Chapter 4

Legislation targeting participation in an organised crime group

Introduction

4.1 As outlined in chapter 1, this inquiry was, in part, established to consider the legislative developments in South Australia with the *Serious and Organised Crime (Control) Act 2008*. When it was introduced, the South Australian legislation was unique in Australia in that it targeted association with a 'criminal organisation' as the basis for an offence.

4.2 This chapter considers legislation in various jurisdictions, both within Australia and internationally, which has the effect of expanding criminal liability, or using administrative means, to criminalise or otherwise prevent participation in, or association with criminal organisations.

4.3 The justification for laws targeting participation in groups rather than the acts committed by individual members of groups is that they enable law enforcement to proactively prevent organised crime from occurring, rather than simply react to it once it has occurred. The South Australian Government argued that:

> The criminal law has a limited capacity for 'prevention' and as such makes legislative reform in this area reactive in nature… In many instances, by the time law enforcement have established the requisite suspicion, associations between those involved in serious and organised crime have advanced into relationship and networks, with positive steps taken towards the commission of the crime. Law enforcement therefore is disadvantaged in 'preventing' the threat an impact of serious and organised crime on the community.[1]

4.4 There are various legislative models aimed at prohibiting organised criminals from associating with each other, thereby attempting to prevent organised crime from occurring. The model used in each jurisdiction depends on a number of factors, including:

1 Government of South Australia, *Submission 13*, p. 21.

- the legal system in the jurisdiction. For example, whether a legislature has the constitutional power to enact criminal laws; or limitations on the kinds of laws that can be enacted;[2]
- the organised crime environment in the jurisdiction. For example China, Hong Kong and Macau have laws specifically targeted at triads, and Italy has laws designed to limit the power and control of the mafia; and
- human rights protections, which may make it extremely difficult for some jurisdictions to pass legislation which criminalises association or consorting.[3]

4.5 The committee has identified three main types of laws which aim to prevent the members of organised crime groups from associating with each other and committing offences jointly:

- criminal laws which make it an offence for any person (other than legitimate business associates, family members etc) to associate with, or participate in an organised crime group. This is the basis of the South Australian approach;
- civil orders, such as control orders or restraining-type orders, which apply to a specific individual and may state that the individual must not associate with a group or with other named persons, making it a criminal offence to breach the order. This approach has been adopted in the United Kingdom, Canada, New South Wales and South Australia; and
- criminal laws with specific offences for certain activities that occur within organised crime groups, such as racketeering (as in the United States model), or directing a criminal group (as in Canada).

4.6 Each of the above approaches has benefits and drawbacks. It should be noted that the models used in most jurisdictions examined by the committee are not restricted to one of the above approaches. Instead jurisdictions tend to use a combination of association offences, civil orders and/or specific criminal offences.

4.7 The following section analyses some of the general strengths and difficulties of each approach. Then, specific legislative models, both within Australia and overseas, aimed at preventing organised crime by targeting participation in or membership of criminal groups are considered in detail.

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2 For example, in the United States of America the federal legislature only has the power to make criminal laws in respect of matters with relevance to the federal government, such as interstate crimes. This means that most criminal law is the responsibility of state governments. This restriction has impacted on the way the US laws are structured in that criminal acts committed by 'enterprises' under the *Racketeering Influenced and Corrupt Organisations Act 1970* must have some connection with interstate commerce.

3 For example, the rights protections in both Canada and the United States of America have meant that those jurisdictions' legislative attempts to prevent organised crime groups from associating have focussed on participation in rather than membership of criminal organisations. See ACC, *Submission 15*, p. 6.

Association and consorting offences

4.8 For the most part the criminal law is designed to prosecute 'isolated crimes committed by individuals.'[4] This usually requires proof of the main elements of the offence, including the performance of an act, with the necessary intent, and without a legitimate defence. However, as Dr Andreas Schloenhardt explains:

> The structure and modi operandi of criminal associations… do not fit well into the usual concept and limits of criminal liability. For example, it is difficult to hold directors and financiers of organised crime responsible as they plan and oversee the criminal organisation but frequently have no physical involvement in the execution of the organisation‘s criminal activities. [5]

4.9 Therefore, various exceptions or extensions to the principles of criminal liability have developed, including consorting or association offences which criminalise associations between individuals.

4.10 In Australia consorting offences have existed since 1835, and have been used as a means of breaking up criminal gangs since 1929.[6] Most states have an offence along the lines of 'habitually consorting' with 'reputed criminals, known prostitutes or persons with no visible means of support' - or words to that effect - which survive today.[7]

4.11 The South Australian Police submitted that the old consorting offences are problematic because of 'the petty nature of the classification of persons', 'the absence of any defence' and the fact that 'consorting does not include modern forms of communication.'[8]

4.12 The Commonwealth introduced modernised consorting laws in respect of terrorist organisations in 2002,[9] which make it illegal to be a member of a proscribed terrorist organisation. The anti-terror laws attempt to avoid some of the problems inherent with consorting offences, by targeting preparatory activity. As Mr Geoffrey McDonald, from the Commonwealth Attorney-General's Department explained:

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4 Dr Schloenhardt, *Submission 1B*, p. 16.

5 Dr Schloenhardt, *Submission 1B*, p. 16.

6 Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?', 26 *UNSW Law Journal* 3, 2003, 567 at 581.

7 See section 56, Summary Offences Act (NT); section 13, Summary Offences Act 1953 (SA); section 6, Police Offences Act 1935 (Tas); section 6, Vagrancy Act 1966 (Vic); section 65, Police Act 1982 (WA); section 546A, Crimes Act 1900 (NSW); and QLD (since repealed) See table on page 11 of Submission 16.

8 Government of South Australia, *Submission 13*, p. 29.

9 *Security Legislation Amendment (Terrorism) Act 2002 (*Cth).

> There is no difficulty with the states charging someone with a murder offence—in fact, if attempted murder or other offences is easier to prosecute there is no problem with the states prosecuting people on that basis. The terrorism laws are focused very much on preparatory activity and they try to be more specific about that preparatory activity so that you do not have some of the complications you would have with trying to prove conspiracy, incitement and aiding and abetting. So always the terrorism laws have been understood to allow the states and territories to prosecute with their traditional offences if they want. In fact, the legislation makes it pretty clear that it does not bar the states and territories. Of course, the states and territories work with the AFP when they do prosecute people for terrorism offences—they are very actively involved.[10]

4.13 In 2008, South Australia passed legislation introducing consorting laws in respect of organised crime groups. Section 35 of the *Serious and Organised Crime (Control) Act 2008* provides that it is a criminal offence, punishable by up to five years imprisonment, to associate with a member of a declared criminal organisation.

4.14 Other jurisdictions, including Canada and New Zealand, have introduced laws which criminalise association with or participation in criminal organisations, or make such association an aggravating factor in the commission of certain crimes.

The benefits of association offences

4.15 The committee heard from a number of law enforcement agencies about the difficulties they experience in targeting sophisticated criminal networks because:

> [a] successful prosecution of one, or even more members of a network, often has only a limited effect on the broader operations of the larger criminal group.[11]

4.16 Assistant Commissioner Harrison from the South Australian Police told the committee about the specific problems that law enforcement faces in gathering evidence about organised criminals:

> I am sure the committee would be aware that, when it comes to investigating crimes committed by gangs and serious and organised crime groups, it is often very, very hard because of their construction in relation to maintaining a code of silence and having a brand of intimidation and fear in respect to witnesses.[12]

4.17 Given the challenges of responding to organised crime some witnesses view association offence laws as an important means for disrupting such criminal activity.

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10 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 40.

11 CMC, *Submission 6*, p. 1.

12 Assistant Commissioner Harrison, South Australian Police, *Committee Hansard*, 3 July 2008, p. 3.

4.18 A number of law enforcement agencies argued that association laws are necessary in order to prevent, as opposed to simply react to, serious crime. For example, the South Australian Police gave evidence in this inquiry that:

> [Police] traditionally have the investigative focus which is very reactive. We wait for the crime or the criminal activity to occur and then the police put a response strategy in place. Invariably that has not been overly successful when you look at serious and organised crime, established criminal networks and outlaw motorcycle gangs, because of their composition, structure and culture…The anti-association aspect…is all about trying to prevent those associations occurring. We try to disrupt the planning processes and we would like to hope that we then have some impact on preventing crimes occurring within our communities.[13]

4.19 Chief Inspector Powell told the committee that anti-association laws are an important tool for combating organised crime because the association is such an important aspect of their criminality. He said:

> Serious and organised crime groups require the communication and the association with each other to become sophisticated, to generate their levels of sophistication and methodologies. When you are talking about gangs, a reputation for violence, a criminal reputation, becomes essentially an asset. It is no different to goodwill for a legitimate business.[14]

4.20 Reflecting on this argument, the Law Council of Australia submitted:

> The view is that police should not be left frustrated and unable to act when they possess evidence demonstrating associations and connections between 'known criminals' but have no way of sheeting home responsibility for any particular planned or executed offence.
>
> There is nothing new about these types of sentiments. It has always been the challenge of criminal law to define the limits of culpability in such a way that police are empowered to act both: to proactively prevent crimes from occurring; and to bring to account all those who knowingly instigated, facilitated or participated in the commission or planned commission of an offence.[15]

The disadvantages of association offences

4.21 Consorting-type offences have attracted a great deal of criticism, particularly from academics, lawyers and judges because they are argued to impinge on the freedom of association.[16] For example, Mr Ray, the President of the Law Council of Australia, expressed the view that:

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13 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 5.

14 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, pp. 18-19.

15 Law Council of Australia, *Submission* 8, p. 4.

16 Dr Heriot, Attorney-General's Department, *Committee Hansard*, 6 November 2008, p. 45.

> The notion of prosecuting people for associations rather than substantive offences is really quite abhorrent. If somebody is involved, is sufficiently proximate and commits an offence, even one of an attempt or one of a conspiracy nature, then the existing laws are there to deal with them. It is very clear that not only do some of these laws have the potential to be structurally unfair and restrict relationships—they introduce laws that are really Big Brother laws, dictating who you can talk to and where you should be—but they also create other issues of accidental capture of conduct that is clearly not criminal. The accidental capture of such conduct is a reflection of legislation that is emotively introduced, such as the terrorism legislation, and has within it changes that are based on fear rather than the logical application of law.[17]

4.22 Mr Ray went on to argue that one of the most concerning features of association offences is the potential for them to prevent those subject from associating with family members and friends:

> What troubles me about the blanket declaration is that you have legitimate friendships and relationships with neighbours and with relatives that suddenly subject you, through those relationships, to a potential criminal charge. That is quite extraordinary. I know that in the South Australian legislation they do exempt certain relatives so that a spouse, former spouse, brother, sister, parents and grandparents are exempted. But there would still be a broad range of relatives that many people would keep in touch with and there would be absolutely no criminal intent behind that contact and yet it would be the creation of an illegal relationship. We have to be very cautious in this day and age about creating criminal offences that are new and do not reflect criminal intent or criminal conduct.[18]

4.23 The fairness of punishing an entire organisation for the actions of what OMCG members insist is a 'small number of individuals',[19] was also raised as an issue. Mr Gildea, President of the Hells Angels in Queensland commented:

> How can you hold an organisation responsible for the actions of its individual members? We could give numerous examples of politicians and officers of the police force who have committed crimes and have been charged and convicted as individuals. These crimes include theft, assault, drug-dealing and paedophilia. Those individuals have been punished, and rightly so, but we have not tried to label the government or the police force illegal organisations; nor have we tried to hold the head of government or the commissioner of police responsible for the actions of the individuals.[20]

4.24 Similar views were expressed by the Law Council of Australia:

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17 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 48.

18 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p.50-1.

19 The committee notes that, as discussed in chapter 2, the level and nature of OMCG involvement in serious and organised crime is fiercely disputed.

20 Mr Gildea, Hells Angels, *Committee Hansard*, 7 November 2008, p.7.

> The power of association is one that should not likely by itself lead to criminal liability. The reason for that is clear: it is like a company, and there are fundamental laws in a company dictating whose conduct becomes the conduct of the company. It is called the law of attribution. The conduct of a person in the company under civil law may bind the company but under the criminal law ordinarily will not, historically, unless that person is the mind and will of the company—quite senior—or further down the company if it were to do with other rules of interpretation based on the articles of association or the incorporation et cetera of the company. We need to be very cautious about attributing the conduct of individuals to organisations without clear definition and clear proof. What you do once you do have such attribution and such rules is to then talk of introducing quite extraordinary powers to prosecute and convict on criminal offences that are currently not known to the law.[21]

4.25 The committee also heard evidence from those involved in groups which are at risk of being declared under anti-association legislation. These witnesses talked about the negative impact on their lives of their group being 'outlawed':

> Biking has been a major part of my life. I have Rode more kilometres than I care to recall and all those km's as a proud and Free Australian, I Served this country in the Australian army and did so under the assumption I was doing so to Keep our country free from political dictatorship…
>
> I am in no way attached to any 1% club but do associate with some, I have made good friends with individuals within these clubs. I Feel that my way of life (the one I choose to live) is under threat of being taken away from me with the introduction of these new laws. Now I have read in the news and from transcripts of political documents that, I quote "If you are not a criminal or partake in criminal activities you have nothing to fear". I find this utter rubbish as the laws state that if I associate with these individuals or groups more than 6 times in 1 year than I can and will be gaoled. Let me just add here that I have no police record or prior convictions for any criminal or illegal activities.[22]

4.26 Accordingly, association and participation laws have resulted in a number of challenges under human rights legislation in those jurisdictions which have statutory rights protections, including Canada and the United Kingdom. Law enforcement agencies in both of those jurisdictions expressed concern that the lengthy legal processes involved in human rights challenges have the potential to make the administration of association laws cumbersome and inefficient.[23]

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21 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 50.

22 Mr Griffiths, *Submission 22*, p.1.

23 See discussion in: The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 23-24, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

4.27 For this reason the police force in Victoria - which is the only Australian state with a human rights act - submitted that:

> An adoption of similar reform [to that in South Australia] in Victoria may possibly be inconsistent with Victoria's Charter of Human Rights & Responsibilities.[24]

4.28 Witnesses informed the committee that there are also a range of difficulties inherent in developing laws that criminalise association with criminal organisations. One of the key challenges is defining 'criminal organisations'. A further challenge arises in developing a fair, efficient and consistent process for making a decision that a specific group falls within the definition of a 'criminal organisation'. As the Hon Roberts-Smith QC, Commissioner of the Corruption and Crime Commission of Western Australia, explained:

> From a purely practical point of view, there will be definitional problems. Who is included? Who is not? How do you prove their association? How do you prove participation? What are you proving participation in—membership of a group, the conduct of criminal enterprises or what? All of these are very vexed questions which are actually quite difficult, I would suggest, to deal with in framing legislation.[25]

4.29 Dr Schloenhardt's submission deals in some detail with the difficulties various jurisdictions have had in developing a suitable definition of 'criminal organisation' (or other similar term). For example, he explains that the definitions initially adopted in both Canada and New Zealand were too narrow, making the legislation in both countries relatively ineffective.[26]

4.30 The Attorney-General's Department has identified two processes through which a group is determined as criminal: 'the legislative test, and proscription by government official'.

4.31 The legislative test is conducted on a case-by-case basis whereby the court determines whether an organisation meets the criteria of 'criminal organisation' as set out in the legislation. Most jurisdictions internationally have adopted this approach. For example, Canada's legislation requires that a group be proven to be a 'criminal organisation' on each separate occasion that a member of the group is brought before the court, using a test set out in the legislation. This aspect of the Canadian model has been criticised as an inefficient use of police and court resources.[27]

4.32 By contrast, South Australia's legislation adopts the proscription approach and provides that such a decision is to be made by the Attorney-General. The legislation

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24 Victoria Police, *Submission 4*, p. 2.

25 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 16.

26 Dr Schloenhardt, *Submission 1B*, p. 80.

27 Government of South Australia, *Submission 13*, p. 12.

lists a number of factors that the Attorney-General is required to take into account in making a decision to prescribe a group.[28]

4.33 New South Wales' new laws give the role of deciding to declare an organisation as a criminal organisation to Supreme Court judges. The NSW Police Minister, the Hon Tony Kelly, reasoned that:

> By entrusting this role to Supreme Court judges, we can avoid having to include a list of the types of organisations that cannot be declared, such as political parties. Such an exemption list is commonsense. After all, who wants to see a future government trying to declare an opposing party or a troublesome lobby group unlawful? Members should examine what has happened in South Australia. The bikie gangs have formed a political party, ostensibly to oppose the repressive legislation. However, it is obvious that it is really a device to get around the law by using a political party exemption.[29]

4.34 Noting the difficulties inherent in drafting effective legislation, the ACC further expressed a view that association laws may not have a great impact on disrupting serious and organised crime anyway, echoing the concerns of a number of other organisations and agencies:

> Legislative amendment and new regulatory frameworks can have a short-term impact on such criminal groups. However, current trends in group formation and the consequent adaptability and resilience mean that they are increasingly able to minimise their effects. The definition of specific criminal groups has become more difficult and proving membership of or participation in a specified organised criminal group would be challenging in this environment. In particular, there is a clear risk that law enforcement effort would be diverted away from intervention and prevention efforts to the burden of proof required to establish membership of an unlawful organisation.[30]

4.35 On a related point the Hon Mr Roberts-Smith stated:

> How does one deal with those groups which are randomly formed for the commission of the offence, or groups which briefly deal with other groups for a particular criminal enterprise? I think the complexities of trying to cast laws around criminalising conduct of that kind are very great.[31]

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28 *Serious and Organised Crime (Control) Act* 2008, section 10.

29 The Hon Mr Kelly MLC, NSW Legislative Council Hansard, 2 April 2009, p. 14341.

30 ACC, *Submission 15*, p. 8.

31 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 16.

Civil orders

4.36 A number of jurisdictions have attempted to limit the ability of organised crime group members to associate with each other through the use of civil orders. There are numerous forms that such orders take, however, on the whole they:

- are made by courts;
- are made against individuals;
- contain restrictions on the activities that the individual may take part in, the places they may visit, the people they may associate with, or other orders designed to prevent them from committing criminal offences; and
- specify that a breach of an order is a criminal offence.

4.37 Orders may be made post-sentencing, or without a criminal conviction. The UK has adopted the former approach, and has made Serious Crime Prevention Orders against people convicted of serious crimes.

4.38 South Australia, New South Wales and Canada have legislation enabling courts to make orders based on a lower, civil standard of proof (the court's reasonable satisfaction),[32] that do not require a criminal conviction. In South Australia and New South Wales control orders can be made by courts against members of 'declared organisations'. In Canada 'gang peace bonds' can be made against people who are reasonably likely to commit an organised crime offence, including junior gang members.

4.39 The committee heard that control orders can be an effective means of preventing organised crime gang members from committing offences, and particularly for breaking the cycle for more junior gang members.[33] The Commonwealth Attorney-General's Department said:

> In general terms, civil orders might be effective in preventing crime as they allow the conduct of certain persons, such as those involved in criminal activity, to be monitored and restrained with the aim of preventing them from engaging in criminal conduct. Other civil orders allow for the continued detention or supervision of certain convicted persons, once again with the aim of preventing the person from engaging in criminal conduct. These types of civil orders may have a deterrent effect, but this can also be said of criminal laws. Generally, the breach of these types of civil orders is subject to criminal sanction.[34]

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32 See *Serious and Organised Crime (Control) Act 2008* (SA), section 14; *Crimes (Criminal Organisations Control) Act 2009* (NSW), section 14.

33 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 25-26, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

34 Attorney-General's Department, answers to question on notice, 6 November 2008, p. 5.

4.40 The orders are also made against specific individuals, so do not impinge on the freedom of association to the same extent that broader-ranging association laws do. However, in certain forms – including those adopted in South Australia and New South Wales - the orders raise similar human rights concerns as association offences, albeit to a lesser extent. Dr Andrew Lynch told the committee that:

> Allowing control orders against individuals simply on the basis of membership of a declared organisation is an extraordinary extension of the regulatory state. Adding an element of criminality to the criteria for making such an order might seem to strengthen the justification for them but the problem is that they are still clearly designed to avoid the rigors of a criminal trial with the appropriate burdens of proof.[35]

4.41 Canada's approach, which requires a reasonable suspicion that a person may be involved in committing criminal offences – rather than reasonable satisfaction that they are a member of a listed group as in South Australia and New South Wales – avoids some of the concerns raised by Mr Lynch.

4.42 However, substantial resources are required to monitor control orders, and the committee was cautioned that the approach should not be used if law enforcement do not have adequate resources to enforce and monitor the orders.[36]

Organised crime offences

4.43 The third approach that has been adopted in some jurisdictions is the development of specific criminal offences for acts committed by members of criminal groups, which would not otherwise be criminal acts. For example, Canada has criminal offences for directing a criminal organisation, committing a crime on behalf of a criminal organisation and supporting a criminal organisation.

4.44 Ordinarily, in most common law jurisdictions, the leader of a criminal organisation may be able to be prosecuted for the offence of inciting another person to commit a criminal act, or for conspiracy.[37] However these offences tend to attract lesser penalties than the commission of the act itself. It can also be very difficult to prove these offences in relation to organised crime gang leaders, who tend to 'create a corporate veil to insulate them from liability' and do not typically engage in overt

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35 Dr Lynch, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 29 September 2008, p. 4.

36 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 26, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

37 Dr Schloenhardt, *Submission 1B*, p. 23.

criminal acts themselves.[38] In addition, conspiracy laws are generally very complicated, resulting in a high failure rate of conspiracy charges.[39]

4.45 Under Canadian law, there is a specific offence for instructing the commission of an offence for a criminal organisation, which carries a maximum penalty of life imprisonment. Canada also has a specific criminal offence for participating in the activities of a criminal organisation.

4.46 New South Wales also has criminal legislation targeted at the specific activities of gang members. Section 93T of the *Crimes Act 1900* provides that involvement in a criminal group is an aggravating factor in the commission of certain criminal offences. New South Wales' new laws also introduce an offence of recruiting a person into a criminal organisation.

4.47 The committee was told that the United States RICO laws, which are a variation of this approach, have been very successful in targeting high level members of organised crime groups.[40] However, they can also be very complex, and similar drafting issues arise in terms of defining 'criminal organisations' as in association offences.

4.48 These three examples are considered in further detail later in the chapter.

Examples of specific legislative approaches

4.49 This section outlines the legislation in key jurisdictions which targets participation in, or association with, criminal organisations, using a combination of the above methods. Where possible, the effectiveness and practical impacts of the legislation are explored.

United States of America

Racketeer Influenced and Corrupt Organisations Act 1970 (USA) (RICO Act)

4.50 The United States of America was one of the first countries to respond to organised crime by expanding their criminal legislation.[41] The *Racketeer Influenced and Corrupt Organisations Act 1970* (RICO Act) aims to combat organised crime:

> …by strengthening legal tools of the evidence gathering process through establishing new penal provisions, and providing enhanced criminal

38 Dr Schloenhardt, *Submission 1B*, p. 24.

39 Dr Schloenhardt, *Submission 1B*, p. 24.

40 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 32-33, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

41 Dr Schloenhardt, *Submission 1B*, p. 12.

> sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.[42]

4.51 The RICO Act does not ban membership of criminal organisations, although 'it may have that effect'.[43] Instead, it creates additional offences and penalties for 'racketeering', which may be applied to members of criminal organisations which have committed two or more related serious crimes over ten years.

4.52 The Act sets out four racketeering offences, each of which requires some involvement with an 'enterprise'. The offences are:

(a) having an interest in an enterprise which receives income as a result of a 'pattern of racketeering activity' or the 'collection of an unlawful debt';

(b) having an interest in an enterprise through a pattern or racketeering activity or collection of an unlawful debt;

(c) involvement in the activities of an enterprise that is conducting a pattern or racketeering activities or the collection of unlawful debt; and

(d) conspiring to commit any of the above activities.[44]

4.53 An 'enterprise' is any legal entity, including individuals, partnerships and corporations. It can also include any group of individuals associated in fact, such as a family or motorcycle club. Dr Schloenhardt's submission explains that the broad definition of enterprise means that the RICO Act applies to a wide range of groups, both legitimate and criminal.[45]

4.54 A 'pattern of racketeering activity' means that an enterprise has committed any two of 35 predicate crimes within a ten year period. The predicate crimes encompass almost all serious crimes under state and federal law.[46]

> In essence, the offences in §1962 criminalise the investment of 'dirty' money by racketeers, the takeover or control of an interstate business through racketeering, and the operation of such a business through racketeering.[47]

4.55 In addition, prosecutors must also prove that:

(a) the individuals in the 'enterprise' are associated with one another;

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42 *Organised Crime Control Act 1970* (US), Pub L 91-452, 84 Stat 922, 923.

43 Edward Wise, 'RICO and its Analogues' (2000) 27 *Syracuse Journal of International Law & Commerce* 303 at p. 303.

44 RICO Act, 18 USC, §1962 (a)-(d).

45 Dr Schloenhardt, *Submission 1B*, pp. 220-223.

46 Dr Schloenhardt, *Submission 1B*, p. 218.

47 Dr Schloenhardt, *Submission 1B*, p. 213, quoting Craig Bradley, 'Racketeers, Congress, and the Courts: An Analysis of RICO' (1980) 65 *Iowa Law Review* 837 at 844–845.

(b) the predicate acts are related; and

(c) the criminal acts have some impact on interstate commerce (e.g. withdrawing money from an interstate bank account).

4.56 In summary, the RICO Act enables the state to charge people who are involved in businesses or groups that have a history of using illegal means to run their business or group with racketeering. The penalty for racketeering is a maximum of 20 years imprisonment and/or a fine of $250 000. In addition, the RICO laws provide for the forfeiture of all proceeds of crime plus any additional interest gained through racketeering. [48]

4.57 The RICO Act also has the unique feature of allowing private parties to sue 'racketeers' for damage to their business property. If successful, the court may award triple damages to the affected business owner.[49]

Effectiveness of RICO Act

> Over nearly forty years of operation, *RICO* has been used successfully to prosecute a number of high profile leaders of criminal organisations and has incapacitated a diverse range of criminal syndicates.[50]

4.58 Dr Schloenhardt details a number of high-profile prosecutions involving members of La Cosa Nostra, the American branch of the Sicilian Mafia, and notes that the laws have also been successfully applied to members of Asian organised crime groups and members of the Russian Mafia.[51] However, attempts to use the laws to prosecute members of the Hells Angels, including its founder Sonny Barger, failed because the jury was not convinced that a 'pattern of racketeering activity was part of the club's policy'.[52]

4.59 However, the South Australian Government's submission stated that the complexity of the RICO Act has limited its utility.[53] It was submitted that because prosecutors require approval from the Department of Justice, which is only granted in special circumstances, the laws have not been widely used.[54]

4.60 Dr Schloenhardt agrees that initially the uptake of the laws was slow, as it took time for law enforcement to become familiar with the laws. However, he noted that now there is a high frequency of RICO prosecutions, and stated:

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48 RICO Act, 18 USC, §1963(a).

49 Attorney-General's Department, *Submission 16*, p. 16.

50 Dr Schloenhardt, *Submission 1B*, p. 225.

51 Dr Schloenhardt, *Submission 1B*, pp. 225-227.

52 Dr Schloenhardt, *Submission 1B*, p. 227.

53 Government of South Australia, *Submission 13*, p. 9.

54 Government of South Australia, *Submission 13*, p. 9.

> [s]ince 1980, practically every significant organised crime prosecution has been brought under RICO[55]

4.61 Dr Schloenhardt submitted that the flexibility of the RICO laws has allowed law enforcement to follow and adapt to the dynamism of organised crime groups. This flexibility, he pointed out, derives from the legislation's lack of definition of terms such as 'organised crime' and 'criminal organisation', enabling the courts to change the definition over time so that the laws could be applied to evolving structures and crimes. [56]

> The great flexibility with which the legislation operates is also *RICO*'s principal advantage over traditional conspiracy offences and their confined elements that left many key leaders of criminal organisation immune from prosecution.[57]

4.62 Another positive aspect of the laws is their ability to:

> Present a complete picture of a large-scale, ongoing, organised-crime group engaged in diverse rackets and episodic explosions of violence.[58]

The ability to join separate trials, and to merge offences and offenders underpin this feature.

4.63 The RICO laws have managed to avoid some of the criticisms of the models used in other jurisdictions, in particular the level of impingement on the freedom of association. The laws do not criminalise association with other persons, but the commission of certain acts, such as receiving an income from, or having an interest in, an enterprise. This focuses on the illicit business or criminal group itself, rather than the members of the group.

4.64 However, this aspect of the RICO legislation has also limited its flexibility, as it 'does not allow rapid responses to new and emerging organised crime activities as statutory amendments take considerable time.'[59] This can be contrasted to the greater flexibility of an approach which criminalises association with, or participation in, any listed group, and enables groups to be listed through subordinate legislation or administrative orders, such as the South Australian laws.

4.65 The South Australian Government also commented that the RICO legislation 'has limited prevention capability'.[60] This is because the RICO laws still require that

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55 Dr Schloenhardt, *Submission 1B*, p. 228, quoting James Jacobs & Lauryn Gouldin, 'Cosa Nostra: The Final Chapter?' (1999) 25 *Crime and Justice* 129 at 170.

56 Dr Schloenhardt, *Submission 1B*, p. 228.

57 Dr Schloenhardt, *Submission 1B*, p. 228.

58 Dr Schloenhardt, *Submission 1B*, p. 229, quoting James B Jacobs et al, *Busting the Mob* (1994) 11.

59 Dr Schloenhardt, *Submission 1B*, p. 229.

60 Government of South Australian, *Submission 13*, p. 10.

traditional criminal acts, albeit an expanded form, have been committed or attempted, as opposed to targeting associations which may lead to conspiracies to commit criminal acts prior to the acts themselves being committed.

4.66 Nonetheless, US Department of Justice officials told committee members that the RICO legislation has been highly successful. In part, its success is based on the fact that law enforcement can more readily make a case against a criminal enterprise than the individuals at the top of the structure running the enterprise. The committee heard that the evidential burden required to establish racketeering activity is so high that members of the criminal enterprise, once identified, would readily give evidence.[61]

Canada

> In 1997, together with New Zealand, Canada became the first common law jurisdiction in the region to introduce specific offences against criminal organisations. These offences were introduced in response to the activities of outlaw motorcycle gangs (OMCGs or in Canada referred to as 'biker gangs'). Throughout the 1990s the province of Québec saw particularly violent clashes, including bombings and killings, between rival biker gangs, frequently involving the Hell's Angels and the Rock Machine gangs that were fighting for control of Montréal's illicit drug trade.[62]

4.67 Organised crime in Canada is widespread, but particularly prevalent in the major cities of Montreal, Toronto and Vancouver. Organised criminals are involved in a range of activities, but primarily, like in most industrialised countries, in the manufacture, import and supply of drugs. Illicit drugs are the main organised crime problem for Canadian law enforcement. [63]

4.68 There is an estimated 900 organised crime groups operating in Canada, comprising a range of different types of groups from Mafia-style groups, OMCGs to loosely associated criminal networks. Several groups have transnational links.[64]

4.69 The Canadian *Charter of Rights and Freedoms* contains a number of features that impact on Canada's options for responding to serious and organised crime, including:

- A provision that guarantees freedom of association.[65]

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61 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, pp. 32-33, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

62 Dr Schloenhardt, *Submission 1*, p. 18.

63 Dr Schloenhardt, *Submission 1B*, p. 48

64 Criminal Intelligence Service Canada, 'Report on Organized Crime, 2008' (2008), pp. 12, 14.

65 *Charter of Rights and Freedoms*, Subsection 2(d).

- the requirement that all laws be 'in accordance with fundamental justice'.[66] This has been interpreted to include a requirement of proportionality,[67] which means that citizens may challenge legislation on the basis that it is not proportional to the end sought to be achieved.
- The interpretation of section 7 as requiring that all criminal laws have a *mens rea* (or mental) element.[68] Therefore all criminal offences attracting penalties of imprisonment require the proof of some level of intent.

4.70 The Charter has meant that Canadian criminal legislative approaches have centred on legislation which targets participation in – rather than membership of – a criminal enterprise or organisation.[69]

Criminal Code (Organised Crime and Law Enforcement) 2001

4.71 Amendments to Canada's *Criminal Code* in 1997[70] and 2002[71] added:

- new offences for participating in and contributing to the activities of criminal organisations;[72]
- proceeds of crime forfeiture provisions based on the civil standard of proof;[73]
- orders to 'keep the peace';[74]
- consecutive sentencing provisions;[75] and
- police surveillance powers.[76]

4.72 The Canadian Criminal Code now provides for three offences targeting various levels of involvement in organised crime offences:

(a) Participation in the activities of a criminal organisation;[77]

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66 *Charter of Rights and Freedoms,* Section 7.

67 *R. v. Heywood* [1994] 3 S.C.R. 761.

68 *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486.

69 ACC, *Submission 15*, p. 6.

70 *Act to amend the Criminal Code (criminal organizations) and to amend other Act in consequence* (Bill C-95).

71 In the *Act to amend the Criminal code (organised crime and law enforcement) and to make* consequential amendments to other Act (Bill C-24).

72 *Criminal Code* (Canada), section 467.1.

73 *Criminal Code* (Canada), subsection 490.1(2).

74 *Criminal Code* (Canada), section 810.01.

75 *Criminal Code* (Canada), section 718.2.

76 *Criminal Code* (Canada), sections 183 and 186.

77 *Criminal Code* (Canada), section 467.11

(b) Commission of a criminal offence for a criminal organisation;[78] and

(c) Instructing the commission of an offence for a criminal organisation.[79]

4.73 The offences act as both distinct, separate crimes, and as sentence enhancers. Each of the offences carries a different maximum penalty of five years, 14 years and life imprisonment respectively.

4.74 A 'criminal organisation' is defined as three or more people whose main purpose or activity is the commission of one or more serious offences for material benefit. It does not include a group that forms randomly to commit a single offence. A 'serious offence' includes an indictable offence with a maximum sentence of five years or more.[80]

4.75 Membership of an organisation itself is not an offence. However, the Code sets out indicia to assist the court in establishing a person's participation in a group, which are clearly intended to capture members. These include:

- the use of a name, word or symbol associated with the group;
- the fact of association; and
- the receipt of a benefit from the group.[81]

4.76 In order to prove that a person participated in a criminal group, it is not necessary for the prosecution to prove that an accused took part in a criminal offence, only that they were participants in a criminal group which carries out such offences.

4.77 Similarly, the offence of instructing the commission of an offence, which is intended to capture the leaders of organised crime groups, does not require evidence that an offence has been committed.[82] However, the offence of committing of a crime for an organisation does require that the elements of an initial indictable offence be proven.[83]

4.78 The legislation also alters the ordinary evidentiary burdens in favour of the prosecution, recognising the difficulties that prosecutors often have in obtaining evidence from an accused person's alleged associates. For example, the prosecution does not need to prove that the organisation facilitated or committed an indictable offence or that the accused knew the identity of any of the persons who constituted the organisation.

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78 *Criminal Code* (Canada), section 467.12.

79 *Criminal Code* (Canada), section 467.13.

80 *Criminal Code* (Canada), section 467.1.

81 *Criminal Code* (Canada), paragraph 467.11(3).

82 Dr Schloenhardt, *Submission 1*, p. 33.

83 Dr Schloenhardt, *Submission 1*, p. 31.

Gang Peace Bonds

4.79 The 1997 amendments to the Canadian Criminal Code also expanded the availability of 'peace bonds' to people likely to commit an organised crime offence. Peace Bonds were originally developed to tackle domestic violence, and may place a range of restrictions on individuals who are suspected on reasonable grounds to be likely to commit a criminal offence.[84]

> A Peace Bond is a promise, enforceable under the Criminal Code of Canada, to keep the peace and be of good behaviour and to obey all other terms and conditions ordered by a Judge or Justice of the Peace ('JP'), for period of up to twelve (12) months. Judges and JP's may impose reasonable conditions on those who are subject to the Peace Bond, for example: restrictions on contact with other persons, restrictions on attending certain places, restrictions on possessing firearms and ammunition.[85]

4.80 If a person reasonably suspects that another person will commit an organised crime offence they may, with the consent of the Attorney-General, provide that information to a judge.[86] If the judge is satisfied that there are reasonable grounds, they can make an order that the person enter into an agreement to keep the peace. Any reasonable conditions may be applied to the person's bond. A bond may be for up to 12 months.

4.81 If a person refuses to enter into such a bond, the court may sentence them to up to 12 months imprisonment. If a person breaks a bond, they will be guilty of an offence punishable by up to two years imprisonment.

4.82 Mr Bill Bartlett, from the Canadian Department of Justice, and Mr Don Beardall, from the Public Prosecution Service of Canada, told committee members that Peace Bonds have been used successfully to break the link of 'lower' level gang members to a criminal gang. [87]

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84 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p.25, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

85 Law Societies of the Northwest Territories, *Peace Bonds and Restraining Order*, www.lawsociety.nt.ca/ForthePublic/LegalInformation/PeaceBondsRestrainingOrders/tabid/123/Default.aspx (accessed 1 June 2009).

86 *Criminal Code* (Canada), section 801.01.

87 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 25, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

Effectiveness of Canadian approach

4.83 The South Australian Government's submission commented that the Canadian legislation has been 'somewhat effective' against motorcycle clubs involved in serious and organised crime,[88] citing the arrest of 31 motorcycle club members and associates on 4 April 2007 following Project DEVELOP, an 18 month investigation by the Royal Canadian Mounted Police, as an indicia of its success.

4.84 One of the strengths of the Canadian model is that it recognises that there are different levels of involvement in organised crime groups, and different levels of culpability for the group's activities.[89] For example, the committee heard that one of the reasons organised crime groups are so successful is because they use their reputation for violence to intimidate and coerce.[90] The Canadian law recognises that intimidating and coercive behaviour of gang members, although perhaps not criminal in and of itself when committed outside of a gang situation, contributes to the gang's ability to commit serious crime.

4.85 Dr Schloenhardt submitted that:

> Unlike most other jurisdictions, Canada's offences are more suitable to criminalise core directors of criminal organisations as well as persons who only provide rudimentary support.[91]

4.86 The Canadian laws have been criticised as being too broad and vague and for imposing criminal sanctions without requiring proof of any specific criminal intention.[92] For example, a person could be liable for attempting to participate in a criminal organisation. Dr Schloenhardt pointed out that this breadth was deliberate, so that the laws could apply to any one associated with criminal gangs.[93]

4.87 The Canadian model has also been criticised for requiring 'criminal organisations' to be proved on each separate occasion[94]—i.e. if a group is found to be a criminal organisation in one prosecution, that status does not carry over into subsequent prosecutions of members of the same group.

4.88 However, Dr Schloenhardt notes that case law indicates that a court finding that a group is a criminal organisation in one case does have a flow on effect and may result in 'the quasi-black-listing of some groups',[95] citing the fact that the decision in *R*

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88 Government of South Australia, *Submission 13*, p. 12.

89 Dr Schloenhardt, *Submission 1*, p. 34.

90 Chief Inspector Powell, SA Police, *Committee Hansard*, 3 July 2008, p. 19.

91 Dr Schloenhardt, *Submission 1B*, p. 69.

92 Dr Schloenhardt, *Submission 1*, p, 35.

93 Dr Schloenhardt, *Submission 1B*, p. 69.

94 Government of South Australia, *Submission 13*, p. 12.

95 Dr Schloenhardt, *Submission 1*, p. 36.

v Lindsay which found that the Hell's Angels motorcycle club was a criminal organisation has been cited in other cases involving the Hell's Angels.[96]

4.89 In practice the laws have 'found limited application', particularly as separate offences. There has also been no noticeable decline in Canadian organised crime since their inception.[97]

4.90 In a number of instances in which the joint trial provisions of the Act have been applied, the laws have resulted in substantial stresses and expense to the judicial system with limited success. For example, the laws were used against an Aboriginal street gang in Manitoba, in which 35 people were accused of participation offences. The trial process took over 2 years, was very expensive, and ultimately resulted in relatively minor penalties - all less than 4.5 years.[98]

Proposed amendments

4.91 Dr Schloenhardt submitted to the committee that:

> The recent spate of gangland killings in Vancouver raises further doubts about the adequacy and effectiveness of organised criminal laws in Canada, especially if non-conventional, non-heirarchical syndicates are involved.[99]

4.92 The Vancouver killings led the Canadian Government to introduce new legislation specifically targeted to preventing and prosecuting gang related homicides and shootings. On 26 February 2009, the Minister for Justice and Attorney-General, the Hon Rob Nicholson, introduced *An Act to amend the Criminal Code (organised crime and protection of justice system participants*). The Bill proposes the following amendments to the Criminal Code:

- Murders connected to organised crime activity will automatically be first-degree. First degree murder is subject to a mandatory life sentence with a 25 year non-parole period.
- The creation of a new offence to target drive-by shootings. The Bill makes it an offence to intentionally discharge a firearm while being reckless as to whether it will endanger the life or safety of another person. The offence carries a mandatory penalty of four years imprisonment, with a maximum of 14 years. The minimum sentence is increased to five years for a first offence and seven years for a subsequent offence if the offence is committed for a criminal organisation.

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96 Dr Schloenhardt, *Submission 1*, p. 36; See for example *R v Pink*, 2006 CanLII 38867 (ON S.C.)

97 Dr Schloenhardt, *Submission 1B*, p. 70.

98 Dr Schloenhardt, *Submission 1B*, p. 71.

99 Dr Schloenhardt, *Submission 1B*, p. 71.

- The creation of two new offences of aggravated assault against a peace of public officer that causes bodily harm, and aggravated assault with a weapon on a peace or public officer (any public official employed to maintain public peace or for the service or execution of civil process).
- Clarifying that when imposing sentences for certain offences against justice system participants (including police), courts must give primary consideration to the objectives of denunciation and deterrence.
- Lengthening gang peace bonds from a maximum of 12 months to 24 months, for defendants with previous convictions for certain organised crime offences. The amendments would also make it clear that courts may impose any bond condition they deem necessary to protect the public. [100]

New Zealand

4.93 As in Australia, organised crime in New Zealand is transnational in nature, and is characterised by loose networks between groups and individuals. For example drugs may be imported by a group operating transnationally, and distributed using domestic gangs.[101]

4.94 Notable groups, which vary in size and sophistication, include:

- street level local youth gangs;
- territorial gangs which tend to control regional drug manufacture and distribution;
- outlaw motorcycle and other 'organised gangs' which operate at a national level and whose criminal activity is focussed on money making operations; and
- transnational groups which target New Zealand.[102]

4.95 Organised crime groups in NZ are involved in: drug trafficking, manufacture and supply, of which cannabis is the most prevalent; people smuggling; document forgery; black market fishing and poaching; wildlife smuggling; extortion; fraud; cyber crime; and corruption and money laundering.[103]

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100 Department of Justice Canada, *New measures to combat gangs and other forms of organized crime*, February 2009, available at: www.justice.gc.ca (accessed 26 May 2009).

101 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

102 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

103 New Zealand Ministry of Justice, *Organised Crime Strategy*, March 2008, available at www.justice.govt.nz/cpu/organised-crime/strategy.html (accessed 26 May 2009).

Crimes Act 1961

4.96 New Zealand introduced specific provisions to target organised crime in 1997 'under very similar circumstances and in the same year as Canada',[104] in response to a perceived increase in gang activities, particularly of OMCGs and 'organised criminal groups of Maori and Pacific Islander background'.[105] The laws were amended in 2002.

4.97 A new offence of participation in a criminal gang was added to the *Crimes Act 1961* which provides that it is an offence to knowingly or recklessly participate in an 'organised criminal group'.[106] 'Organised criminal group' is defined as a group of three or more people who have as one of their objectives to obtain material benefit from offences punishable by at least four years imprisonment or to commit specified serious violent offences.

4.98 In order to prove the participation offence, the prosecution must show that the defendant had knowledge of the fact that a group was an organised criminal group and that they had knowledge that their participation contributed to the occurrence of criminal activity, or recklessness as to whether their participation so contributed. However, the term 'participation' is not defined in any further detail and this has been criticised as a 'grave flaw' of the laws.[107]

4.99 The offence has broad application because it does not require that the group be structured in any particular way, only that it comprises three or more persons. The offence is punishable by a maximum of five years imprisonment.

4.100 The New Zealand laws have been criticised on the grounds that they extend criminal liability beyond its appropriate limits. In particular, the inclusion of the concept of 'recklessness' as sufficient to form the mental element of the participation offence is questioned.[108]

United Kingdom

4.101 The Attorney-General's Department submitted that serious crimes in the United Kingdom are committed by 'career criminals who network with each other', rather than well-established and stable groups such as the mafia groups in the United States. The Department went on to state:

> The Home Affairs Committee on Organised Crime could not formulate an adequate definition to encapsulate organised crime as experienced in the United Kingdom. Therefore a different approach to that adopted in other

104 Dr Schloenhardt, *Submission 1*, p. 38.

105 Dr Schloenhardt, *Submission 1*, p. 38.

106 *Crimes Act 1961*, section 98A.

107 Dr Schloenhardt, *Submission 1*, p. 42.

108 Dr Schloenhardt, *Submission 1*, p. 44.

international jurisdictions needed to be adopted to address the issues in the United Kingdom.[109]

4.102 The Serious Organised Crime Agency (SOCA) was established in 2005 to lead the UK's efforts to combat serious and organised crime. 'SOCA is an intelligence-led agency with law enforcement powers and harm reduction responsibilities.'[110] SOCA has both civil and criminal powers to reduce the impact of organised crime.[111]

Serious Crimes Act 2007

4.103 The *Serious Crimes Act 2007* enables courts to impose control orders on people suspected of organised crime. The Act, which applies in England, Wales and Northern Ireland:

- creates a new scheme of Serious Crime Prevention Orders;
- creates a statutory crime of encouraging or assisting crime; and
- merged the Assets Recovery Agency into SOCA (formerly a separate agency dealing with proceeds of crime matters), creating a new proceeds of crime regime.

4.104 The provisions of the Act governing Serious Crime Prevention Orders (SCPOs) came into force on 6 April 2008. Under the new laws, the courts may make SCPOs containing whatever prohibitions, restrictions, requirements and other terms that the court thinks necessary, if:

- it is satisfied that the person has been involved in *serious crime*, and
- it has reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime.

4.105 The burden of proof for the court to apply an SCPO is the balance of probabilities.[112]

4.106 SCPOs may only be placed on persons over the age of 18,[113] and must be of specified duration, not exceeding five years.[114] The breach of an SCPO is a crime, punishable by up to five years imprisonment and/or an unlimited fine. The courts also

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109 Attorney-General's Department, *Submission 16*, p. 13.

110 Serious Organised Crime Agency, *About Us*, www.soca.gov.uk/aboutUs/index.html (accessed 30 January 2008).

111 Attorney-General's Department, *Submission 16*, p. 12.

112 *Serious Crimes Act 2007*, sections 35-6.

113 *Serious Crimes Act 2007*, section 6.

114 *Serious Crimes Act 2007*, section 14.

have the power to order the forfeiture of any assets or property involved in the offence.[115]

4.107 A person has been involved in a *serious crime* if they have:

- committed a serious offence (drug offences, people trafficking offences, arms trafficking, prostitution, armed robbery, money laundering, corruption, bribery etc)
- facilitated the commission by another person of a serious offence, or
- conducted himself in a way that was likely to facilitate the commission of a serious offence, by him/herself or by another person, whether or not the offence was committed.

4.108 SPCOs can also be imposed on businesses and unincorporated associations and can restrict the business's activities, for example, its financial, property or business dealings, contracting and agreements, employment of staff and so on.[116]

4.109 An order can also require a person to answer questions or provide information or documents specified in the order. The order can specify how, when and where the question must be answered or the information or documents provided to a law enforcement officer.

Effectiveness of UK approach

4.110 The committee was told that in the first year of the operation of the Serious Crimes Act, SOCA successfully applied for 12 SCPOs, and the Courts supported the addition of restrictions and prohibitions.[117]

4.111 All of the SCPOs that SOCA has applied for have been against persons convicted of serious criminal offences, and will come into effect once the individual is released from prison. Therefore, at present, there are not large numbers of SCPOs in operation and it is too early to gauge their effectiveness. However, the committee was made aware that the orders may become difficult to manage if applied in great numbers, because of the level of resources required to monitor such orders. It is anticipated that in a decade or so, once those subject to the SCPOs begin to be released from prison, law enforcement in the UK will require substantial resources to

115 *Serious Crimes Act 2007*, section 26.

116 *Serious Crimes Act 2007*, subsection 5(4).

117 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

monitor the SPCOs.[118] In order to address this issue, the court may appoint an overseer to monitor an SCPO at the expense of the convicted person.

4.112 The committee was informed that a number of concerns regarding the human rights implications of SCPOs had been raised, and the orders had been challenged under the *European Convention on Human Rights Act 1998*. However, none of the challenges to the orders have been successful.[119]

Asian examples

4.113 The legal systems in China, Hong Kong and Macau differ significantly from Australia's. In spite of this, it is useful to briefly note the legislation dealing with organised crime in those jurisdictions, as the laws have been designed to specifically target triads, which are part of the organised crime environment in Australia.

4.114 Each of those jurisdictions has very sophisticated laws outlawing different levels of involvement in organised criminal groups.[120] China has criminal offences which extend criminal liability, and also has specific organised crime offences. In addition, there are offences targeting corruption and bribery of law enforcement officials, which has been a particular problem in China over the past two decades.[121]

4.115 Hong Kong, which has had legislation targeting organised crime groups for over 150 years, has legislation which specifically mentions the common traits of triads and provides for different penalties for different levels of association with triads.

4.116 Macau has comprehensive legislation that criminalises the different activities which might assist triads in performing their criminal functions, such as bookkeeping for a triad.

4.117 The significant extensions of criminal liability in each jurisdiction are limited by very specific and carefully developed definitions of the groups that are captured as 'organised crime groups'. For example, the Macau laws criminalise bookkeeping and organising meetings for 'secret societies/associations' but limits the extension of liability by narrowly defining the characteristics of 'secret societies/associations.'[122]

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118 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86 http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

119 The Parliament Of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands*, June 2009, p. 86, http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

120 Dr Schloenhardt, *Submission 1*, pp. 45-73.

121 Dr Schloenhardt, *Submission 1*, p. 53.

122 Dr Schloenhardt, *Submission 1*, pp.45-73.

4.118 Dr Schloenhardt suggests that this model of legislation may be effective in these jurisdictions - particularly Hong Kong and Macau - because of the high proportion of organised crime controlled and committed by triad groups.[123] Within this context an approach that targets the broad range of people involved in organised crime groups with a specific, static and definable structure, is appropriate. However, as noted in chapter 2, the committee heard evidence from numerous law enforcement agencies that organised crime in Australia is increasingly diverse and characterised by its fluidity and flexibility.[124] As such, Australian authorities are concerned with ensuring that the application of legislation is not limited by a narrow understanding of how organised crime groups are structured.[125]

South Australia

Serious and Organised Crime (Control) Act 2007

4.119 As noted earlier in the report, the *Serious and Organised Crime (Control) Act 2008* came into force on 4 September 2008. The Act, based on Australia's anti-terror legislation, provides a framework under which groups can be declared 'organised crime groups', and various orders made restricting the movements and associations of its members.

4.120 Professor George Williams told the committee that, in his view, the use of the terrorism proscription model against organised crime groups is inappropriate:

> The terrorism proscription model is an entirely different context. It is also based on entirely different types of criminal activity based as they are upon questions of religion, ideology and the like. There are also specific aspects of the antiterror laws that simply make them an inappropriate model in this context.[126]

4.121 The Commonwealth Attorney-General's Department also expressed concern about the appropriateness of using the anti-terror law model to deal with organised crime groups:

> Many people have said about the terrorism laws that these are exceptional circumstances. A lot of the critics at the time were saying, 'we hope there isn't going to be bracket creep on this.' Even amongst the people that talked in the debate about terrorism laws, there was a feeling that they were about exceptional powers.[127]

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123 Dr Schloenhardt, *Submission 1*, pp.66 and 73.

124 Mr Kitson, ACC, *Committee Hansard*, 6 November 2008, p. 3; Deputy Commissioner Stewart, Queensland Police Service, *Committee Hansard*, 7 November 2008, p. 18; Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p.10.

125 Government of South Australia, *Submission 13*, p. 8.

126 Professor Williams, *Committee Hansard*, 29 September 2008, p. 2.

127 Mr McDonald, Attorney-General's Department, *Committee Hansard*, 6 November 2009, p. 46.

4.122 Although the Act is not restricted in its application to OMCGs, it has frequently been referred to as 'anti-bikie legislation'. This is because the laws were specifically enacted in response to OMCG activity.[128] However, Chief Inspector Powell, from the South Australian Police noted:

> I might just add in relation to the new legislation that it is designed to deal with not only outlaw motorcycle gangs but serious and organised crime groups generally.[129]

Declarations

4.123 Under the Act, the Commissioner of Police may apply to the Attorney-General for a declaration in relation to a specific organisation. If satisfied that the organisation associates for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity, and that the organisation represents a risk to public safety, the Attorney-General can make a declaration. [130]

4.124 The Attorney-General must publish notice of the application for a declaration, and invite public submissions. The Attorney-General is not required to provide reasons for a declaration.[131]

Offences

4.125 The Act creates three new offences:

(a) Associating with a member of a declared organisation, or a person the subject of a control order on more than six occasions in a 12 month period.

(b) Two persons each with criminal convictions for major indictable offences (or conspiracy to commit such an offence) associating with each other on more than six occasions in a 12 month period.

(c) Refusal or failure to comply with a requirement under the Act to provide personal details, or to provide false evidence as to personal details, without reasonable excuse.

4.126 The first offence overcomes the ambiguity inherent in the term 'habitually' in the old consorting offence. In proceedings for an association offence, the prosecution does not need to prove that a defendant associated with another person for any

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128 Ms Lindsay Simmons, *House of Assembly Hansard*, South Australian House of Assembly, 11 September 2008, p. 40.

129 Chief Inspector Powell, SA Police, *Committee Hansard*, Adelaide, 3 July 2008, p. 11.

130 *Serious and Organised Crime (Control) Act 2008*, sections 8 and 10.

131 *Serious and Organised Crime (Control) Act 2008*, section 13.

particular purpose or that the association would have led to the commission of any offence.[132]

4.127 The committee is aware of concern within the community about the potential for the South Australian association offence to negatively impact on those innocently associating with criminal organisations:

> Maybe the person that sells a 'designated person' petrol; groceries; or teaches their children at school etc will be deemed an associate? This is because the South Australian legislation (SOCCA) is open to such a broad interpretation (misinterpretation and abuse), that the powers of the police could be utilised inappropriately and clearly in contravention of basic human rights. What has happened to the basic right of 'innocent until proven guilty beyond reasonable doubt'?[133]

4.128 Proponents of the legislation argue, however, that there are sufficient limits in place. Certain associations are not captured by the offences, including associations between close family members and lawful business associates.[134] It is a defence to the association offences to be unaware that a person is a member of a declared organisation, subject to a control order or had a relevant criminal conviction.[135]

Control orders

4.129 Once an organisation has been declared by the Attorney-General, the Commissioner may apply to the Magistrates Court for a control order against a member or associate of the declared organisation. If the court is satisfied that a person is a member of a declared organisation, the court must make a control order.

4.130 The court has a discretion to make a control order at the request of the Commissioner if:

(a) the defendant associates with members of a declared organisation and either

  (i) has been a member of the organisation or

  (ii) engages, or has engaged, in serious criminal activity, or

(b) the defendant engages or has engaged in serious criminal activity and regularly associates with other people who engage in such activity.

4.131 A control order may prohibit the person from associating or communicating with specified persons or a class of persons, or being in the vicinity of specified premises, or possessing articles of a specified class.

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132 *Serious and Organised Crime (Control) Act 2008,* subsection 35(9).

133 Mr Whittle, *Submission 21*, p. 2.

134 *Serious and Organised Crime (Control) Act 2008,* subsection 35(6).

135 *Serious and Organised Crime (Control) Act 2008 (SA),* subsections 35(2) and (4).

4.132 The court also has wide discretion in making consequential or ancillary orders under the Act.[136] This includes a power of entry without a requirement for reasonable grounds for suspected breach of a control order and could include such practical matters as banning the wearing of club colours, a move which motorcycle clubs have publicly resisted and vowed to defy.[137]

4.133 In order to make a control order, a court need only be satisfied of a person's association or involvement in criminal activity on the balance of probabilities. If a control order is breached, that breach must be made out to the criminal standard of beyond reasonable doubt.

4.134 There is no requirement to publish notice of an application for a control order or to notify anyone in particular. A person may only become aware of a control order issued against them once the order is served. A person subject to a control order is, however, provided with a statement of reasons excluding 'criminal intelligence'.[138]

4.135 The South Australian Police gave evidence to the committee about the potential benefits of control orders:

> The other danger in the current system is that, if we have to wait until the offenders are in a vehicle en route to cause harm to make out an offence, we then have a position where officers are stopping armed offenders in a vehicle. That increases the risk to officers and the public. It would be my experience that if those people are in a vehicle with firearms when we go to intercept them, they will attempt to evade police and we will have a high-speed pursuit, again causing serious risk to the public and officers. If you wind back the clock, we would be able to take action for a breach of the control order well before there was any risk to the public or the intended victims.[139]

Public Safety Orders

4.136 Part 4 of the Act provides that a senior police officer may make a public safety order in respect of a person, or class of persons, if satisfied that their presence at any premises, event or area poses a serious risk to public safety or security, and that the making of the order is appropriate in the circumstances.[140]

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136 *Serious and Organised Crime (Control) Act 2008* , subsection 14(7).

137 Adam Shand, 'Taking on South Australia's bikie gangs', *Sunday*, 24 February 2008.

138 *Serious and Organised Crime (Control) Act 2008* (SA), subsections 15(1)(d) and 15(2).

139 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 21.

140 *Serious and Organised Crime (Control) Act 2008 (SA)*, subsection 23(1).

4.137 Public Safety Orders are limited to 72 hours and any extension beyond that time limit must be by order of a court.[141] A person the subject of an order will have the right to object to any order beyond seven days.[142]

4.138 A Public Safety Order must be served on the people to whom it applies and must be accompanied by a notice setting out the details of the order and the penalty for breaching it.[143] The reasons for the order are not required unless the order is extended beyond seven days.

4.139 It is an indictable offence to contravene a public safety order, attracting a maximum penalty of five years imprisonment.[144]

Effectiveness of the South Australian legislation

4.140 Given that the *Serious and Organised Crime (Control) Act* 2008 is relatively new legislation, it is difficult to assess its effectiveness. On 14 May 2009, the South Australian Attorney-General, the Hon Michael Atkinson, declared the Finks Motorcycle Club to be a criminal organisation for the purposes of the Act, the first and only such declaration made under the legislation.

4.141 Subsequently, eight members of the Finks have been made subject to control orders. Those members have challenged the constitutionality of the legislation.[145] Therefore, there are no control orders yet in effect in South Australia.

4.142 However, during the course of its inquiry the committee heard concerning evidence about the anticipated effects of the South Australian legislation - a similar version of which was adopted in New South Wales in April 2009, and which other states and territories are considering adopting.

4.143 A number of the concerns were summarised by the Hon Leonard Roberts-Smith, from the WA Corruption and Crime Commission:

> Having the powers is one thing; using them effectively as part of a broader strategy is another. The commission does not believe that the proscription of groups and making membership or association with members of those groups an offence will be effective. The Victoria Police submission to the committee does not support the proscription of outlaw motorcycle groups, because it is disproportionate, offends human rights, is narrowly focused,

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141 *Serious and Organised Crime (Control) Act 2008*, subsections 27(2) to 27(4).

142 *Serious and Organised Crime (Control) Act 2008*, section 26.

143 *Serious and Organised Crime (Control) Act 2008*, section 30.

144 *Serious and Organised Crime (Control) Act 2008*, subsection 32(1).

145 Sean Fewster, 'South Australia's anti-bikie laws grind to a halt', *The Advertiser*, 19 June 2009, available at www.news.com.au/adelaidenow/story/0,27574,25659111-2682,00.html (accessed 22 June 2009).

> will drive activities underground and will marginalise groups within the community. The commission agrees.[146]

4.144 In response to the concerns about the South Australian law impinging on human rights and the risk of innocent groups being captured by the laws, Assistant Commissioner Harrison from the South Australian Police said:

> …for people who are going about their lawful business riding a motorbike on the streets of South Australia, there is no way whatsoever that they could be captured by this piece of legislation. I think [the legislative] thresholds are deliberately set to ensure that there is a significant delineation between those who engage in serious criminal activity—plan, organise, facilitate and so forth and pose a safety risk to the community of South Australia—and those who go about their lawful business.[147]

Sending criminal groups 'underground' or interstate

4.145 One of the main concerns with the South Australian model is that it will lead to criminal groups being driven 'underground', or moving interstate, thereby shifting the problem and/or making it less obvious.

4.146 Mr Adam Shand, a journalist who has spent a number of years investigating organised crime, explained these concerns and gave evidence that:

> The proposition that underlies [South Australia's] legislation seems to be that the crime in motorcycle clubs is centralised in the clubs. My experience is that that is not the case; it is actually decentralised and the crime tends to be carried out by twos and threes in connection with other individuals outside the club. The issue, ultimately, will be that, if you break the clubs up, you will have no effect on the commission of that crime. There is ample evidence from other jurisdictions that outlawing clubs simply drives them underground, pushes the moderates in the clubs towards the hardcore and ultimately has no effect on the overall commission of crime in that jurisdiction.[148]

4.147 Mr Shand told the committee that this was already occurring, and warned of the potential consequences:

> I think it is already driving people underground and we will see a much more hardened core of bikies in this state who are not visible and who will exchange their very visible insignia and places of association for hidden ones. There will be new insignia—it might be a flash of colour, it might be a certain handshake or certain tattoos—which would be much harder to discern. [149]

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146 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 6.

147 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, pp. 12-13.

148 Mr Shand, *Committee Hansard*, 3 July 2008, p. 41.

149 Mr Shand, *Committee Hansard*, 3 July 2008, p. 41.

4.148 Victoria Police echoed these concerns:

> [W]e suspect the criminal activity in South Australia will be driven underground. We will start to see the inclusion of more middle people between people to enable enterprise to occur. Then, when it does occur, it will become more difficult to prove that organised criminal behaviour is occurring. In some ways it will improve the way that organised crime groups operate.[150]

4.149 The Tasmanian Police gave evidence about the difficulties that Police might encounter if the South Australian legislation drives groups underground:

> [O]utlaw motorcycle gangs are probably one of the most high-profile because they are quite overt in terms of saying, 'Hey, here we are.'… When you know who someone is and where they are, if you have a need to target any aspect of what they get up to, from a law enforcement perspective, it is easier to do.
>
> If, for example, you have legislation that is more focused on associations than on actual criminal acts per se, some people are going to be reluctant to be seen to be associated with the organisation even if, in fact, they are. There are no guarantees that they are going to cease any criminal activity they might be involved in; it may just be more difficult for police to identify individuals who are involved because they are not wearing a jacket or attending a clubroom and doing some of those other things.[151]

4.150 The CEO of AUSTRAC, the Commonwealth Government agency that regulates and analyses financial reporting to counter money-laundering and terrorist financing, noted the potential for the problem to shift to an exposed jurisdiction:

> Our issue is only to alert the committee to that fact. In recommending legislation going forward, if it is to close down particular entities, that is not a problem so far as we are concerned but we just need to ensure that anything flowing from that is adequately covered as well so that we are just not pushing them straight in to another area on which we do not have coverage.[152]

4.151 Noting these concerns, Assistant Commissioner Harrison from the South Australian Police presented a different perspective:

> I genuinely believe that breaking up associations will cause a state of chaos within some of these organisations whereby the inner sanctums or the code of silence which is maintained will be somewhat disrupted and law enforcement will be more able to identify criminal activities they are involved in. It will also provide us an enhanced opportunity to gather

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150 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 4.

151 Acting Deputy Commissioner Tilyard, Tasmania Police, *Committee Hansard*, 27 October 2008, p. 14

152 Mr Jensen, AUSTRAC, *Committee Hansard*, 28 October 2008, p. 22.

> evidence to put before courts. This legislation could do the reverse of sending criminals underground; I think it will actually bring them out into the open because they will not be able to exploit the culture which has existed for a long time where they can give the tasks out to nominees, prospects and hangers-on—the throwaways, if you like—to undertake the criminal activities for them. [153]

4.152 Furthermore, Superintendent Bray added that he considers the South Australian legislation unlikely to drive criminals underground because:

> Most people want known their participation and involvement in gangs because that is one of their tools of trade—the public knowledge and threat that the gang is behind them...It is the serious and organised crime that they undertake that they attempt to conceal from police and law enforcement, and they have done that forever…So I do not believe personally that it will have any effect on the way I do business.[154]

4.153 A related issue that was raised was whether the approach of banning gangs, particularly OMCGs, as has been adopted in South Australia and New South Wales, will result in only those 'hardened' members of the gangs remaining. The committee heard from Mr 'Mac' Hayes, a member of the Longriders Christian Motorcycle Club, that there are currently a large proportion of non-criminal members of OMCGs who act as a 'moderating influence' on the gangs as a whole. Mr Hayes said:

> Some are and some do [leave or join non-criminal motorcycle groups like the Longriders]. There are some who stay and try to be moderating voices. Their club is their life. My understanding is that part of the angle of this law is to possibly push those moderating people out of those clubs. That is a concern. That could backfire.[155]

4.154 Professor Arthur Veno agreed, and referred to the Canadian experience as an example of what the impact of South Australia's laws might be:

> It will outlaw them [OMCGs], but that further substantiates their draw to a certain criminal element. As they stand now, I think you are going to see a serious division. In Canada when they jailed every single Hell's Angels that they could, the net effect 15 years on is that the Hell's Angels Motorcycle Club is still the number one organised crime problem.[156]

4.155 In terms of whether there has actually been a displacement of OMCG members into other states following the introduction of the South Australian laws, the committee was told that there was evidence in Tasmania of one individual possibly

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153 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 7.

154 Superintendent Bray, SA Police, *Committee Hansard*, 3 July 2008, p. 7

155 Mr Hayes, Longriders Christian MC, *Committee Hansard*, 3 July 2008, p.57.

156 Professor Veno, *Committee Hansard*, 28 October 2008, p. 36.

having being 'displaced', however the incident may simply be a case of 'a Tasmanian returning to Tasmania'.[157]

Insufficient appeal/oversight mechanisms

4.156 A second concern with the South Australian laws was the perceived lack of review mechanisms and oversight, particularly of the Attorney-General's decision to declare an organisation. Mr Grant Feary, the President of the Law Society of South Australia stated that:

> In our view, it undermines the presumption of innocence; restricts or removes the right to silence; lacks proper procedural fairness; and removes access to the courts to challenge decisions of the Attorney-General or, indeed, of the police which might be unfounded or unreasonable.[158]

4.157 The Commissioner of the Western Australian Corruption and Crime Commission (CCC), the Hon Leonard Roberts-Smith QC, noted that the lack of oversight and breadth of the South Australian laws may leave them open to abuse.

> Laws of that kind, because of their potential ambiguity and potential width, suffer from two main difficulties. They are open to abuse by the executive, including police and investigative agencies generally—and one sees that reflected in a number of the submissions which are already before this committee—for example, the experience in Queensland before the Fitzgerald royal commission and so on. [159]

4.158 The Queensland Bar Association and Law Society expressed similar reservations in relation to Queensland's plan to introduce similar laws, arguing that the laws might see a return to the corruption that was exposed in the 1980s Fitzgerald Inquiry:

> Certain offenders can be given free rein in return for corrupt payments, while competition is arrested and charged…The handmaiden of organised crime is the corruption of officials, with police officers being the No1 target.[160]

4.159 Conversely, the South Australian Police argued there are sufficient accountability mechanisms. Assistant Commissioner Harrison stated:

> It is actually documented within the legislation itself…in respect of the safeguards, if you like, to ensure that the legislation is appropriately administered and utilised by law enforcement. That certainly includes an

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157 Commissioner Hyne, Tasmania Police, *Committee Hansard*, 27 October 2009, p. 5.

158 Mr Feary, Law Society of South Australia, *Committee Hansard*, 3 July 2008, p. 25.

159 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 15.

160 Chris Merrit, 'Queensland Bar Association and Law Society warning on anti-bikie powers', *The Australian Online*, 2 June 2009, available at: www.theaustralian.news.com.au/story/0,25197,25572815-5006786,00.html (accessed 22 June 2009).

> annual review by an independent judicial officer and a report to parliament. It looks at a review at the four-year mark of the legislation and it also includes a sunset clause at the five-year mark, which is rather unusual for pieces of legislation as well.[161]

An expansion of police powers

4.160 Mr O'Gorman, the President of the Australian Council for Civil Liberties, criticised the continual expansion in police powers and strengthening of criminal legislation, suggesting that the trend is more about politics than a need for law enforcement to actually use those increased powers.

> If you look state by state and at the federal level, police and law enforcement agencies year by year are always being given greater powers. In relation to cybercrime, if the police can make out an evidence based case that they do not have sufficient powers to deal with cybercrime—as opposed to empty political banging-the-law-and-order-tub rhetoric—then they should be given extra powers. If they cannot make an evidence based case that they do not have enough powers, then they should not be given any extra powers.[162]

4.161 The Hon Leonard Roberts-Smith, the Commissioner of the WA Corruption and Crime Commission expressed similar concerns, warning that while the legislative powers granted to police may be adequate, often they are not utilised effectively, making them appear inadequate.

> Many powers, both traditional and coercive, are available to law enforcement agencies under various laws. Their existence does not necessarily translate to their application. It is not simply the existence of the powers or the law that is effective but their use as part of a broader strategy.[163]

Resources involved in enforcing legislation

4.162 The committee heard concerns that the resources involved in enforcing the Serious and Organised Crime (Control) Act and orders made thereunder, may outweigh any benefits of the laws:

> I suspect our state legislation will more than likely fail in practical terms (1) because it overreaches and (2) because it will unnecessarily divert police resources from proper policing of criminal activities. It creates crimes which are not crimes at all.[164]

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161 Assistant Commissioner Harrison, SA Police, *Committee Hansard*, 3 July 2008, p. 9.

162 Mr O'Gorman, Australian Council for Civil Liberties, *Committee Hansard,* 7 November 2008, p. 41

163 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 5.

164 Mr Mancini, Law Society of South Australia, *Committee Hansard*, 3 July 2008, p. 29.

4.163 Detective Superintendent Paul Hollowood from Victoria Police agreed that this was a significant issue with the legislation:

> To enforce the legislation you have to use the scant resources available to be bale to prove the association. So, the whole focus will be on proving associations between people to enact that part of the legislation rather than the activity it is designed to prevent. I do not think that anyone is saying that drug trafficking, armed robbery, extortion and so on will stop. Who will be investigating those if our resources are concentrating on the association aspect? That is our fear about it.[165]

Other states' responses to South Australian laws

4.164 The introduction of strong laws in South Australia has clear implications for other states and territories, including, as discussed above, the risk of organised criminals moving interstate and the chance that other states will be seen as 'soft on organised crime'.

4.165 New South Wales Police Commissioner Andrew Scipione noted the potential impact of the South Australian laws on other states:

> There could be a displacement effect. However, if it is done well, if there is some harmonisation across the country and we have some really effective strategies, you might see a very good result.[166]

4.166 However, he also said:

> I am yet to be convinced that [proscription] is the way to go. I could stand convinced, and I am sure there will be an opportunity for this to be considered, but at this stage I am yet to be convinced.[167]

4.167 Other state police agencies were similarly cautious. In October 2008, Tasmania Police stated that it would take a 'wait and see approach'[168] to the Australian legislation and commented that South Australia has a:

> …bigger issue than [Tasmania] in relation to outlaw motorcycle gangs anyway. We have far fewer problems and issues obviously than they have.[169]

4.168 Queensland Police also noted they have adopted a 'wait and see approach' and commented:

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165 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard* , 28 October 2008, p.10.

166 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p.25.

167 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p.31.

168 Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p.5.

169 Commissioner Hine, Tasmania Police, *Committee Hansard*, 27 October 2008, p.5.

> Anti-gang laws of the type enacted in South Australia will undoubtedly have a deterrent effect on the growth and prospective membership of groups, including the recruitment of youth…The introduction of South Australia's legislation provides an opportunity to monitor its impact on OMCGs and other organised crime groups as a model for consideration of wider application.[170]

4.169 The Queensland Police agreed with the South Australian government that there is a need to focus on prevention for public safety reasons and conceded that 'more aggressive law enforcement attention could lead to the reduction in organised criminal activity and consequently less victimisation'.[171] However they also noted some of the potential negative implications of the South Australian model discussed earlier in this chapter: that is, the possibility that groups will go underground; the displacement of organised criminal activity to jurisdictions with less-rigourous measures in place; and the possibility that 'business and corporations' registrations could be driven offshore'.[172]

4.170 Victoria Police were particularly opposed to the suggestion of introducing similar laws in Victoria.

> [F]rom a community perspective it [the SA legislation] causes us a few concerns about how it impacts on our charter of human rights…We have concerns that it may be a sledge hammer being used to crack open a walnut. From an investigator's perspective, we just do not think it will work. The reason it will not work is that we require the association to occur for us to be successful. If the whole focus is just trying to prevent association between people, we only have to look at the fact that we have had consorting laws in most Australian states, including Victoria, for many decades, and they have not worked. That is, people find a way to get around them.[173]

4.171 In Western Australia in July 2008, the Commissioner of the Corruption and Crime Commission (CCC), the Hon Leonard Roberts-Smith QC, also gave evidence that the CCC was not supportive of the approach taken in South Australia because of the civil rights implications. The Commissioner added that those civil rights concerns would likely lead to significant delays resulting from legal challenges being made to the laws.[174]

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170 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 20.

171 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 21.

172 Assistant Commissioner Steward, QPS, *Committee Hansard*, 7 November 2008, p. 21.

173 Detective Superintendent Hollowood, Victoria Police, *Committee Hansard*, 28 October 2008, p. 4.

174 The Hon Mr Roberts-Smith QC, CCC, *Committee Hansard*, 4 July 2008, p. 15.

A turning point: the Sydney Airport incident

4.172 The fatal incident involving rival OMCGs at Sydney airport in March 2009 (noted in chapter 2) prompted a heightened interest and investment in the approach taken up in South Australia. While prior to the incident, most states had adopted a 'wait and see' position, more recently all states and territories have expressed an intent to adopt laws along the lines of the *South Australian Serious and Organised Crime (Control) Act*,[175] and New South Wales adopted similar laws in April.

New South Wales – Crimes (Criminal Organisations) Control Act 2009

4.173 New South Wales has had legislation targeted at criminal groups since 2006. Its anti-gangs legislation,[176] which is based on the New Zealand laws, was introduced in 2006 in response to concerns about the violent actions and organised criminal behaviour of ethnic gangs.[177]

4.174 In September 2008, the NSW Police gave evidence to the committee that they were satisfied with the legislation from a law enforcement perspective. [178] The committee was informed that since the introduction of the legislation, 168 individuals have been charged with gang participation offences, 23 of whom were members of motorcycle clubs.[179]

4.175 However, Mr Ray from the Law Council of Australia pointed out that of the 168 charges only half have led to a conviction. He stated:

> On no occasion has there been a conviction only of those specific breaches. They have always been hand in glove with other substantive offences. So we should say to ourselves, 'What's wrong with charging the substantive offence?' If there is a specific intent that is more heinous in nature, that becomes an aggravating factor for sentencing and is appropriately dealt with within the criminal justice system on that basis.[180]

4.176 The NSW Parliament indicated its belief that the gang laws were not sufficient to prevent and prosecute organised criminals, by passing additional legislation in April 2009 that goes a step further by criminalising membership of, and not just participation in, organised crime groups.

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175 The Australian, 'Two more jurisdictions sign up for bikie-gang laws', *The Australian online*, 20 June 2009, available at: http://www.theaustralian.news.com.au/story/0,25197,25662681-5013871,00.html (accessed 22 June 2009).

176 *Crimes Legislation Amendment (Gangs) Act 2006.*

177 NSW Legislative Assembly Hansard (30 August 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Steward, Bankstown), 1142.

178 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p. 31

179 Commissioner Scipione, NSW Police, *Committee Hansard*, 29 September 2008, p. 23.

180 Mr Ray, Law Council of Australia, *Committee Hansard*, 6 November 2008, p. 48.

4.177 The *Crimes (Criminal Organisations) Control Act 2009* restricts members of criminal organisations from associating with each other, thereby aiming to disrupt the activities of criminal groups.

4.178 Under the Act, the NSW Police Commissioner can apply to a Supreme Court Judge, acting in an administrative capacity, for a declaration that an organisation is a criminal organisation under the Act.[181] If the judge is satisfied that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and the organisation represents a risk to public safety, then the Judge may make an order declaring the organisation to be a criminal organisation for the purposes of the Act. The Act lists a number of considerations that the Judge may take into account. [182]

4.179 Once a declaration has been made, the Supreme Court of NSW may make control orders against a declared organisation's members if it is satisfied that a person is a member of a declared organisation and there are sufficient grounds for making such an order.[183] The Act then creates two offences for controlled members:

- association between two controlled members (excluding certain relationships – such as family);[184] and
- recruiting other members to the organisation.[185]

4.180 The new laws also prohibit a person subject to a control order from engaging in certain activities within specified industries, including the casino industry, the private security industry, pawnbroking, operating a tow truck and repairing or dealing in motor vehicles.[186] The NSW Police Minister, the Hon Tony Kelly said that this is necessary because:

> It is often said that organised crime cannot flourish without the capacity to infiltrate industries and occupations that can assist them both to commit the crimes and to launder the profits. This is why we have taken the strong measure of saying that if you are a declared member of a criminal organisation you are not a fit and proper person to work in a high-risk industry. In some cases existing licences will be revoked. In all cases declared members will not be able to apply for licences.[187]

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181 *Crimes (Criminal Organisations) Control Act 2009,* section 6.

182 *Crimes (Criminal Organisations) Control Act 2009,* subsection 9(2).

183 *Crimes (Criminal Organisations) Control Act 2009,* sections 14 (interim orders) and 19 (final orders).

184 *Crimes (Criminal Organisations) Control Act 2009,* section 26.

185 *Crimes (Criminal Organisations) Control Act 2009,* section 26A.

186 *Crimes (Criminal Organisations) Control Act 2009,* section 27.

187 The Hon Tony Kelly (Minister for Police, Minister for Lands, and Minister for Rural Affairs), NSW Legislative Assembly Hansard, 2 April 2009, p. 14331.

4.181 In the Bill's second reading speech, the NSW Police Minister justified the expansive reach of the new laws by saying:

> [T]his legislation will, for the first time, take on these crime gangs as a whole and not just charge individual members for individual offences. We must stop them acting as a group or as a gang if we are to break their power. That is why the new non-association orders are needed. No doubt some will say that not everyone, even in an outlaw motorcycle gang, commits offences. Even if that is true, their membership of the brotherhood, their respect for the code of silence, and the extra menace their numbers bring help the gang to carry on its criminal enterprise. If they do not like the crime they are surrounded by, they should leave the gang.[188]

4.182 As with South Australia's legislation, the laws have been criticised by various groups, including the NSW Law Society. The President, Mr Joe Catanzariti, said:

> The legislation simply will lead to people going underground and we're very concerned about that[189]

4.183 The Australian Council for Civil Liberties also expressed concern over the NSW laws, and other states' intentions to adopt similar laws.[190]

4.184 To date no organisations have been declared under the new NSW laws.

Conclusions

4.185 During this inquiry, the committee heard about a range of ways in which law enforcement is taking a more preventative approach to combating organised crime by using laws which restrict association. This may be done through laws which criminalise particular groups, civil orders which restrict the associations and activities of individuals suspected or known to be criminals, the introduction of new criminal offences such as racketeering, or a combination of these methods.

4.186 The committee notes that the development of legislative approaches to combat serious and organised crime is an evolving process, and must continuously adapt to the changing organised crime environment. For example, the committee was informed that the Irish government has recently introduced a Bill which seeks to 'address the increasing levels of violence and intimidation directed at witnesses and other members of the public' by providing for a 'Special Criminal Court for the hearing of particular

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188 The Hon Tony Kelly (Minister for Police, Minister for Lands, and Minister for Rural Affairs), NSW Legislative Assembly Hansard, 2 April 2009, p. 14331.

189 Sydney Morning Herald, 'NSW Government Rushes Anti-Bikie Laws', *Sydney Morning Herald online*, April 2 2009, available at http://news.smh.com.au/breaking-news-national/nsw-govt-rushes-antibikie-laws-20090402-9jys.html (accessed 22 June 2009).

190 Herald Sun, 'Australian Council for Civil Liberties urge caution on 'rushing' anti-bikie laws', *Herald Sun online*, 13 April 2009, available at http://www.news.com.au/heraldsun/sport/afl/story/0,26576,25326978-1702,00.html (accessed 22 June 2009).

organised crime offences'.[191] Special Criminal Courts have flexible procedures, can hold hearings in private and do not require a jury.[192]

4.187 The committee examined the various approaches that have been adopted in Australian and overseas jurisdictions, each of which has benefits and disadvantages. However, the approaches share a number of common difficulties, including: the challenge in defining 'organised crime groups', and the challenge of developing an efficient and transparent process by which a group or individual is found to be involved in organised crime. These aspects make laws targeting association very complex, and fraught with legal and constitutional difficulties.

4.188 Of the approaches examined by the committee, the UK's Serious and Organised Crime Prevention Orders (SPCOs) seem to be an effective way of managing the activities of known criminals. One of the key advantages of SCPOs is that they can be targeted to specific individuals, and do not attract many of the concerns about criminalising entire groups. However, the committee is also cognisant of the costs of monitoring such orders, and for that reason considers that the orders would really only be cost-effective for use against the most high-risk criminals. The committee considers that such an approach may have significant benefits if applied in Australia and urges that further consideration be given to implementing SPCOs in Australia.

Recommendation 2

4.189 The committee recommends that the ACC monitor the Serious Crime Prevention Orders, of the United Kingdom's Serious and Organised Crime Agency, and report to both the Minister for Home Affairs and the Parliamentary Joint Committee on the Australian Crime Commission on the operation of the orders and on any benefits to Australian law enforcement agencies.

4.190 Obviously, such an approach alone will not be sufficient to deal with the significant problem of serious and organised crime. However, the committee's view is that, after examining all of the evidence presented to it during this inquiry, there may be less complex ways of targeting and dismantling serious and organised crime than by the implementation of far-reaching anti-association laws. One of the committee's concerns with anti-association laws is that they may not make it any easier for police to target the leaders of gangs, and instead be used against those at the lower echelons of organised crime groups, as has occurred to an extent with participation offences in Canada.[193]

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191 Criminal Justice (Amendment) Bill 2009 (No 45 of 2009), introduced 30 June 2009, Explanatory Memorandum, p. 1.

192 *Offences Against the State Act 1939* (Ireland), Part V.

193 Dr Schloenhardt, *Submission 1B*, p. 71.

4.191 The committee is strongly of the view that in order to prevent serious and organised crime, it is critical to remove or reduce the motivations for it – the money. Therefore, the next chapter considers an alternative approach to preventing serious and organised crime – targeting finances.