Chapter 6

The adequacy of legislative arrangements

Introduction

6.1 This chapter discusses the adequacy of current legislation dealing with organised crime. The discussion includes legislative weaknesses as well as legislative strategies that have potential to support law enforcement's efforts against serious and organised crime.

The adequacy of Australian legislation

6.2 Both the Australian Crime Commission (ACC) and the Australian Federal Police (AFP) expressed general satisfaction with the legislation under which they operate. The AFP submission observes:

> While each agency's legislative program is constantly being updated to reflect changes in their operating environment, the AFP is not aware of any significant legislative or administrative impediments limiting its collaboration with the ACC. The AFP is also not aware of any systemic failings in the ACC's legislative or administrative regimes that fundamentally prevent it from countering nationally significant organised crime.[1]

6.3 The ACC submission, which also notes the sufficiency of current arrangements, indicates that the nature of organised crime will inevitably require further legislative initiative to combat it. At the heart of present and future legislative developments there is a tension between the need for more expansive police powers and the foundations of individual rights and freedoms on which Westminster style democracies are founded:

> While…legislative and administrative arrangements are considered adequate to address the current criminal environment, it may be necessary…to consider amendments to counter the increasing sophistication of serious and organised criminal activity. While acknowledging potential community unease in relation to increases in law enforcement powers, the high level negative impact of serious and organised crime may require consideration of such approaches in the future.[2]

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1 *Submission 16*, pp 7-8.

2 *Submission 17*, p. 16.

Crimes Act 1914 and *Criminal Code Act 1996*

6.4 Central to the ACC's and AFP's organised crime law enforcement activities are the *Crimes Act 1914* (the Act) and the *Criminal Code Act 1996* (the Code).

6.5 Although the Act details a number of offences, it is concerned mainly with process as opposed to substantive definitions of offences. Part 1, for example, deals with search, information gathering, arrest and related powers. Part 1AB deals with controlled operations for obtaining evidence about suspected Commonwealth offences. The Code is intended to be a statement of the criminal law of the Commonwealth. Chapter 2 of the Code describes the principles of criminal responsibility—previously a matter for the common law—and sets out offences related to such matters as the security of the Commonwealth, the proper administration of government and national infrastructure.

Expansion of Commonwealth legislation

6.6 The committee heard that there has been a trend towards expansion of the area of Commonwealth criminal law across broad categories of offences. The submission of the Commonwealth Director of Public Prosecutions observes:

> The areas of activity regulated at least in part by federal criminal law have expanded considerably. This trend has continued rapidly, as demonstrated by offences being created in areas such as terrorism, domestic drug activity, the contamination of goods, sexual servitude, transnational crime, cybercrime, and telecommunications offences including offences involving the use of carriage services for child abuse and child pornography material.[3]

6.7 The committee notes that, in general, there has been a swift legislative response to the need for updated criminal offences and new and enhanced investigative powers to deal with emerging matters. Nevertheless, some weaknesses were identified. The following section examines the weaknesses in Australian legislation identified by the inquiry.

Weaknesses in current legislation

The Australian Crime Commission Act 2002

6.8 The *Australian Crime Commission Act 2002* (the ACC Act) was modelled on the legislation it replaced, the *National Crime Authority Act 1984*. The ACC's powers to combat organised crime are broad and are set out in part II of the ACC Act. The ACC has search and seizure powers, which are currently the subject of legislation before the parliament intended to bring them into line with those contained in the *Crimes Act 1914*. While there was broad support for the current legislation, the issue of failure to cooperate with ACC examination processes was brought to the committee's attention.

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3 *Submission 11*, pp 1-2.

The ACC and the lack of an efficient contempt process

6.9 At present, a person who does any of the following is liable for a penalty of five years imprisonment or a fine of 200 penalty units:

- refuses to answer a question put by an ACC examiner; or
- refuses to take the oath or make an affirmation at an ACC examination; or
- fails to appear in response to a summons to an ACC examination; or
- fails to provide requested documents.[4]

6.10 The committee was advised that this process is protracted and ineffective in leading to disclosure of the information sought or to a significant penalty for an examinee guilty of contempt. Mr William Boulton, an Australian Crime Commission examiner, argued that the efficiency of the ACC's examination process would be improved by changes to the current contempt provisions. Mr Boulton informed the committee that the significant delays in contempt matters being addressed by the courts were being used by witnesses to frustrate investigations. Such delays can significantly compromise an investigation and in some cases they are, in Mr Boulton's opinion, orchestrated by groups such as outlaw motorcycle gangs:

> The real problem for us…is that a lot of the investigations and operations go cold…not only that, but a lot of the investigative staff who are secondees return to their home environments and no-one is left to pick up the trail.[5]

6.11 The committee heard that a former Minister for Justice and Customs had, under section 4 of the *National Crime Authority Legislation Amendment Act 2002*, commissioned a review and report on the operation of certain provisions in the *National Crime Authority Act 1984* and the *Australian Crime Commission Act 2002.* Included in the terms of reference for the review was a requirement to:

> …consider whether the ACC Act should be amended to provide the ACC with a contempt power for witnesses not fulfilling their obligations under the ACC Act.[6]

6.12 The review was conducted by Mark Trowell QC. The report has been referred to the Inter-Governmental Committee on the ACC for comment. Following that comment, a copy of the report will be tabled in each house of parliament.[7]

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4 *Australian Crime Commission Act 2002*, section 30.

5 *Committee Hansard*, 6 July 2007, p. 41.

6 Attorney-General's Department, http://www.ag.gov.au/www/agd/agd.nsf/Page/Crimeprevention_ReviewofspecificprovisionsoftheNationalCrimeAuthorityAct1984andtheAustralianCrimeCommissionAct2002, viewed 6 July 2007.

7 Mr Alastair Milroy, Chief Executive Officer, Australian Crime Commission, *Committee Hansard*, 6 July 2007, p. 42.

6.13 Mr Boulton foreshadowed that the review was likely to support changes to contempt processes, and clarified the changes being sought:

> …the committee's concern in the past was the thought that the examiners themselves were asking to deal with the contempt, but they never were. They always said that it was a matter for the courts. They just wanted to be able to certify the contempt and then have the courts deal with it. If someone has a perfect defence, they will be able to raise that before the courts.[8]

6.14 Mr Boulton noted that constitutional constraints would prevent examiners from being able to personally deal with contempt offences:

> There is a constitutional problem, and that is the fact that we are only quasi-judicial officers and we cannot exercise the judicial power of the Commonwealth...[9]

6.15 The ACC advised the committee that the Queensland and NSW jurisdictions already allow the certification of contempt charges. For example, in Queensland the *Crime and Misconduct Commission Act 2001* deals with contempt under section 199 by allowing the presiding officer to certify the contempt by writing to the Supreme Court of Queensland. The presiding officer has the power to issue a warrant directly to police to have the alleged offender brought before the court for the allegation to be dealt with.[10] Further, the presiding officer's certificate of contempt is evidence of the matters contained in the certificate.[11] Certification of the offence by the presiding officer expedites bringing the contempt before a court for a finding to be made on whether or not the contempt charge is proved.[12]

6.16 In contrast, the ACC's current procedure involves the ACC referring the matter to the Director of Public Prosecutions, who then drafts the charges for the court to consider in the usual way.

6.17 The committee's review of the *Australian Crime Commission Act 2002* discussed extensively the issue of delays in dealing with those who refuse to cooperate with the examination process. The committee at that time suggested that a timely disposition of these matters could be achieved through the implementation of the suggestion that a protocol between the Commonwealth and the courts be developed to enable priority to be given to disposition of these matters.[13] The committee notes with great disappointment that this issue has still not been resolved.

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8 *Committee Hansard*, 6 July 2007, p. 42.

9 *Committee Hansard*, 6 July 2007, p. 43.

10 *Crime and Misconduct Commission Act 2001*, section 199(4).

11 *Crime and Misconduct Commission Act 2001*, subsection 199(10).

12 Mr William Boulton, Examiner, Australian Crime Commission, *Committee Hansard*, 6 July 2007, pp 42-43.

13 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, p. 42.

6.18 The committee acknowledges the serious potential for current arrangements surrounding the prosecution of contempt charges arising from ACC examinations to undermine investigations of organised crime in Australia. While the committee appreciates that the matter is the subject of a review, it believes the amendments to state schemes should serve as a ready model for the necessary changes to the ACC Act. The committee believes that resolution of this issue is well overdue.

Recommendation 2

6.19 The committee recommends that the issue of failure to cooperate with the Australian Crime Commission examination process be resolved immediately; and that the Commonwealth Government release the Trowell Report as a matter of priority.

Telecommunications (Interception and Access) Act 1979

6.20 The history of the amendments to the *Telecommunications (Interception and Access) Act 1979* (the TI Act) reflects the changing technology of the communications industry and the increasingly sophisticated use to which telecommunications equipment can be put to commit crime. The TI Act is designed to be technologically neutral, meaning its definitions and offences are constructed so as not to limit their application to extant technologies—an important aspect of design in considering how best to prepare to combat organised crime in the future.

6.21 Deputy Commissioner John Lawler, National Security, Australian Federal Police, emphasised the need for flexible legislation designed to encompass the rapid pace of advance and change in new technologies, and the need for the kind of 'broad generic laws which have been enacted in recent times'.[14]

6.22 The telecommunications environment supports offences that, as described by section 4 of the ACC Act, involve two or more offenders, substantial planning and organisation and the use of sophisticated methods and techniques. For this reason, the ACC's telecommunications interception (TI) powers are central to its work on organised crime.

Telecommunications interception powers: Australian Customs Service

6.23 TI is authorised by a warrant issued by a Federal Court judge or a member of the Administrative Appeals Tribunal nominated for the purpose of issuing the warrants.[15] Section 39 of the TI Act lists the agencies that are able to apply for TI warrants.

6.24 The Australian Customs Service (Customs) submission notes that Customs' access to TI warrants and subsequent information is restricted. Customs is not

14 *Committee Hansard*, 5 July 2007, p. 65.

15 For circumstances concerning security matters, the Attorney-General issues the warrants under section 9 of the TI Act.

authorised to seek a warrant under the TI Act for the interception of telephone calls or other telecommunications transmissions, and relies for this on other agencies such as the AFP, the ACC or state police and crime commissions.[16] Customs' submission identifies the following ways that this has a negative or potentially negative effect:

- agencies' investigative priorities may delay or prevent Customs access to TI material; this may seriously affect Customs' ability to investigate and respond to serious criminal offences;
- agencies may not have experience in the Customs environment; where interception material that is not the result of a joint operation is provided, information which could affect Customs' 'targeting and profiling' can easily be overlooked; and
- Customs' reliance on agencies such as the ACC to both interpret accurately and provide information from interceptions is a burden on those agencies, and results in a diversion of resources away from critical operations.[17]

The changing nature of Customs investigations

6.25 Mr Brian Hurrell, Acting National Director, Enforcement and Investigations Division, Australian Customs Service, explained that historically there was a view that Customs were not necessarily 'investigating that higher end of criminal activity that warranted [granting them TI powers in their own right]'.[18] He told the committee that this has now changed:

> We are finding…that the sorts of investigations that Customs is getting involved in, either initially on its own as an agency or then later in company with other policing or law enforcement agencies, are tending towards the higher end of criminal activity.[19]

6.26 Mr Hurrell indicated that there are links between various criminal activities through criminals who have an intimate knowledge of the Customs system and are therefore able to move goods through the border:

> …the same people who may be involved in substantial illegal tobacco importations will also be involved in activities involving narcotics or, indeed…a precursor…[They] are linked in all of those activities at a certain level of organised crime.[20]

6.27 Mr Hurrell reiterated the submission's contention that the present situation places limitations on Customs' ability to obtain evidence in certain circumstances:

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16 *Submission 14*, p.6.

17 *Submission 14*, p.6.

18 *Committee Hansard*, 5 July 2007, p. 101.

19 *Committee Hansard*, 5 July 2007, p. 101.

20 *Committee Hansard*, 5 July 2007, p. 101.

> …there are specialist areas within law enforcement, and a Customs officer might interpret raw product from interception in a different way, knowing how the import-export system works, to what a police officer or an intelligence analyst from another agency.[21]

6.28 Customs has had exploratory discussions with the Attorney-General's Department on this issue, and acknowledges that complex policy and legislative issues are involved, including the need for balancing privacy concerns with Customs' operational needs.[22]

6.29 The committee notes that powers permitting TI, the conduct of search and seizure operations and the use of surveillance devices are usually given to law enforcement and investigative bodies and royal commissions within a framework of accountability requirements. This ensures that these highly invasive powers are used responsibly in limited circumstances. Customs maintains that the law enforcement element of its work and its regulatory responsibilities are inhibited by it being unable to apply for telecommunications interception warrants and, in some cases, by being unable to assess raw interception information. However, the committee is of the view that requests to extend the power to seek interception warrants to agencies outside law enforcement agencies should be considered with great care.

6.30 The committee considers telecommunications interception to be an invasive power, particularly since the 2006 amendments to the Act that allowed access not only to communications but also to stored communications.[23] The potential gravity of the exercise of such powers should properly be restricted to those agencies whose exclusive area of operation is law enforcement. Greater effort should be made by Commonwealth Government departments and agencies to collaborate in a more planned and strategic manner to prevent the need for the granting of such invasive powers to a plethora of bodies outside law enforcement.

Recommendation 3

6.31 The committee recommends that the Australian Customs Service continue to have access to telecommunications interception through law enforcement agencies, and that those agencies liaise to enhance the provision of telecommunications interception information to the Australian Customs Service.

Telecommunications interception powers: Queensland

6.32 The committee was made aware of the inability of Queensland agencies to access TI warrants—except in Commonwealth matters and in joint operations. In

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21 *Committee Hansard*, 5 July 2007, p. 101.

22 *Submission 14*, p. 6.

23 Senate Scrutiny of Bills Committee, *Entry, Search and Seizure Provisions in Commonwealth Legislation*, http://www.aph.gov.au/senate/committee/scrutiny/entrysearch/report/c04.htm, viewed 18 July 2007.

Queensland, Detective Chief Superintendent Barnett, Queensland Police Service, told the committee:

> The QPS, in not having telephone interception powers, is unique as a policing jurisdiction within Australia. Consequently, partnerships with policing agencies that can facilitate access to telecommunications intercept, TI, powers are often critical to QPS investigations targeting significant criminal entities and networks. Every major investigation conducted between the ACC and the QPS has utilised telephone interception as a key investigative strategy and this support will continue to be critical to the QPS investigations targeting serious and organised crime.[24]

6.33 Detective Chief Superintendent Barnett explained that there have been some attempts to introduce legislation to remedy the problem but these have not been successful.[25]

6.34 The committee raised this issue with the Commonwealth Attorney-General's Department. Ms Catherine Smith, Assistant Secretary, Telecommunications and Surveillance Law Branch, confirmed that, to Commonwealth agencies such as the ACC and the AFP, TI is available in every state of Australia. At the state level, however, the power is not universally available:

> There is only one police force, the Queensland Police Service, that does not have interception powers. The Queensland Crime and Misconduct Commission also does not have interception powers. We are currently working with our colleagues in the Queensland Attorney General's department and we are working our way forward to look at interception powers for the Queensland police.[26]

6.35 The committee notes that the difficulty in granting TI powers at this level seems to arise from questions surrounding the appointment of a public interest monitor in Queensland to oversee the process. Ms Smith noted that there is no prohibition on the Queensland government having whomever they choose involved in the development of affidavits and applications for warrants; however:

> At the moment the act requires that a law enforcement agency approach either the AAT or the Federal Court and it is a judicial decision as to whether that warrant is issued. Bringing in a third party to then appear before an AAT member or a Federal Court judge is not actually provided for in the legislation. There is no issue with a public interest monitor working with the Queensland police, if that is what they want to do, to look at the basis of applications. The Queensland government has put in legislation which oversights after the fact to ensure that the accountability

24 *Committee Hansard*, 7 June 2007, p. 3.

25 *Committee Hansard*, 7 June 2007, p. 5.

26 *Committee Hansard*, 5 July 2007, p. 12.

> regimes have all been adhered to, like the Commonwealth Ombudsman does. So it is within their power to appoint that work.[27]

6.36 The committee is extremely concerned that Queensland is at present the only jurisdiction not to have TI powers Overwhelmingly, the evidence to the inquiry highlighted the need for a nationally consistent approach to dealing with serious and organised crime. In not having TI powers, Queensland is undermining the efforts of all LEAs and providing a less hostile environment in which serious and organised crime groups are able to develop. It is the committee's view that there are benefits for Queensland law enforcement in having access to their own TI powers. The inability of one jurisdiction to access such powers creates a weak link in addressing criminal activity nationally. On this point Mr Bob Bottom, appearing in a private capacity, observed:

> The state wants the Commonwealth to acknowledge that the procedure for Queensland would be different from the other states, in that it would enable Queensland to have an extra mechanism—that is, all applications to tap telephones whether they be of organised criminals or any policeman or politician they dealt with, would have to go through a public interest monitor, who would then report to the Attorney-General and the Premier. That does not happen in other states. It has not been deemed necessary.[28]

Recommendation 4

6.37 The committee recommends that the Commonwealth and Queensland governments collaborate to expedite the granting of telecommunications interception powers to the Queensland Police Service and the Queensland Crime and Misconduct Commission.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 and *Financial Transactions Reports Act 1988*

6.38 The Australian Transaction Reports and Analysis Centre (AUSTRAC) submission focuses upon legislation that deals with money laundering and associated activities, particularly the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Financial Transactions Reports Act 1988* (the FTR Act). This legislation places obligations on financial institutions and other financial intermediaries to report to the AUSTRAC CEO:

- suspicious transactions;
- cash transactions of A$10,000 or more or the foreign currency equivalent; and
- international funds transfer instructions.[29]

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27 *Committee Hansard*, 5 July 2007, p. 13.

28 *Committee Hansard*, 7 June 2007, p. 35.

29 *Submission 10*, pp 6-7.

6.39 AUSTRAC explains that the AML/CTF reforms are intended to ensure:

> …Australia's financial sector remains hostile to criminal activity by providing law enforcement, security, social justice and revenue agencies with valuable sources of information to investigate and prosecute serious organised crime and terrorist activity. They also bring Australia into line with international standards, including standards set by the Financial Action Task Force on Money Laundering.[30]

6.40 The AML/CTF Act will be implemented in stages over two years 'in order to allow industry to develop necessary systems in the most cost efficient way'.[31] A second phase of reforms will encompass combating money laundering and terrorism financing involving real estate agents, jewellers and professionals such as accountants and lawyers.

6.41 The reforms also address the Financial Action Task Force on Money Laundering (FATF) 2005 mutual evaluation report on AML/CTF measures in Australia, which identified the strengths and weaknesses in Australia's financial system.[32] The AML/CTF Act additionally covers services provided by the financial sector, including gambling, bullion dealers and other professionals or businesses.[33]

6.42 Chapter 3 identifies financial crime, particularly money laundering, as a present and future trend in the activities of organised crime groups. While recent legislation has addressed this area of activity, the committee notes that the question of its effectiveness remains open. The committee intends to monitor the performance of the AML/CTF Act, as well as the programmed second phase of reforms.

Proceeds of Crime Act 2002

6.43 The Commonwealth *Proceeds of Crime Act 200*2 commenced in January 2003. Previously, confiscation proceedings were available under the *Customs Act 1901* and the *Proceeds of Crime Act 1987*; however, these proceedings were conviction based, meaning they relied on the successful prosecution of a person in order to recover assets from proven criminal activity.

6.44 The principal Commonwealth agencies involved in proceeds of crime work are:

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30 *Submission 10*, p.7. The Financial Action Task Force on Money Laundering (FATF) is 'an inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF was established in 1989 by the G7 and Australia was a founding member. The FATF currently has 33 members, of which two are regional organisations': Attorney-General's Department, http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_TheFATFsmutualevaluationofAustralia, viewed 16 July 2007.

31 Australian Transaction and Reports Centre, *Submission 10*, p. 7.

32 Financial Action Task Force on Money Laundering, *Third mutual evaluation report on anti-money laundering and combating the financing of terrorism*, 14 October 2005.

33 Australian Transaction and Reports Centre, *Submission 10*, p. 7.

- Australian Crime Commission;
- Australian Customs Service;
- Australian Federal Police;
- Australian Securities and Investments Commission; and
- Australian Taxation Office.[34]

6.45 Broadly, the *Proceeds of Crime Act 2002* operates to restrain proceeds of crime. The restrained proceeds are frozen until further action is taken to confiscate them. Assets are frozen by the court after an application, usually made by the DPP, which must support a reasonable suspicion that the assets are proceeds of crime.

6.46 The *Proceeds of Crime Act 2002* allows confiscation of assets based on civil forfeiture—that is, where a court is satisfied on the balance of probabilities that a serious offence has been committed, the assets will be forfeited. The then Attorney-General, the Hon. Daryl Williams QC, emphasised in his second reading speech on the bill that the provisions are about 'accounting for unlawful enrichment in civil proceedings, not the imposition of criminal sanctions…[and that] the object or focus of the proceeding is the recovery of assets and profits, not putting people in jail'.[35]

6.47 In a submission to the inquiry, Mr David Lusty expressed concern at the ratio of restrained assets to those forfeited. Mr Lusty observed that, despite having some of the widest confiscation laws in the world, 'the value of criminal proceeds confiscated…each year in Australia is still disappointingly low'.[36] The ACC proceeds of crime figures for the last three years, set out in table 6.1 below, are illustrative:

Table 6.1: Proceeds of crime recovery 2003-06[37]

	2003-04	**2004-05**	**2005-06**
Proceeds restrained	$16 million	$13.4 million	$20.7 million
Proceeds forfeited	$2.4 million	$0.9 million	$1.6 million

6.48 Table 6.1 highlights the considerable difference between the proceeds restrained and the proceeds confiscated. In evidence, Dr Dianne Heriot, Acting First Assistant Secretary, Security and Critical Infrastructure, Attorney-General's

34 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 6.

35 *House Hansard*, 13 March 2002, p. 1,113.

36 *Submission 2*, p. 1.

37 Australian Crime Commission, *Australian Crime Commission Annual Report 2005-06*, October 2006, p. 40.

Department, explained that to some extent this reflects a 'lead time', with some proceeds of crime matters still being dealt with under the 1987 Act.[38]

6.49 In 2006, Mr Tom Sherman AO presented to the then Minister for Justice and Customs a report, being the review required under section 327(2) of the *Proceeds of Crime Act 2002*. In the course of the review, Mr Sherman found difficulties in obtaining comprehensive statistical information about the results achieved under the Act. In part, this was attributable to the fact that no one agency possessed all the information necessary to compile a complete picture of the Act's results.[39] Other difficulties included inconsistency in valuations of property across agencies and the reduced value of encumbered properties.

6.50 The agencies involved in the review expressed various positive views about the proceeds of crime regime, although some were qualified. The ACC, for example, told the review that criminals are well aware that it is to their advantage to hold assets in jurisdictions other than those where they conduct their business, and in entities that cannot be traced to them. While the new provisions support the earlier recovery of assets in a wider range of circumstances, the main challenge—which has not been affected by the 2002 legislation—is to identify proceeds before they have been laundered.[40]

6.51 Dr Heriot told the committee that the Sherman report showed, in comparison to the 1987 Act, a 45 per cent increase in average annual recoveries under the 2002 Act. She continued:

> Because the act has not been in place very long, some proceedings are still happening under the 1987 act. With the nature of court proceedings, it will take a while to gain legs.[41]

6.52 Mr Sherman's report notes that there are indications that the *Proceeds of Crime Act 2002* is having more effect than its predecessor.[42] However, the limitations of the legislation are acknowledged:

> The Act has enabled law enforcement authorities to trace proceeds of crime more effectively. But the Act is no panacea in this regard…[T]here are still challenges in tracing proceeds that the Act does not solve. But it is also true

38 *Committee Hansard*, 5 July 2007, p. 16.

39 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 16.

40 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 14.

41 *Committee Hansard*, 6 July 2007, p. 16.

42 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 23.

> that a complete solution to these challenges may be beyond the scope of reasonable legislation in any event.[43]

6.53 Dr Heriot noted that the Sherman report had made recommendations on improving the scheme and that these are currently being considered.[44]

6.54 The committee considers that the confiscation of proceeds of crime is clearly a critical strategy against organised crime, and one with considerable deterrent value. In this, the committee concurs with the observation of Mr Sherman that, while underlings can be paid to take risks:

> …[c]onfiscating…illicit profits is often the most effective form of punishment and deterrence for…[the] leaders.[45]

6.55 In the light of the evidence received, the committee believes that the rate of recovery of criminal proceeds under the *Proceeds of Crime Act 2002* should be accelerated.

Recommendation 5

6.56 The committee recommends that the recommendations of the Sherman report into the *Proceeds of Crime Act 2002*, where appropriate, be implemented without delay.

Possible additional legislative strategies

Proscription of organised crime groups: anti racketeering and consorting style laws

6.57 Proscription of OMCGs and similar criminal groups—whereby a group, membership of the group or associating with its members is banned outright—is often suggested as a means of addressing the problem of organised crime groups in Australia. This approach has been used with success in some overseas jurisdictions. The committee notes that calls for such an approach often quickly follow and increase in the light of highly publicised organised crime related incidents, which tend to stimulate media and public interest.

Racketeer Influenced and Corrupt Organizations legislation

6.58 Despite there being some satisfaction about the current legislative environment, concerns were expressed that authorities are 'not terribly well-equipped to deal with serious organised crime'.[46] As a result, some witnesses suggested that legislation based on the *Racketeer Influenced and Corrupt Organizations* legislation

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43 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 23.

44 *Committee Hansard*, 5 July 2007, p. 16.

45 Mr Tom Sherman, 'Report on the independent review of the operation of the *Proceeds of Crime Act 2002* (Cth)', July 2006, p. 24.

46 Professor Rod Broadhurst, Private Capacity, *Committee Hansard*, 7 June 2007, pp 59-60.

(RICO) in the United States of America might prove useful in dealing with organised crime in Australia.[47]

6.59 The purpose of RICO is:

> …to seek the eradication of organised crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.[48]

6.60 The United States law prohibits any person, including any individual or entity capable of holding a legal or beneficial interest in property, from:

- using income received from a pattern of racketeering activity or from the collection of unlawful debt to acquire an interest in an enterprise affecting interstate commerce;
- acquiring or maintaining through a pattern of racketeering activity or through a collection of an unlawful debt an interest in an enterprise affecting interstate commerce;
- conducting or participating in the conduct of the affairs of an enterprise affecting interstate commerce through a pattern of racketeering activity or through collection of an unlawful debt; or
- conspiring to participate in any of these activities.[49]

6.61 While RICO laws were initially clearly targeted at the Mafia, they also allow civil claims to be brought by any person injured in their business or property by reason of a RICO violation. By the late 1980s, RICO laws were being routinely used to press civil claims, such as common law fraud, product defect, and breach of contract, as criminal wrongdoing, which in turn enabled the filing of a civil RICO action.[50] A US website on RICO states:

> During the 1990's, the federal courts, guided by the United States Supreme Court, engaged in a concerted effort to limit the scope of RICO in the civil context. As a result of this effort, civil litigants must jump many hurdles and avoid many pitfalls before they can expect the financial windfall available under RICO, and RICO has become one of the most complicated and unpredictable areas of the law.[51]

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47 Mr Bob Bottom, Private Capacity, *Committee Hansard*, 7 June 2007, p. 36; Mr Christopher Keen, Director, Intelligence, Queensland Crime and Misconduct Commission, *Committee Hansard* 7 June 2007, p. 57; *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § (1968).

48 *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § (1968).

49 *Racketeer Influenced and Corrupt Organizations Act*, 18 USC § (1968).

50 Mr Jeffrey Grell, http://www.ricoact.com/, viewed 10 August 2007.

51 Mr Jeffrey Grell, http://www.ricoact.com/, viewed 10 August 2007.

6.62 Concerns about the evidential and procedural requirements of RICO style laws were canvassed in the course of the inquiry. The South Australia Police has advised its government that getting convictions under RICO legislation can be complex, protracted and resource intensive. Overseas experience has shown that it can take three or four years to secure a conviction and that such timeframes do not disrupt organised crime groups.[52]

6.63 The committee notes that, despite awareness about the potential shortcomings of RICO style laws and anti organised crime laws, police are generally positive about the need to consider introducing anti racketeering style laws as part of developing either staged or comprehensive regimes.[53]

Consorting laws

6.64 The committee received a number of submissions calling for consorting laws to be enacted or, where they exist, to be reinvigorated against organised crime groups. Consorting laws criminalise the act of keeping company with a known or listed person. The committee was told that these laws were used successfully against the drug trade in Australia in the fifties.[54] There was agreement that consorting laws would need to be updated to reflect modern realities and circumstances if they were to be effective. Mr Bottom observed that such laws have worked in the past and could do so again, as long as their design is based upon sufficient research.[55]

6.65 However, the committee was cautioned against transplanting legal strategies or laws from past eras or different countries without reference to the particular needs or characteristics of Australian conditions. Assistant Commissioner Graeme Morgan, Commander, State Crime Command, NSW Police Force, noted that a number of factors had contributed to the success of consorting laws in the past, such as the creation of a designated consorting squad, the relatively small number of targets and the likelihood of imprisonment for those convicted.[56]

6.66 Presently, for example, the NSW consorting laws require a person to be booked 'seven times in six months' to prove an 'habitual association' or consorting offence.[57] This might require a dozen police to attend court to prove the offence, which would be a tremendous drain on resources. Also, under today's sentencing practices, there would be no guarantee of a jail term and thus of preventing an offender from continuing to communicate and consort with his or her associates.

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52 Assistant Commissioner Tony Harrison, Crime Service, South Australia Police, *Committee Hansard*, 6 July 2007, p. 22.

53 Assistant Commissioner Tony Harrison, Crime Service, South Australia Police, *Committee Hansard*, 6 July 2007, p. 23.

54 Mr Bob Bottom, Private Capacity, *Committee Hansard*, 7 June 2007, p. 38.

55 *Committee Hansard*, 7 June 2007, p. 37.

56 *Committee Hansard*, 8 June 2007, p. 6.

57 Assistant Commissioner Graeme Morgan, Commander, State Crime Command, NSW Police Force, *Committee Hansard*, 8 June 2007, p. 7.

Assistant Commissioner Morgan's assessment revealed a gulf between the superficial appeal of such laws and their present suitability for addressing organised crime:

> The two things that could assist in useful consorting legislation would be, firstly, reducing the burden on police in the court process, however that is achieved and, secondly, making the outcome meaningful, however that is achieved.[58]

6.67 Similarly, Deputy Commissioner Andrew Scipione,[59] NSW Police Force, pointed to the fact that to reflect current habits and technology adequately a modern consorting law would need to be able to take account of, and capture, electronic consorting:

> Look seriously at the way people consort these days…[C]hildren consort primarily through a mobile phone, an SMS or an internet machine. If we are going to get serious about dealing with meetings, most of them happen in cyberspace.[60]

6.68 Assistant Commissioner Tony Harrison, Crime Service, South Australia Police, advised the committee that consorting laws are attractive because of their focus on interrupting criminal associations, which in turn breaks down the infrastructure promoting illegal activities. Mindful of the potential problems of poorly designed RICO or consorting style laws, South Australia is updating its consorting laws to take into account the distinct characteristics of modern crime groups and the context in which they operate.[61]

6.69 Assistant Commissioner Harrison identified a number of imperatives for these streamlined laws. These are:

- to reduce the complexity of consorting laws;
- to break up the associations and prohibit re-association;
- to impose non-association control orders, a breach of which could prevent a person from getting bail; and
- to connect violent and/or drug related activity to criminal association offences.[62]

6.70 The introduction of relatively easy-to-administer laws would allow police to attack both the extended associations and the core membership of organised crime groups—an ability that has traditionally eluded police. Assistant Commissioner Harrison explained that non-association control orders would target the centre of the

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58 *Committee Hansard*, 8 June 2007, p. 7.

59 The committee notes that Mr Andrew Scipione is now Commissioner of the NSW Police Force.

60 *Committee Hansard*, 8 June 2007, p. 16.

61 *Committee Hansard*, 6 July 2007, p. 22.

62 *Committee Hansard*, 6 July 2007, p. 22.

organised crime networks—'the inner sanctum…which is the difficult area for law enforcement to infiltrate'. The new consorting regime would be used to attack:

> …the hangers-on, the street gangs, the prospects and the nominees of outlaw motorcycle gangs, to preclude them from being able to associate continually with full members of outlaw motorcycle gangs or higher ranking people within serious organised crime groups'.[63]

6.71 The South Australian laws will also address modern systems and habits of communication, including mobile telephones, the internet, voice over internet and person-to-person communication. The South Australia Police advised:

> …we will try to capture all those associations to make sure that it is contemporary with the way people communicate today.'[64]

Anti-racketeering and consorting style laws: international observations

6.72 The committee notes that internationally there is a range of anti-racketeering and consorting style laws.

Reputational violence: the Hong Kong experience

6.73 The committee was made aware that Hong Kong has introduced laws that outlaw membership in a triad criminal group, as well as the claiming of membership in such a group and the wearing of related group paraphernalia. Critical to the legislative design is the prohibition on claiming to be a member of such a group; this aspect of the legislation seeks to undermine the 'reputational violence' that triad groups rely on to promote and achieve their ends.[65]

6.74 The importance of reputational violence to the triads in Hong Kong is comparable to certain crime groups in Australia:

> These gangs, both in the Chinese context and also here, operate entirely on the intimidation of that reputational violence. That brand name—as we academics sometimes like to call it—the brand recognition of wearing a Hell's Angels jacket, a Coffin Cheaters jacket or whatever, has the same equivalent intimidatory effect as does the wearing of a triad tattoo and so on.[66]

6.75 Reputational violence allows organised crime groups to easily 'slip from protection to extortion, to infiltration of legal businesses'.[67] Gang or group membership goes to the heart of reputational violence and is therefore a potentially

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63 *Committee Hansard*, 6 July 2007, p. 23.

64 Assistant Commissioner Tony Harrison, Crime Service, South Australia Police, *Committee Hansard*, 6 July 2007, p. 23.

65 Professor Rod Broadhurst, Private Capacity, *Committee Hansard*, 7 June 2007, p. 59.

66 Professor Rod Broadhurst, Private Capacity, *Committee Hansard*, 7 June 2007, p. 59.

67 Professor Rod Broadhurst, Private Capacity, *Committee Hansard*, 7 June 2007, p. 59.

legitimate area for law and policy makers to address when designing responses to organised crime.[68]

Other jurisdictions

6.76 In 1997, Canada amended its criminal code to include a number of consorting offences, designed to deprive criminals of their profits. The legislation also creates an offence of participation in a criminal organisation through the commission or furtherance of certain indictable offences for the benefit of that organisation.[69]

6.77 The Scandinavian countries, as well as Italy, France and Germany, have all enacted similar legislation. For example, section 129 of the German penal code, which is concerned with the formation of criminal associations, states:

> Whoever forms an association the objectives or activities of which are directed toward the commission of criminal acts or whoever participates in such an association as a member, solicits for it or supports it, will be punished by imprisonment not exceeding 5 years or by a fine.[70]

Considerations for implementing RICO and consorting style laws

6.78 Dr Arthur Veno, who has written on the activities and internal dynamics of OMCGs, does not consider that such legislation would work in Australia:

> [Such laws would] [a]bsolutely not [work in Australia]…Canada, the RICO Act in America…[and] the Scandinavian countries have all tried similar kinds of legislation. It has not worked one iota. It simply draws the clubs underground, in a lot of cases weeds out the more moderate elements of the club, and the clubs do then become even more violent.[71]

6.79 The committee is concerned that such laws could create an incentive for secrecy, which could arguably make such groups more ruthless and ultimately harder to detect.

6.80 The committee notes that consorting laws by themselves have not achieved great successes; however, they could be used as a component of a coordinated strategy.

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68 Professor Rod Broadhurst, Private Capacity, *Committee Hansard*, 7 June 2007, p. 64.

69 Bill C-95, 2nd session, 35th Parliament, Canada: Canadian Parliament, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2329667&Language=e&Mode=1&File=11, viewed 10 August 2007.

70 Reproduced in Professor Hisao Katoh, 'Corruption in the Economic World in Japan', Keio University website, http://www.law.keio.ac.jp/~hkatoh/CORRUPTIONINTHEECONOMICWORLDINJAPAN.htm, viewed 10 August 2007.

71 ABC Radio, 'Father urges Melbourne shooter to come forward', *The World Today*, 27 June 2007, http://www.abc.net.au/worldtoday/content/2007/s1956695.htm, transcript, viewed 10 August 2007.

6.81 Using Canada as an example, Detective Superintendent Stephan Gollschewski, Queensland Police Service, observed that the success of proscription laws in Canada is in fact testament to a comprehensive approach to combating organised crime groups:

> With outlaw motorcycle gangs…[the Canadians] have shown a reduction in crime associated with those particular types of groups, but they have a very holistic approach…They do not just look at the organised crime aspect; they look at the whole of the activities of the group and target even simple things like their traffic offending and that type of stuff, to put pressure on them.[72]

6.82 Professor Broadhurst noted that the success of RICO type legislation in New York is:

> …because of the twinning of political will and dedicated law enforcement with RICO type statutes, and particularly those focusing on the money; where it comes from and how you got it.[73]

6.83 However, Detective Superintendent Gollschewski warned against succumbing to the appeal of proscribing antisocial and criminal groups without considering broadly the context in which they operate. Despite the criminal overtones and affiliations of such groups, a gang cannot, in many cases, be regarded as wholly or exclusively criminal.[74] A strategy based solely on outlawing a group and membership of that group could therefore risk leaving untouched those same criminal networks. As a result, a focus on membership of a certain group could be a distraction from the more important task of identifying particular participants in, and incidences of, criminal behaviour:

> Law enforcement has to be very careful to identify…criminal networks…that pose the significant threat to the community. If we focus just on the outlaw motorcycle gangs, we are not getting the complete picture. So our targeting methodology and the way we are attacking them is to focus on the high-threat things to the community.[75]

6.84 The difficulty of accurately identifying an organised crime group or network is compounded by the ability of organised crime groups to frustrate proscription by re-forming a previously proscribed group.[76]

6.85 Similarly, Mr Bottom, although having no objection to the proscription of groups per se, felt that criminals would frustrate the working of such laws almost as a

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72 *Committee Hansard*, 7 June 2007, p. 17.

73 *Committee Hansard*, 7 June 2007, p. 51.

74 *Committee Hansard*, 7 June 2007, p. 16.

75 *Committee Hansard*, 7 June 2007, p. 16.

76 Detective Superintendent Stephan Gollschewski, Queensland Police Service, *Committee Hansard*, 7 June 2007, p. 17.

matter of course, observing, 'you could wipe them out and they would re-emerge at another point'.[77]

6.86 The committee acknowledges the innovative legislative developments occurring at the state and Commonwealth levels for the disruption and dismantling of organised crime groups. The committee believes that Australia, in considering its own RICO or consorting legislation, has the benefit of international models and their varying degrees of success. During the course of the inquiry, the committee had anticipated that the Attorney-General's Department would be able to provide information on the current international landscape. However, the committee did not receive this information and was therefore unable to draw any conclusions in this area.

Recommendation 6

6.87 The committee suggests that the Parliamentary Joint Committee on the Australian Crime Commission in the next term of the Federal Parliament conduct an inquiry into all aspects of international legislative and administrative strategies to disrupt and dismantle serious and organised crime.

Corporations Act 2001

6.88 The committee received little evidence on the relationship of the Corporations Act 2001 to organised crime. However, Assistant Commissioner Harrison pointed out an apparent anomaly whereby dishonesty offences can prohibit a person from being a company director under the Corporations Act 2001, yet a serious drug offence does not necessarily incur such a prohibition:

> …where serious organised crime identities may have serious drug and/or violence convictions, that does not necessarily preclude them—and it certainly does not preclude an immediate family member—from being a company director. It is certainly one of the areas…we strongly believe…needs…some tightening up in relation to a fit and proper person being a director of companies, particularly in the area…[of] telecommunications.[78]

6.89 In the absence of more evidence, the committee considers that this is a matter which should be further explored.

Recommendation 7

6.90 The committee recommends that any future review of the Corporations Act 2001 identify provisions which could be amended to inhibit the activities of organised crime, including, but not limited to, those provisions dealing with directors.

77 *Committee Hansard*, 7 June 2007, p. 35.

78 *Committee Hansard*, 6 July 2007, p. 19.

Design of legislative schemes

6.91 While a substantial part of the hearings focused on the benefits or otherwise of laws aimed at particular groups, such as OMCGs or those committed to politically motivated acts of violence, Deputy Commissioner Lawler emphasised that the proper and most worthwhile focus is on designing comprehensive suites of laws that allow all types of criminal behaviour to be addressed as they arise, with minimum need to amend existing laws or create new statutes:

> …outlaw motorcycle gangs…commit criminal offences and breaches in Australia of Australian law. So the full array of tools available, in a generic sense, to law enforcement are very important to treat those particular problems…[T]he tools available for the investigation of any crime can be equally applied to organised crime, to the outlaw motorcycle groups, to groups that might target our tax system or our financial systems and to those involved in amphetamines or terrorism.[79]

Uniformity of laws

6.92 In canvassing potential legislative measures to address organised crime, the committee understands that, beyond the question of design, the perennial issue of national uniformity must be addressed. Noting the lack of uniform laws directed at organised crime groups—and specifically laws dealing with membership of organised crime groups or serious criminal networks—Professor Broadhurst suggested:

> …law enforcement agencies in Australia are, to a certain degree—the extent of which we could argue about—operating with legal restrictions which make it much more difficult to control these kinds of groups.[80]

6.93 The committee heard that, although there is limited evidence of jurisdiction-shopping by organised crime groups, such groups undoubtedly operate rationally in the pursuit of profit and in order to minimise their risks. Thus it is almost certain that they select their activities, and the jurisdictions in which they operate, based on assessments of profit, risk and potential cost—that is, penalty or loss of profit. The effect of disparate regimes across Australia would depend on the quality and extent of difference but, ideally, implementation of national laws would remove the potential for jurisdiction-shopping within Australia altogether. A 2005 report of the Corruption and Crime Commission of Western Australia explains:

> Geography and traditional jurisdictions work in favour of organised crime and market forces influence greatly where and how it operates.[81]

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79 *Committee Hansard*, 5 July 2007, pp 64-65.

80 *Committee Hansard*, 7 June 2007, p. 59.

81 Corruption and Crime Commission of Western Australia, 'Organised crime report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the commission's organised crime function and contempt powers', December 2005, p. 6.

6.94 In addition, the national nature of organised crime group structures contributes to their ability to resist policing efforts, which must be pursued mainly via the seven state and territory law enforcement structures. Detective Chief Superintendent Barnett provided an example to the committee of the way in which the existence of separate jurisdictions in Australia can beset even the simplest of transactions with jurisdictional and investigative hurdles:

> …one feature of the drug market…[in Queensland] which is fairly consistent is that there is a significant transhipment of bulk MDMA from New South Wales in the Sydney area up to here…So the organised crime groups that are established in Sydney are having an impact here. They are not geographically located here but they are shipping a lot of product in here, so they are having an impact remotely.[82]

6.95 On the evidence received, the committee notes that national uniformity of laws is not of itself a guarantee that there can be no gaps between state and territory regimes that can be taken advantage of by organised crime groups.

6.96 While the inquiry did not attempt an exhaustive survey of legislative regimes, submissions from and discussions with police revealed that states and territories have different experiences of similar or even identical legal regimes.

6.97 The committee observed obvious differences in what state and territory LEAs see as the most effective legislative approach in their jurisdictions, based on present priorities, assessments of local conditions and the myriad considerations going to the dynamics of organised crime within a given jurisdiction. The committee is not able to gauge the extent to which differences in local conditions could undermine uniform approaches; however, it is clear that the desirability and practicality of uniform criminal laws addressing organised crime are questions that must be answered before such an approach can be endorsed:

> …it is important to have…[a] national approach, particularly in giving powers to our colleagues in Queensland to allow them to fit into, if you like, the bigger jigsaw. It is about making sure that we are fully enabled and we do not have some potential deficit in one location as opposed to another. …We need to realise that outlaw motorcycle gangs are now organised criminals in the highest sense. They are no longer motorcycle club members that are involved in crime. They are organised crime heads and they lead syndicates that are national and international. So I think it is about making sure that…we stay very connected when it comes to things like telephone interception and capabilities.[83]

6.98 The committee observes that uniformity is a potential avenue to achieve better-designed and more-effective laws against organised crime but acknowledges that these goals may well be achieved via better coordination of state regimes, based

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82 *Committee Hansard*, 7 June 2007, p. 24.

83 Assistant Commissioner Andrew Scipione, NSW Police Force, *Committee Hansard*, 8 June 2007, p. 16.

on national and international considerations or context. A report of the Corruption and Crime Commission of Western Australia frames the issue not as one of uniformity but as one of proper balance and design:

> The best defence is to create an environment that is hostile and at the very least no less hostile than that of neighbouring jurisdictions. Organised crime will gravitate to those locations in which it can operate with fewer hindrances.[84]

6.99 Assistant Commissioner Harrison expressed a similar view:

> Getting harmony and encouraging the states, territories and the Commonwealth to look at getting legislation that is complementary to each and every state and jurisdiction would really go a long way to ensure that we do not have serious organised crime figures exploiting not so much loopholes but a lack of harmony between jurisdictions and states.[85]

6.100 The committee notes that an example of the operational implications of the lack of harmony between jurisdictions is the flow-on effects on cost and resources of returning a serious offender to the state where an offence took place:

> …we still send detectives interstate to bring back a person for committing a fraud, hold-up or rape. Two detectives on a plane travel interstate, appear before a magistrate, make an application and then bring them back across the border…[86]

6.101 The committee is extremely concerned that the current multi-jurisdictional approach to the development and enactment of legislation which deals with serious and organised crime is so fragmented that it works to the advantage of the criminals and to the disadvantage of LEAs. Governments must move beyond the rhetoric and remove the legislative impediments which restrict LEAs in undertaking the effective detection and prosecution of serious and organised crime.

Recommendation 8

6.102 The committee recommends that, as a matter of priority, the Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime.

Conclusion

6.103 Evidence to the inquiry suggests that the legislative environment for serious and organised crime is developing and being refined to meet current and evolving

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84 Corruption and Crime Commission of Western Australia, 'Organised crime report to the Joint Standing Committee on the Corruption and Crime Commission with regard to the commission's organised crime function and contempt powers', December 2005, p. 6.

85 *Committee Hansard*, 6 July 2007, p. 21.

86 Assistant Commissioner Tony Harrison, Crime Service, South Australia Police, *Committee Hansard,* 6 July 2007, p. 21.

challenges. As the committee has argued in this chapter, LEAs require legislation that is flexible enough to address the broad and evolving range of organised crime activities in Australia. The committee has some concerns about factors which it believes undermine the adequacy of the legislative environment.

6.104 While the committee heard a great deal about the collaborative arrangements that now exist between government departments and agencies, it is apparent that legislative gaps across a range of issues continue to exist.

6.105 Primarily, the committee is concerned about the lack of legislative coordination and harmonisation across jurisdictions in the area of serious and organised crime. As outlined in chapter 2, serious and organised crime does not respect Commonwealth and state boundaries, and the current federated system has produced an environment that restricts the policing of these activities nationally. The committee acknowledges the important role of the ACC in bringing a national approach to the area of serious and organised crime, but was consistently advised that the lack of legislative complementarity undermines the efforts of LEAs across Australia. It is the committee's view that this issue should be addressed as a national priority.