Re Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

Attention Secretary Legal and Constitutional Committee (Senate): Mr Peter Hallahan

I write in general support of the proposed changes in the Serious and Organised Crime Bill. I am in favour of the introduction of unexplained wealth provisions into the law of the Commonwealth and the amendments proposed to strengthen the confiscation of criminal assets. It is also necessary to provide significant enhancements to the interception and surveillance powers of police agencies in order for them to better investigate patterns of illegality and the activities of groups/networks involved in crime. Legal protection of witnesses and undercover and/or controlled operations are also needed and the enhancements suggested are logical extensions of the kind of countermeasures now needed to adequately investigate and successfully prosecute serious crime and persistent forms of criminal conspiracy. Although I venture the following opinions I do so noting that there is not a vast body of empirical/evidence-based research in respect to Australia that might confidently guide law-makers or provide certainty of success in respect to the best means of addressing organised crime (OC).

Unexplained Wealth

Unexplained wealth laws appear to have been reasonably effective in dealing with some aspects of OC in the NT, WA, Hong Kong (HK) SAR and elsewhere. It should be noted that they have not been used frequently in NT and WA and now are also not as frequently applied in HK as before: the measure was used heavily in the 1970s and 1980s to break the symbiosis between triads and police. Tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in OC is usually indirect in terms of actual commission. Indeed unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery that often facilitate serious crime. The Committee should also note that the corruption of public officers often goes hand-in-hand with the development of OC groups and the application of unexplained wealth measures can be an effective way of disrupting the cultivation of public officers by OC and other serious criminals who may seek to buy protection or connections. It would have a significant general deterrent effect on public officers who may be more wary of the potential of such investigations and who would need to go to unusually complex means of hiding such wealth. I also note that corruption will also occur in the private sphere, in particular in licit enterprises with the potential to hide illicit activity.

I support the reversal of the usual presumption that the crown proves beyond reasonable doubt that such wealth has been acquired unlawfully as a necessary, if regrettable change. The option of the lower test on the balance of probability as in civil forfeiture also has merit if the presumption that the suspect must prove that the wealth has been acquired legitimately is seen as too great a change. Given that most people should know the sources of their income and the burden of establishing its origins is not especially onerous this aspect of the new law does not, in this context, seem unreasonable. However, it is important to recognise that seizure of the relevant assets prior to formal conviction may have very grave implications for parties (such as the suspect's family) not directly connected to the suspect conduct[1]. In other words collateral damage should be avoided and discretion provided so to mitigate the impact on third parties and avoid undue hardship. One should note that (indirect) collective punishment are unjust and may serve to bring the law and its administration into disrepute – a principle that also bears on the implementation of consorting laws.

A natural governor (per Cesare Beccaria) is a preference for the prevention of (grave) crime over (often futile) attempts to use the law as a coercive instrument of behavioural change or for the sake

[1] For examples see; Ayling, J., Grabosky, P & C. Shearing, Lengthening the Arm of the Law, Cambridge University Press, 2009, at page 68.

of crime reduction alone. Thus the state should eschew severe measures that are potentially lethal. Severe retributive punishment (including those ruinous to livelihood) exercised without mercy or restorative processes may cause offenders to be driven to extreme acts of desperation such as the murder of witnesses, law officers and the like.

In my view inadequate attention is given to the problem of corruption in Australia and the present suite of countermeasures embedded in various oversight institutions in the sphere of the Commonwealth could be strengthened. Consideration should be given to extending/including the remit of this amendment [in regard to tainted wealth and interception] to those bodies charged with preventing corruption and promoting integrity, for example, the Commonwealth Ombudsman, the Australian Commission for Law Enforcement Integrity. These agencies may fall short of the necessary "teeth" thought necessary by higher community expectations of probity. A Commonwealth agency in the style of an "Independent Commission Against Corruption" with standing powers of a Royal Commission may be one means to consolidate anti-corruption activities within the federal sphere. Given the greater interplay between federal and state agencies and our greater law enforcement footprint overseas it would be prudent to consider preventative measures via better community awareness and an independent investigative capability.

Corruption of course also extends to the role of delinquent professionals (for example solicitors, accountants, chemists, IT experts and so on) in facilitating OC and it is likely that closer attention is needed to the self-regulatory capacity of such professions. The vexed question of how best to reduce the potential misuse of legal privilege is a good example of the challenges in this respect. The infiltration of the legal profession and the courts by serious criminals has had/could have an extremely damaging impact on public confidence in the criminal justice system. Eternal vigilance is thus necessary and at the risk of cliché fatigue --- the question of "who guards the guardians" --- must be squarely addressed.

Joint Commission of Offences

These provisions are adopted primarily to assist in harmonizing evidence gathering between the Commonwealth, NSW and SA: States that have recently passed laws to control the criminal activities of some members of motorcycle gangs. In my view it appears that some self-styled "outlaw motorcycle gangs" (OMCG) are in effect secret criminal societies that venture into illicit activities or enterprises based on their reputation for violence. Such reputation or "brand violence" is a tradeable commodity – including the protection of illicit enterprises and protection itself may readily slip to extortion and ultimately control of otherwise legitimate enterprise.

Criminal intelligence has long been mustered to show that such "brotherhoods" are not merely comprised of thrill seekers who are only bent on expressing their freedom by breaching traffic laws. OMCG are relatively disciplined groups that are bound by economic as well as non-economic ties. A criticism of this view is that not all "members" of OMCGs are criminals and participation in criminal activities is relatively infrequent – so the criminalisation of these associations would be grossly unfair and would serve to drive such groups underground. From a policing perspective this may also make it much more difficult to monitor their activities and to infiltrate them.

Although the suppression of the triads by way of outlawing membership and many of its rituals and practices or the simulation of the same appear to have been modestly effective, the Hong Kong example is not one that might be easily replicated in Australia. Nor it must be said that the evidence is unequivocal about the effectiveness of this 'cultural' approach and a raft of other countermeasures have been introduced in recent years to better address the influence of triad related "dark societies" and other serious criminals. A 'gentrification' process[2] has also been

[2] Observation attributed to Mr Steve Vickers, a former RHKP officer who now manages *International Risk*

indentified among the 'old' triads and traditional approaches to suppression are in constant need of revision.

The danger with such laws is that they seek to prevent associations based on past conduct but also serve a predictive (protective) function that seek to punish offenders for offences that *may* happen in the future. If the higher courts perceive this to be the case they may likely be struck down. Thus the problem of seeking effective means to disrupt and neutralise the potential of such groups to engage in crime remains uncertain. The form of "control orders" envisaged, for example, by the SA laws are onerous and will be disruptive to the organisation of such groups – should indeed the law stand the test of appeal. However, such laws may risk capturing parties who have no criminal intent and the oversight of the laws will require considerable judicial involvement to ensure that they are no more intrusive than is essential to curtail the criminal propensity of the individuals targeted because of past conduct. From a preventative point of view the identification of very high risk of offenders or "career criminals" will be a valuable means of targeting limited criminal justice resources, however, from an actuarial perspective it must be acknowledged that there will be a large number of "false positives" and critically a significant number of "false negatives": i.e. persons who are not identified as potential risks but actually are high risk offenders.

My colleague Ms Julie Ayling has also offered some comments on the joint commission provisions (attached), in which she canvasses the potential for the broad definition of "agreement" to lead to an overly inclusive application of the joint commission offence.

Intelligence Gathering and Other matters

The very great difficulties faced by an investigation and prosecution of conspiracy to commit serious crime and/or into engage in a pattern of systematic criminality suggest that effective means of intercepting the communications of possible offenders is crucial. There can be little question that special means are necessary to intercept communications and uncover the activities of suspected OC groups.

My colleague Mr John McFarlane (Fellow of Australian Research Council, Centre for Excellence in Policing and Security [ARC CEPS] and former AFP Intelligence Manager) has noted the UK Home Office has just published a policy paper titled *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime* (July 2009)[3]. Although we have not had time to study this paper in detail, the UK strategy contains five specific proposals:

1. shut down businesses like saunas and massage parlours that are a front for criminal activity
2. seek to block mobile phone use in prisons (but of variable importance in Australian correctional settings)
3. recover the assets of all organised criminals under investigation by putting "regional asset recovery teams" in every part of the country (relevant to the federal nature of the Australian criminal justice system)
4. investigate the UK-based assets of criminals overseas
5. step up the approach to international organised crime through better coordination with overseas agencies

[3] The URL for the Home office paper is http://www.homeoffice.gov.uk/documents/extending-our-reach.

The third of the suggestions (assets recovery teams) is of course particular to the UK – where there is very large number of constabularies and some that are too small and ill equipped to counter OC and or transnational crime. Indeed we may comment that UK efforts to establish an effective national agency [Serious and Organised Crime Agency] have been fraught and it is yet to achieve the necessary operational effectiveness required. Thus continued emphasis on harmonising and strengthening our federal-state co-operative law enforcement arrangements is a priority so that a seamless web of mutual legal assistance prevails. However, it remains the case, for example, in relation to frequent but low-level cybercrime frauds that inter-state co-operation needs to be greatly improved. Without implying any criticism of the relevant agencies our appreciation of the impact of globalisation on crime and the financial crisis is developing rather than comprehensive.

Closely monitoring of “grey” businesses such as “massage parlours” and other cash-based low skill services may be a more realistic option. Overseas practice (for example the experience in suppressing the New York “mafia” and elsewhere) suggests that wide use of civil regulation in relation to food hygiene, fire safety and liquor license laws may also be effective in minimising the use of such legitimate “fronts” in money laundering. In SA, for example, liquor licensing laws have been used to ban certain individuals with proven “bad character”

Mr McFarlane’s second suggestion touches on the fourth strategy identified in the Bill, i.e. "facilitating greater access to telecommunications interception for criminal organisation offences". The current law in relation to the police use of telephone intercept or audio operations only allows that evidence to be used which relates specifically to the list of offences /issues under which the relevant warrant was sought. In the current situation, if understood, a significant amount of valuable intelligence or evidence not directly related to the investigation may *not* be used (or even retained) by the police. He argues that the Bill could be amended so that in certain cases involving *serious* organised crime - this "displaced" intelligence can at least be considered for other leads into serious organised criminal activities. Under the Telecommunications Act, ASIO is able to retain all such intelligence in areas relating to its responsibilities, even though it may not necessarily be used in evidence in a subsequent prosecution case. ASIO critics may well say that this enables the Organisation to conduct "fishing expeditions". Be that as it may, he would certainly like to see more use being made of such material in criminal investigations. Given the fluid nature of modern criminal networks and the growing capacity of law enforcement to “join up the dots” via sophisticated software programmes and data sets it makes very good sense to facilitate the lawful storage of such data.

My colleague Ms Julie Ayling has also contributed a short critique of telecommunications aspects of the amendments (attached). These, as she notes, are potentially unsafe because of their interrelationship with provisions of the SA and NSW legislation on outlaw motorcycle gangs and the fact that the SA Act is currently the subject of legal challenge.

I conclude by noting the general nature of these comments and given the relatively recent development of the research work on illicit organisations at ARC CEPS ANU they are offered as individual perspectives and do not reflect a formal or final view.

Yours Sincerely

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21.8.09

Joint Commission (Part 1, Schedule 4)

(Ms Julie Ayling, Associate Investigator, ARC Centre for Excellence in Policing and Security)

The purpose of the joint commission provisions of the Bill that put in place amendments to Part 2.4 of the Commonwealth Criminal Code is to ensure that all members of a group that has agreed to engage in criminal activity are jointly held responsible for offences committed as part of, or in the course of, that activity, even if not all members of the group engage in committing those offences. The amendments "will enable the prosecution to obtain higher penalties for offenders who commit crimes in organised groups by aggregating the conduct of offenders who operate together….. A person that is convicted of a joint offence is liable to receive the penalty prescribed for that offence" (Explanatory Memorandum). The provisions fill a gap in the Criminal Code by introducing the common law principle of 'joint criminal enterprise'.

Joint commission differs from being an accomplice. To be complicit in an offence and thus be found liable for committing it, section 11.2 of the Code requires that a person must in fact have done a positive act: intentionally or recklessly aiding, abetting, counselling or procuring the commission of the offence. In contrast, no aiding, abetting, counselling or procuring is required under new section 11.2A (joint commission). The threshold requirements for the application of the provision is the existence of an agreement between at least two people to commit an offence and the commission of an offence by at least one of those persons in accordance with the agreement, or of a collateral offence in the course of carrying out the agreement. No positive act apart from entering into an agreement is required for a person to be found guilty of joint commission. In fact, a person need not even be present when any of the conduct that makes up the joint offence occurs (new section 11.2A(7)). In order not to be found guilty of joint commission, however, positive action *is* required: the person must have terminated their own involvement and have taken "all reasonable steps" to prevent the commission of the offence (11.2A(6)).

Proving the existence of an agreement to commit an offence might have proved difficult if a written or express agreement was required. But new section 11.2A(5) provides that the agreement "may consist of a non-verbal understanding; and 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." The Explanatory Memorandum states that this definition is meant "to capture any agreement, arrangement or understanding that can be implied or inferred taking into account all the circumstances."

I am in general agreement with the thrust of these provisions. One effect will be to give scope for the prosecution for offences of persons in organised crime groups who prefer to have others commit those offences for them. Thus law enforcement agencies may be empowered to target more powerful but more covert participants who have effectively hidden (for example, through employing a chain of command) their role in 'procuring' the crime.

However, I am somewhat concerned about the scope of the provisions. Several issues appear to me. The first is that it is not clear where the line is to be drawn between joint commission and the offence of conspiracy in the case of persons who are not present when the offence is committed. Conspiracy also requires the entering into of an agreement to commit an offence. Is a conspirator necessarily liable to be charged with joint commission once the offence is committed? And if not, as conspiracy is punishable "as if the offence to which the conspiracy relates had been committed" (s.11.2A(5) of the Criminal Code), will a conspirator ultimately be punished as if they had been charged with joint commission? The Explanatory Memorandum makes no comment on this issue.

Another issue is the breadth of the definition of agreement. If the existence of an agreement can be inferred from all the circumstances, rather than requiring any overt or verbalised expression, there is

a risk that mere membership of a group that regularly commits crime could be used as a basis to infer an agreement to commit a particular offence (for example, a drug offence or a murder), and thus make all members of the group presumptively culpable for joint commission.

This risk is exacerbated by the fact that under s.11.2A(5) the agreement can be inferred to come into existence at the same time as the actual offence. Thus a member of a gang who does not agree with the commission of a particular impulsively committed offence (say, a drive-by shooting) might be inferred to have agreed to it (possibly even if not present), and the member may not have had any opportunity before the commission of the offence to act positively to show his or her non-agreement under s.11.2A(6).

The definition of agreement, therefore, in our view, requires more thought and perhaps some legislative limitations. The inclusion in s.11.2A(5) of non-verbal understandings and of agreements reached "at the same time as" the commission of an offence effectively means that s.11.2A(6) concerning termination of involvement may be rendered meaningless in certain circumstances. The extension effected by s.11.2A(5) of our general understanding of 'agreement' as some sort of contract, to any non-verbal 'arrangement' or 'understanding' that may lead to an offence being committed, has the potential to lead to overly broad application of the joint commission offence, perhaps to persons who should actually be charged with an offence such as incitement or accessory after the fact that attracts a lower penalty. A clearer definition of agreement may well assist law enforcement agencies and prosecutors in deciding whether a joint commission charge is appropriate and prosecution is likely to be successful.

Finally, the Explanatory Memorandum suggests that the requirement to "take all reasonable steps" to prevent the commission of an offence in order to show one's own termination of involvement in an agreement under s.11.2A(6) might be satisfied by "discouraging the other parties to the agreement", "alerting the proposed victim", "withdrawing goods necessary for committing the crime" or "giving a timely warning to law enforcement authorities before the offence is committed." However, it should be noted that the provision requires that "all" reasonable steps be taken – one may not be enough. This places a large burden on a person who may have already made clear to others that they have withdrawn from an agreement to do much more, perhaps even at a risk to their own safety (subject to reasonableness considerations). This suggests an imbalance in the onus of proof. It appears it will be relatively easy for a person's involvement in an agreement to be inferred but quite difficult for that person to refute that inference. Again, a better balance may be found if the term 'agreement' is given clearer definitional shape.

Amendment of the Telecommunications (Interception and Access) Act 1979 (Part 2, Schedule 4)

(Ms Julie Ayling, Associate Investigator, ARC Centre for Excellence in Policing and Security)

The Explanatory Memorandum for the Bill states that the proposed amendments to the Telecommunications (Interception and Access) Act 1979 (the Interception Act) are designed "to facilitate greater access to telecommunications interception for criminal organisation offences", those offences being part of the national response to organised crime. The purpose of the amendments is to enable State and Territory law enforcement agencies to use telecommunications interception in investigating these offences under their own, recently enacted, laws.

The Standing Committee will no doubt be aware that the State and Territory legislation referred to here is the South Australian *Serious and Organised Crime (Control) Act 2008* (the SA Act) and New South Wales' *Crimes (Criminal Organisations Control) Act 2009* (the NSW Act), both enacted in response to the threat of outlaw motorcycle gang (OMCG) activity in those states, as well as any future similar legislation enacted in other states and territories. The provisions make this clear. The definition of "criminal organisation" in item 15 of the Bill specifically hangs off the declaration of organisations under those two Acts and hooks into organisations however they may be described in future legislation of other Australian jurisdictions. The definitions of "associate" and "member" are also drawn from the SA and NSW Acts.

The Committee will also be aware of the controversial nature of the SA and NSW legislation. It has come in for much criticism. Most of the informed analysis of the SA and NSW OMCG laws has emanated from practising lawyers and legal academics and so is primarily focused on issues about legality and constitutionality. Other commentators have highlighted human rights deficits in the laws. In New South Wales the Director of Public Prosecutions (DPP), an independent official, has publicly condemned the NSW legislation on his website, giving his considered reasons (Cowdery, N. 'Comments on Organisation/Association Legislation – "Bikie Gangs"', May 2009, available at http://www.odpp.nsw.gov.au/speeches/Organisation%20-%20association%20legislation.DOC).

Currently a legal challenge to the SA legislation is underway. The case was heard by the Full Court of the SA Supreme Court on 23 July 2009 and a decision is pending. There is a real possibility that the case could proceed on appeal to the High Court. While I am not privy to the arguments made before the Supreme Court, undoubtedly reference would have been made by the plaintiffs to the issues about the NSW legislation raised by the NSW DPP. These mainly relate to inconsistencies between the Act's provisions and the rule of law. Basically the rule of law protects against misuse and abuse of power and seeks to ensure consistency and fairness of decision-making. Some of the procedural provisions of the SA Act can be argued to offend notions of justice (such as reversals of the onus of proof and the lack of an obligation to give reasons for the making of declarations), to criminalise identity rather than behaviour, to have a potential to be used against innocent individuals, to retreat from the separation of powers principle and to give scope for abuse of power by public officials. Possible inconsistencies of the legislation with Australia's obligations under international human rights instruments, such as obligations to ensure freedom of association and of peaceful assembly, are also likely to have been raised in the Supreme Court.

Given the close association between the NSW and SA Acts and the proposed amendments to the Interception Act, it is important that these issues be resolved before the Commonwealth Parliament proceeds with these amendments. If the Court were to find, for example, that the restrictions on association and assembly placed on individuals who merely communicate with members of declared organisations cannot be justified as necessary in the interests of national security or public safety and order as required under international human rights treaties, and that therefore the SA Act

breaches Australia's treaty obligations, the Bill's provisions could be affected. Similarly, it is possible that the SA Act or parts thereof (such as parts that criminalise certain associations) that are cited in the Bill's provisions may be found to offend the rule of law and be struck down.

For example, under s. 35 of the SA Act, subject to limited exceptions, it is an offence to associate more than five times a year with a member of a declared organisation, even if one is not oneself a member of a declared organisation. It matters not whether the member or members associated with is or are subject to a control order under the Act. The penalty for so associating is imprisonment for up to five years. Section 35 has the potential to draw within its ambit anyone who associates with such a member (or indeed up to 5 different members: s.35(5)) without a 'reasonable excuse' (which is undefined), although there is no reason to suspect that person has been involved in or intends to be involved in any criminal activity. New subsection 5D(9) of the Interception Act (Item 17 of the Bill) will define a serious offence as including offences where the conduct constituting the offence involves, would involve or has involved "(a)(i) associating with a criminal organisation, or a member of a criminal organisation". Paragraph 5D(9) is of narrower scope than s.35 of the SA Act in that it requires in paragraph (b) that, for association with a criminal organisation or its member to be a serious offence under the Interception Act, the conduct constituting the offence (i.e. association) must have been engaged in, or be reasonably suspected of having been engaged in, for the purpose of supporting the commission of one or more 'prescribed offences' by the organisation or its members. Prescribed offences are defined in s.5 of the Interception Act and include serious drug offences and money laundering offences, amongst other things.

Nevertheless, with such a wide potential application for s.35 of the SA Act, there is still a danger that warrants for interception might be sought under the Interception Act with very little basis apart from the criminalised association itself to suggest that the person who will be affected by the warrant has engaged or intends to engage in activities that will support the commission of prescribed offences. There are privacy, fairness, human rights and rule of law issues arising here of the kind that the NSW DPP and others have raised in relation to the "bikie laws". These issues affect the validity of the NSW and SA Acts and will shape prospective legislation dealing with criminal organisations in other States, and therefore their discussion and resolution by the courts should be given appropriate weight in terms of the Bill's provisions and timing.