia's resources.'

The current view remains essentially the same.[1] There is public benefit in the proper and competitive allocation of capital through financial markets. These policy goals do not, on serious consideration, apply to insider gambling. While, superficially, reinforcing user confidence in the fair operation of any market is an appropriate ambition, not all markets are equal. A loss of confidence or failure in financial markets can lead to massive public harm, as the recent financial crisis has reminded us. A loss of confidence or failure in gambling markets, however, would cause less significant harm. While this point is controversial, it could even lead to net public *benefit*, if the Productivity Commission is to be believed – that is, a net reduction in gambling. This is not to say that insider information in gambling is to be allowed, but the Committee notes that the industry, in racing, sports and casinos, have very effective internal oversight powers and mechanisms, and indeed have vested financial interests in protecting the integrity of their system.

[1] See Australian Government, The Treasury, *Insider Trading Position and Consultation Paper* (2007), 1-4.

A complication to this point is that the gambling market is attached to a number of professional sports that are conducted for reasons other than gambling. It is certainly of concern that insider information gambling would diminish the integrity of the sports. However, the Committee is of the view that, again, this is a matter for the governing body of the respective sport. In addition, proposed subdivision (1), in directly preventing 'fixing', is more attuned to the preservation of integrity in the relevant sports. Subdivision (2) has a weaker, secondary effect on sports.

Proposed language and definitions

The Committee notes the comment of the Commission at 6.30 that the proposed definition for 'insider information' is modeled on the insider trading provisions in the *Corporations Act 2000* (Cth) ("Corporations Act"). For ease of reference, we produce the relevant definitions below:

Corporations Act s 1042A

"inside information" means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available;

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

Proposed offence

“insider information” is information that:

(a) is not generally available in relation to a pending sporting or other event, including:

(i) information concerning any arrangement of the kind referred to in sub-paragraph (1)(a)(iii); or

(ii) concerning any injury to a player or team tactics; and

(b) if it were generally available, a reasonable person would expect it to have a material effect on the betting on that event, or on a contingency occurring within it.

The application of the definition is distinct from s 1043A of the Corporations Act, which imposes strict liability for dealing in the relevant products or communicating the knowledge to others. Reasonable knowledge is required, but there is no subjective state-of-mind test. The proposed offence requires **dishonesty** in the communication or betting activity. Presumably this is intended to raise the threshold of the offence to ameliorate the Commission's concern that

> the inclusion, within a cheating offence, of conduct involving insider dealing, is potentially controversial. There can be a fine line between dishonesty in that context, and the use by a gambler or bookmaker of rumours, and the kind of “mail” on which those involved in gambling have traditionally relied.

Under the Corporations Act, however, insider information can be non-specific, and inferences drawn from it can be included in the meaning of 'information'.[2] This arises from the statutory definition of 'information' under s 1042A:

> "information" includes:
>
> (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
>
> (b) matters relating to the intentions, or likely intentions, of a person.

While the proposed offence does not define 'information', it seems optimistic to believe that a Court applying it would not seek guidance from the many established cases under s 1042A (even if it is not a NSW jurisdiction). Given the number of persons involved peripherally in the racing, gambling and casino industries, and the extent to which they may currently innocently converse about their employment, the consequences are potentially of broad import.

The conclusions reached by the Committee after an examination of the proposed subsection (2) are that the subsection:

- carries a number of subjective terms, including 'reasonable' and 'dishonest', that have not been used before in the context of gambling and will present difficulties in the prosecution of the offence;
- has unclear effect through 'dishonest', a term not used in the precedent offence of insider trading; and
- a potentially much broader application than considered by the Paper.

(2) If so, should it be inserted as part of the Crimes Act 1900 (NSW) or added to some other Act or Acts?

Please see the comments above in relation to codification under to questions 6.1, 6.5, 6.6 and 6.7.

(3) Should it co-exist with the statutory fraud and secret commissions provisions contained in the Crimes Act 1900 (NSW)?

Yes (in relation to proposed subsection (1)).

We note that the proposed definition of 'participant' captures agents, and to this extent there is an overlap with the corrupt commissions provision in particular. That provision, however, is directed towards the particular policy goal of extending bribery prohibitions to the private sector (to overcome a traditional

[2] See *Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, .

reluctance to extend corruption beyond interfering with public authorities).[3] Its ambit should not be interfered with, subject to the usual rules against duplicity. A person charged with inducing a participant's agent under the proposed offence should not also be charged with providing a corrupt commission, and vice versa. The same applies to the statutory fraud offence.

(4) Are the proposed definitions for the provision in paragraph 6.37 sufficiently wide or too wide?

Please see comments above in relation to 'proposed language and definitions', especially regarding the lack of definition for 'information'.

(5) What should be the available maximum penalty?

The maximum sentence for insider trading is now five years prison or a fine of $220,000 for a person, or $1 million for a company. Taking into account the discussion of the relative weight of the public policy rationales, in our view the proposal for a 10 year maximum sentence for the proposed offence is unnecessarily high. It is simply not as objectively serious. By way of comparison, the proposed maximum penalty is the same as that provided for a limited number of very serious offences in the Crimes Act, including:

- s 21 Child murder by mother;
- s 83 Administering drugs etc to woman with intent;
- s 99 Demanding property with intent to steal;
- s 115 Being convicted offender armed with intent to commit indictable offence;
- s 154B Stealing aircraft and unlawfully taking or exercising control of aircraft;
- s 160 Embezzlement etc by persons in the Public Service; and
- s 326 Threatening a judicial officer

While the Committee observes that there are proposals to raise the penalty for insider trading, it does not believe that this is cause to consider that the penalty for the proposed offence be equivalent. If anything, the Commission should consider, if the proposed offence does go ahead, whether a pecuniary civil penalty is not more appropriate. A civil offence would capture the behaviour of persons conversant in insider information who were not licensed (and not susceptible to internal fines), such as stable assistants.

[3] See, for instance, discussion of the offence of receiving a secret commission in Standing Committee of Attorneys-General, *Model Criminal Code Chapter 3: Theft, fraud and related offences, Final Report* (1995), 267.

Conclusion

The Commission has identified a great spread in the offences, regulations and departments covering gambling venues, offences and licensing. It has made a strong case for their consolidation into a single Act. It has also made a case for a new 'fixing' offence. The Committee supports these two propositions.

The Committee does not believe that a case has been adequately made for a new cheating at gambling offence. The Committee is of the view that the Commission's research does not suggest that:

- the available offences are not sufficiently directed to cheating at gambling;
- overlapping offences are undesirable;
- there is a need to prevent cheating at illegal gambling;
- available penalties are inadequate; or
- telecommunications interception powers are necessary.

In relation to the proposed offence of insider information gambling, the Committee does not see that this activity is so undesirable as to justify the public expense that will be required in administering an untested offence that captures a very broad range of offences. Those in the gambling industry may disagree, but surely the disrepute cast on a recreational industry by misbehaving insiders is a matter for internal scrutiny. The Commission describes at several points the internal compliance structures that exist within racing, sports and casinos. These existing arrangements seem to be satisfactory, with the caveat that the current disorganisation of the law is needlessly confusing.

The Committee thanks you for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact: Thomas Spohr, Chair of the NSW Young Lawyers Criminal Law Committee (crimlaw.chair@younglawyers.com.au) or Daniel Petrushnko, President of NSW Young Lawyers (president@younglawyers.com.au).

The primary authors of this submission were **Emma Bayley** and **Alexander Edwards**, members of the Criminal Law Committee.

Yours faithfully,

Thomas Spohr | Treasurer | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales