New South Wales Law Reform Commission
Consultation Paper 12 - "Cheating at Gambling"

Submission of the Office of the Director of Public Prosecutions (ODPP)

Consistent with the lack of relevant criminal case law on cheating in gambling, and the fact that most of the current offences are summary in nature the ODPP has no relevant experience of prosecuting such offences or the regulation of the gambling industry. Accordingly our comments are limited to possible amendments to the *Crimes Act 1900(NSW).*

Question 6.1: Sports and event gambling – a specific cheating offence

In response to question 6.1 regarding where offences concerned with cheating and fraud in the context of gambling should placed, we make the general observation that it is preferable for indictable offences to be in the *Crimes Act* as it tends to send a message to the public that the conduct is viewed as serious criminal behaviour. Also as the *Crimes Act* is the primary legislation used by Police and prosecutors it is the most logical to place look to identify possible criminal behaviour in this area. The fact that there are already fraud offences that may apply to this sort of behaviour within the *Crimes Act* is another good reason to consolidate serious offences concerned with cheating at gambling in that Act, and in doing so ensuring that there is consistency in definitions concepts, penalties and language.

The above comments are contingent on the creation of an indictable offence, as discussed further below we have reservations about the breadth of the proposed provision and the maximum penalty. The first suggestion proposed in question 6.1 that a "Gaming and Wagering Act" could consolidate all the relevant provisions for the regulation of gambling and contain general and specific offences in this regard also has merit. If such an Act were created it may be preferable to put summary offences in that Act.

Regardless of whether or not the proposed offences are in the *Crimes Act,* we note that most fraud offences in NSW are table offences and prosecuted by the Police in the Local Court. The ODPP rarely elects on fraud matters where the benefit obtained is less than $2Million. Accordingly it is likely that the creation of this type offence will continue to mean that matters are dealt with in the Local Court.

We are in support of the codification and consolidation in this area.

Question 6.2: Proposed Provision

We have reservations about the breadth of the proposed provision and the extension of the same criminality to the person fixing the match to the insider or the third party. In terms of culpability it seems that the more culpable are the persons seeking to fix the match and obtain a benefit from it. This first part

of the proposed offence logically fits within the scheme of fraud offences in the Crimes Act.

In our view the culpability of “insiders” and “third parties” is of a different nature and is to a lesser degree. In the case of “insiders” our concern is that the definition covers a very wide range of persons in different fields, who would be privy to all sorts of information, acquired directly or indirectly. Without additional assistance from a regulation about the sport (or event) or a contract of employment or a confidentiality agreement, the provision is too general to make it meaningful to the person who may potentially transgress the provision. We wonder whether this area of offending would be better addressed by a sanction in connection with a breach of a confidentiality undertaking?

In respect of the offence for “third parties” we have a concern that as the third party has no control over the outcome that this is conduct that should not be criminalised. The gravamen of the offence appears to be a simple dishonest in that they have acted on information they shouldn’t have had access to about an event. That information has placed them in a better position than the next person. It is not clear to us why the person who heard it from the source guilty of an offence where the person who had the information second hand is not guilty. How can they be assured of the outcome and the reliability of the information? Are they not merely taking a punt on its reliability? Unless the third party is in the business of trying to corrupt “insiders”, it seems they are significantly less culpable and the behaviour perhaps could or should be characterised as opportunistic rather than criminal. If an offence in the nature of clause 3 is to be created then it should be a separate offence with a lower penalty.

Comments re drafting of proposed provision

We anticipate that investigating and proving offences of this nature will not be without difficulty. It may be that consideration should be given to framing the offence so that the prosecution has to prove the objective elements and the onus reversed for the accused to show that there were not acting dishonestly. This would facilitate the accused providing exculpatory information to the investigators or prosecutors and avoid the bringing of cases that ultimately cannot be proved.

Another possibility concerning “insiders” is to include a provision that enables the use of any confidentiality agreement entered into that person to prove they are an “insider”, what is “insider information” in that context.

To prove the offence at 3 (b) prosecutors would need evidence of an actual bet being placed. We are not aware if consideration has been given to any of the other regulatory provision that would facilitate proof of bets being placed, and the keeping of records for an extended period.

Definitions

The definition of “benefit” although wide does not make reference to winning or losing a game, the motive for a match fix may be a tactical one rather than a financial one.

The definition of “insider information” in (a) (ii) is very broad when considered in the context of the proposed offence in clause 3. Part (b) of the definition potentially poses difficulties if it becomes necessary for the prosecution to engage a betting expert to prove the “material effect”.

Penalties

We appreciate that a maximum penalty of 10 years would facilitate the investigation of these offences, which would otherwise be difficult to prove. We have already noted that in practice these offences would be dealt with in the Local Court. Following from our comments in respect of the culpability of “insiders” and “third parties”, a maximum penalty of 10 years does seem to be too high.

Office of the Director of Public Prosecutions
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