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Inquiry into the legislative arrangements to outlaw serious and organised crime groups

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- "Transnational Organised Crime and International Law: The Palermo Convention" (2005) 29 *Criminal Law Journal* 340-354

Table of Contents

Abbreviations

ACT	Australian Capital Territory
AUD	Australian Dollars
CAD	Canadian Dollars
China	People's Republic of China (PRC)
Cth	Commonwealth of Australia
HKD	Hong Kong Dollars
NSW	New South Wales
NT	Northern Territory
NZ	New Zealand
NZD	New Zealand Dollars
Qld	Queensland
QPS	Queensland Police Service
MOP	Macau Pataca
PRC	People's Republic of China (China)
RCMP	Royal Canadian Mounted Police – Gendarmerie Royale du Canada
SA	South Australia
SAR	Special Administrative Region of China
Taiwan	Republic of China
Tas	Tasmania
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
USD	United States Dollars
Vic	Victoria
WA	Western Australia

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Dr Schloenhardt's principal areas of research include criminal law, organised crime, narcotrafficking, terrorism, international criminal law, and immigration and refugee law. His recent works focuses on organised crime legislation, the illicit trade in timber and timber products, the illicit market for amphetamine-type stimulants (ATS), and the plight of North Korean Refugees in China. His work is frequently cited by other scholars, in government publications, and judicial decisions, including the High Court of Australia.

Dr Schloenhardt teaches Criminal Law, Transnational Organised Crime, and Immigration and Refugee Law. He is closely associated with the United Nations Office on Drugs and Crime (UNODC), the Australian Federal Police (AFP); Australian Institute of Criminology (AIC). He also teaches in the AFP's Management of Serious Crime (MOSC), Advanced Investigator's and Counter-Terrorism Investigations programs. Prior to his position at The University of Queensland, he was a lecturer at The University of Adelaide Law School.

Part 1 Introduction and Background

Organised crime is a phenomenon that has emerged in different cultures and countries around the world. Organised crime is ubiquitous; it is global in scale and not exclusive to certain geographical areas, to singular ethnic groups, or to particular social systems. Criminal organisations exist in dynamic environments, both as a function of the illegal markets in which they operate and as a result of the changing nature of law enforcement activities and government policies.

Organised crime has a long history in Australia and the Asia Pacific region. Triads and the Yakuza have existed in Chinese and Japanese societies for centuries and have also spread to other countries in the region. Many criminal organisations, including outlaw motorcycle gangs (OMCGs), Colombian drug cartels, Italian and Russian mafias and the like, are well established in Australia, Canada, New Zealand, and the United States. Vietnamese organised crime operates throughout Southeast Asia, and West African criminal groups are increasing their presence in Indonesia and elsewhere in the region. In Australia, the 'bikie gang war' on the Gold Coast and in Adelaide, and the gangland killings in Melbourne are further developments that have brought the topic of organised crime back into the public eye in recent years.

Despite the omnipresence of criminal organisations in the region, the concept of organised crime remains contested and there is widespread disagreement about what organised crime is and what it is not. Generalisations about organised crime are difficult to make. Defining organised crime has been a long-standing problem for criminologists, legislators, law enforcement agencies, and others in the field. Many attempts have been undertaken to develop comprehensive definitions and explanations that recognise the many facets and manifestations of organised crime. The spectrum of approaches to organised crime is very broad as governments, law enforcement agencies, and researchers have different objectives when fighting, sanctioning, and analysing organised crime.

The United States and Italy — two countries with a notorious organised crime history, especially in relation to the Mafia — were among the first countries to respond to organised crime by amending their substantive criminal law with the introduction of the US *Racketeer and Corrupt Organisations* Act of 1970[1] and art 416bis "mafia-type associations" into the *Penal Code* in Italy in 1982. Since that time, many other countries, including some in the Asia Pacific region, have followed the same trend by criminalising the enterprise structure of organised crime and/or targeting participation in criminal organisations.

The *Convention against Transnational Organised Crime*, opened for signature in Palermo, Italy, in 2000, seeks to reconcile differences about the meaning of organised crime, propose a universal concept of this phenomenon, and provide Signatories with a set of legislative and practical tools to prevent and suppress organised crime more effectively. Today, the Convention has 147 Signatories; 141 countries have ratified it.[2] The *Palermo Convention* has two main goals: one is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. The Convention is intended to encourage countries that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide these nations with some guidance for the legislative and policy processes involved. It is also intended to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative, and enforcement approaches to the problem of organised crime, and to ensure a more efficient and effective global effort to combat and prevent it. The United Nations Office on Drugs and Crime (UNODC) actively promotes the universal adoption of the *Palermo Convention* and assists State Parties with the implementation into domestic law.

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1 18 USCA § 1961.

2 UNODC, www.unodc.org/unodc/en/crime_cicp_signatures_convention.html (accessed 4 April 2008).

While the *Palermo Convention* has widespread support in the Asia Pacific region, few countries have so far implemented specific offences relating to participation in criminal organisations. At domestic levels, the United States pioneered organised crime laws with the introduction of the *Racketeer Influenced and Corrupt Organizations Act* in 1970, commonly referred to as *RICO*. Other countries, such as the Philippines have legislation modelled after the US statute. Jurisdictions such as China, Hong Kong, and Macau have laws that are tailored specifically to combat local criminal syndicates, namely Chinese triads. Similarly, in the 1990s, Canada and New Zealand created special offences for outlaw motorcycle gangs (OMCGs or 'bikies'). Over the last seven years, some nations have moved to implement the provisions under the *Convention against Transnational Organised Crime*, while many other jurisdictions still lack these laws.

In Australia, for instance, with the exception of New South Wales, no state or territory has any specific offences in relation to organised crime. South Australia and Western Australia have so-called anti-fortification laws which were introduced specifically to 'crack down' on the criminal activities of OMCGs. These laws, however, are seen by many as a failure and are currently under review by the High Court of Australia.

In late 2006, New South Wales became the first State in Australia to introduce specific offences aimed at criminalising the participation in a criminal organisation. The new provisions under the *Crimes Act* 1900 (NSW) mirror similar offences in Canada and New Zealand and reflect some of the elements of the definition of 'organised crime group' in the *Palermo Convention*. Following Australia's accession to the Convention, it is now widely anticipated that other jurisdictions in Australia will implement similar legislation. For example, in Queensland, a Bill to criminalise membership in an organised criminal group was introduced in May 2007. In November 2007, a *Serious and Organised Crime Bill* was introduced into the South Australian Parliament.

This submission to the *Inquiry into the legislative arrangements to outlaw serious and organised crime groups* addresses the following terms of reference:

(a) International legislative arrangements developed to outlaw serious and organised crime groups and association to these groups, and the effectiveness of the arrangements [Part 2 and 3 of this submission];
(b) The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups [Part 4];
(c) Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership and association with those groups, and the effectiveness of these arrangements [Part 5].

This submission is based on preliminary findings from a major research project on *Organised Crime Legislation in the Asia Pacific Region* conducted by the author at The University of Queensland, Brisbane and The University of British Columbia, Vancouver between 2007 and 2009. The research project is kindly supported by the Australian Institute of Criminology (AIC), the Australian Federal Police (AFP), and the United Nations Office and Drugs and Crime (UNODC) Regional Centre for East Asia and the Pacific.

Disclaimer: The views expressed in this submission are solely those of the author. They do not reflect the view of the Australian Government, the AIC, the AFP, the United Nations, or UNODC.

Part 2: International Legislative Arrangements (International Law)

Convention against Transnational Organised Crime (Palermo Convention)

The *Convention against Transnational Organised Crime* was approved by the UN General Assembly on November, 15 2000,[3] and was made available for governments to sign at a conference in Palermo, Italy, December 12-15, 2000, hence the name *Palermo Convention*. 132 of the UN's 191 Member Nations signed the *Convention against Transnational Crime* in Palermo in December 2000.[4] Today, the Convention has 147 Signatories; 141 countries have ratified it.[5] The Convention entered into force on September 29, 2003[6] and has been described as "a giant step toward closing the gap that existed in international cooperation in an area generally regarded as one of the top priorities of the international community in the 21st century."[7]

The *Palermo Convention* has two main goals: One is to eliminate differences among national legal systems.[8] The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. The Convention is intended to encourage countries that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide these nations with some guidance in approaching the legislative and policy questions involved. It also seeks to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative, and enforcement measures relating to transnational organised crime, and to ensure a more efficient and effective global effort to prevent and suppress it.

2.1 Background

Among the first advocates for an international treaty against transnational organised crime was the Italian Judge Giovanni Falcone, who was involved in the prosecution and conviction of many leaders of the Italian Mafia. Just two months before his death, he attended the inaugural session of the UN Commission on Crime Prevention and Criminal Justice where he advocated closer international cooperation against organised crime and suggested a high-level international conference to initiate work in this field.[9] Following his assassination on May 23, 1992, the Italian Government strengthened its commitment to fight organised crime and submitted proposals for international cooperation against transnational organised crime to the United Nations (UN). In 1993, the UN General Assembly endorsed the idea of a first international conference on organised transnational crime, to be hosted by Italy in 1994.[10] The specific objective of this international conference was "to consider whether it would be feasible to elaborate international instruments, including conventions, against organised transnational crime".[11]

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3 UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000).

4 See UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) Annex I for the full text of the Convention in its final form. The text has also been reprinted in (2001) 40 ILM 335.

5 UNODC, www.unodc.org/unodc/en/treaties/CTOC/signatures.html (accessed 4 Apr 2008).

6 Cf Article 38 *Convention against Transnational Organised Crime*.

7 Dimitri Vlassis, "The United nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 75.

8 See further, Andreas Schloenhardt, "Transnational Organised Crime and International Law: The Palermo Convention" (2005) 29 *Criminal Law Journal* 350-364.

9 Dimitri Vlassis, "The United nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 77-78.

10 UN General Assembly, *Crime Prevention and Criminal Justice*, UN Doc A/RES/48/103 (20 Dec 1993).

11 UN Economic and Social Council (ECOSOC), *World Ministerial Conference on Organized Transnational Crime*, UN Doc E/RES/1993/29 at [1](e) (27 July 1993).

The *World Ministerial Conference on Organized Transnational Crime* met on November 21-23, 1994 in Naples, Italy. The principal features of the conference were the recognition of the global growth of organised transnational crime[12] and the elaboration of appropriate countermeasures.[13] The conference called, inter alia, for the universal criminalisation of participation in criminal organisations, measures for confiscation and forfeiture of assets, and enhanced efforts to combat money laundering and corruption.[14]

The conference concluded the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* (hereinafter the *Naples Declaration*)[15] which provides a set of elements for an international convention against organised crime. The scope of any new convention was said to be limited to forms of organised transnational crime that are not already covered by other international conventions and initiatives (such as drug trafficking).[16] In December 1994, the UN General Assembly endorsed the *Naples Declaration*.[17] This resolution opened the way for the elaboration of an international convention against transnational organized crime at the UN level.

On December 12, 1996, the Government of Poland proposed a first draft UN framework convention against transnational organised crime.[18] This document was further discussed at an *Informal Meeting on the Question of the Elaboration of an International Convention*, held in Palermo, April, 6-8 1997. Pursuant to the recommendations of this meeting, the Economic and Social Council, followed by the UN Secretary-General, decided to establish an inter-sessional open-ended intergovernmental group of experts to prepare a preliminary draft convention.[19] The expert group met in Warsaw, February, 2-6 1998 and presented its report together with an outline of options for contents of a convention to the UN Commission on Crime Prevention and Criminal Justice at its Seventh Session in April 1998.[20] The Commission then decided to establish an in-sessional working group to implement the *Naples Declaration* and further discuss the draft

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12 See UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *Problems and Dangers Posed by Organized Transnational Crime in the Various Regions of the World*, UN Doc E/CONF.88/2 (18 Aug 1994).

13 The background papers to the conference (UN Docs E/CONF.88/1-6) have also been reprinted in M Cherif Bassioni & Eduardo Vetere (eds), *Organized Crime: A Compilation of UN Documents 1975-1998* (1998) 450-585, and also in Phil William & Ernesto Savona, *The United Nations and Transnational Organized Crime* (1996) 1-160.

14 See *Convention against Transnational Organized Crime* 40 ILM 353 at [5] (2001); and UN ECOSOC, *World Ministerial Conference against Organized Transnational Crime*, "National Legislation and its Adequacy to Deal with the Various Forms of Organized Transnational Crime", UN Doc E/CONF.88/3 (25 Aug 1994), and UN Office at Vienna, "The World Ministerial Conference on Organized Transnational Crime" (1995) 26/27 *UN Crime Prevention and Criminal Justice Newsletter* 7-8.

15 *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* reprinted in UN General Assembly, *Crime Prevention and Criminal Justice: Report of the World Ministerial Conference on Organized Transnational Crime*, UN Doc A/RES/49/748 Annex (2 Dec 1994).

16 See further Dimitri Vlassis, "The United Nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 78-80.

17 UN General Assembly, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc A/RES/49/159 (23 Dec 1994) [3].

18 UN Doc A/C.3/51/7, reprinted in UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III. See further Dimitri Vlassis, "The United Nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 80-82.

19 UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) para 14; UN General Assembly, *Follow-up to the Naples Political Declaration and Global action Plan against Organized Transnational Crime*, UN Doc A/RES/52/85 (30 Jan 1998) para 14.

20 UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an International Convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/5 (18 Feb 1998).

convention. The working group met in Buenos Aires from August 31 to September 4, 1998 and produced a new consolidated draft to serve as a basis for future formal consultations.[21] The findings of the Buenos Aires meeting were put to the UN Commission and led to the creation of a special ad hoc committee to elaborate the text of a new convention.

On December 9, 1998, the UN General Assembly eventually decided to establish an open-ended intergovernmental ad hoc committee to draft the main text of:

> (a) a new comprehensive international convention against transnational organized crime, and
>
> (b) three additional international legal instruments on:
>
> i. trafficking in women and children;
>
> ii. illicit manufacturing and trafficking in firearms, their parts and components, and
>
> iii. illegal trafficking in and transporting of migrants, including by sea.[22]

Between January 1999 and October 2000, the Ad Hoc Committee held eleven sessions in Vienna to discuss and finalise the text of the Convention and the three supplementing Protocols. Consultations about the main Convention (sometimes referred to as the 'mother convention') and the Protocols against trafficking in women and children and against the smuggling of migrants finished at the eleventh session in October 2001. An additional twelfth session to conclude the Firearms Protocol was held in March 2001.[23] In retrospect, and in comparison to other international treaties, the development of the *Palermo Convention* only took a short time, which "reflects the urgency of the needs faced by all States, developed and developing alike, for new tools to prevent and control transnational organised crime."[24]

The *Palermo Convention* is roughly divided into four parts: criminalisation, international cooperation, technical cooperation, and implementation. Of particular interest to this study are those parts of the Convention that deal with the criminalisation of organised crime. To that end, the Convention introduces four new offences: participation in an organised criminal group (art 5), money laundering (art 6),[25] corruption (art 8),[26] and obstruction of justice (art 23). The following sections explore the definition of organised criminal group in art 2(a) of the Convention, followed by an analysis of the participation offence under art 5. Not further examined here are the other offences and the enforcement measures under the Convention.

2.2 Definition of Organised Criminal Group

Article 2(a) of the Convention defines 'organised criminal group' as

> [a] structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

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21 Dimitri Vlassis, "The United Nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 82-85.

22 UN General Assembly, *Transnational Organized Crime*, UN Doc A/RES/53/111 (20 Jan 1999) [10]; UN General Assembly, *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity*, UN Doc A/RES/53/114 (20 Jan 1999) [13].

23 Cf UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) [77], [102], [108], [120]. See further Dimitri Vlassis, "The United Nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 87-88.

24 Dimitri Vlassis, "The United nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 76, 88.

25 See further, Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 174-175.

26 Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 175-176.

In summary, the definition of organised criminal group in art 2(a) of the *Convention against Transnational Organised Crime* combines elements relating to the structure of criminal organisations with those relating to the objectives of the group. The definition does not require prove of any actual criminal activities carried out by the organised crime group, see Figure 1 below.

Figure 1 "Organised criminal group", art 2(a) *Convention against Transnational Organised Crime*

Terminology Elements	**Organised Criminal Group**
Structure	• Structured group, art 2(c) • Three or more persons; • Existing for a period of time and acting in concert.
Activities	• [no element]
Objectives	• Aim of committing serious crimes (art 2(b)) or Convention offences (arts 5, 6, 8, 23); • In order to obtain a financial or material benefit.

The following paragraphs explore the individual elements of this definition in more detail.

Structured Group of three or more persons

The definition in art 2(a) focuses specifically on sophisticated criminal organisations and the people that constitute that organisation, rather than the activities they engage in.[27] Only "structured groups of" three or more persons can be the subject of the measures under this Convention. The term "structured group" is further defined in art 2(c) to exclude from the definition of "organised criminal group" randomly formed associations for the immediate commission of an offence without any prior conspiracy, and associations that do not need to have formally defined roles for its members, continuity of its membership or a developed structure.[28] Acts committed by individuals or less than three persons, or acts done by three persons not "acting in concert" also fall outside the scope of the Convention.[29] Signatories to the Convention are, however, free to modify the number of members required by this definition.[30]

The concept of organised criminal group under the Convention recognises the structural and managerial features of sophisticated criminal enterprises. On the one hand, the definition under art 2(a), (c) is wide enough to encompass a great variety of structural models. This is also confirmed in the *travaux préparatoires* which — contrary to art 2(c) — indicate that "the term 'structured group' is to be used in a broad sense so as to include both groups with hierarchical or other elaborate structures and non-hierarchical groups where the role of members of the group need not be formally defined."[31] On the other hand, the definition is limited to formal, developed organisations, thus avoiding criminalisation of informal associations such as youth groups and one-off criminal enterprises.

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27 Cf David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 192.

28 Article 2(c) *Convention against Transnational Organised Crime*: 'structured group'. See further Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 282.

29 Cf M Cherif Bassiouni, 'Organised Crime and Terrorist Criminal Activities' (1990) 4 *Emery Int'l Law Review* 9 at 10: 'By definition, organised crime cannot be committed by a single individual'.

30 UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 [hereinafter *travaux préparatoires*] para 2.

31 *Travaux préparatoires*, para 4. Cf Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 282.

Existence for some period of time

It is further required that the organised criminal group "exists for a period of time" thus excluding single, ad hoc operations from the definition.[32] The Convention recognises that the ongoing existence of criminal organisations is generally independent from individual criminal activities; organised crime is characterised by criminal activities on a sustained, repeated basis. Furthermore, the existence of large criminal organisations is largely independent from individual members; their operations generally continue after individuals are arrested, die or otherwise leave the organisation.[33]

Aim to commit serious crime

Only structured associations that "act in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention" are considered organised criminal groups. Accordingly, the group must have one of two aims: either (1) to commit one or more Convention offences (arts 5, 6, 8, 23), such as corruption and money laundering; or (2) to commit one or more serious crimes.

Under art 2(b) "'serious crime' shall mean a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years of imprisonment or a more serious penalty."[34] Seriousness is thus determined solely by reference to a maximum penalty, not by reference to any type of conduct or to any actual harm or damage caused by the criminal organisations' activities.[35] Consequently, even if an organised criminal group engages in exceptionally violent, heinous or detrimental conduct, the group will not fall within the definition of the Convention unless such conduct attracts a penalty of four years imprisonment or more.

The definition of "serious crime" is seen as one of the main weaknesses of the concept of organised crime under the *Palermo Convention*. It is ultimately left to individual State Parties to decide which offences to bring within the ambit of the Convention and which ones to leave out, thus discrepancies between countries are unavoidable. David Freedman remarks that:

> Ultimately, countries themselves define the activities that fall within the rubric of serious crime, given that the definition is linked to punishment rather than a list of predicate offences specifically enumerated. However, since offences and their punishment vary from country to country, the four-year threshold has the potential to raise doubt about which offences should be prosecuted as organised criminal activity.[36]

Some countries may choose to raise minimum penalties on some offence to bring them within the ambit of the Convention, while other may opt to lower penalties in order to circumvent Convention obligations.

Concerns have also been expressed about the fact that criminal groups aiming to commit only a single serious crime are equally covered by this definition. It was mentioned earlier that the ongoing nature of its activities is one of the characteristics of organised crime, thus raising

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32 Cf G Fiorentini G and S Peltzman, 'Introduction' in Fiorentini G and Peltzman S (eds), *The Economics of Organised Crime* (1995) 3; G Fitzgerald (1989) in P Dickie and P Wilson, 'Defining Organised Crime — An Operational Perspective', 4(3) *Current Issues in Criminal Justice* (1993) 215 at 217.

33 Cf M Cherif Bassiouni, 'Organised Crime and Terrorist Criminal Activities' (1990) 4 *Emery Int'l Law Review* 9 at 11.

34 Cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Analytical study on serious crime*, UN Doc A/AC.254/22 (30 Nov 1999).

35 Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 169 refers to this as the "specific-content-free definition of serious crime". He remarks that "[t]he scope of the Convention's application turns ultimately on the seriousness of the particular activities (judged in a rough and ready way by the penalty) rather than on substantive content."

36 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 196. See also Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 284.

questions whether "the commission of just one crime (unless the crime is ongoing), no matter how grave, [is] enough to view an entity as part of organised crime".[37]

Financial or material benefit

Lastly, the definition under art 2(a) requires that the purpose of the group's activity is "to obtain, directly or indirectly, a financial or other material benefit". Here, the Convention recognises the profit-oriented business dimension of organised crime. Furthermore, the *travaux préparatoires* establish that "other material benefit" may also include non-material gratification such as sexual services.[38] As the definition is limited to "material benefit", concerns that the "term has potential of being interpreted very broadly to include on-economically motivated crimes such as environmental or politically motivated offences"[39] seem unwarranted.

In summary, the definition of organised criminal group under the *Palermo Convention* captures some of the established characteristics of criminal organisation and allows enough flexibility to target a diverse range of associations and to respond to the ever changing features and structures of organised crime. On the other hand, the definition in art 2 is seen my many as no more than the lowest common denominator, "referring to almost every kind of formation, thus rendering it almost meaningless".[40] Alexandra Orlova and James Moore have described the definition as "a conceptually weak compromise definition that is, at once, overly broad and under inclusive."[41] Others have argued that the definition of organised crime in the *Palermo Convention* is only a secondary issue "as the Convention was not designed to tell the Signatories what organised crime was."[42]

2.3 Organised Crime Offence, article 5(1)(a)

Under art 5(1)(a) of the *Convention against Transnational Organised Crime*

> [e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:
> a. Criminal activities of the organised criminal group;
> b. Other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

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37 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283.

38 *Travaux préparatoires*, para 3.

39 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283

40 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 283.

41 Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 304.

42 Keith Morrell, Director, United Nations, Criminal Law and Treaty Division, Department of Foreign Affairs and International Trade, Canada (23 Oct 2003) cited in Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 285.

[…]

The article applies only "to the prevention, investigation and prosecution" of "serious crime" "where the offence is transnational in nature and involves an organised criminal group", art 3(1). The application of the offences under art 5 is thus by definition limited to 'transnational organised crime', ie to offences that occur across international borders, art 3(2). It does not encompass purely domestic organised crime, though State Parties are at liberty to extend the application of their domestic provisions accordingly.

Article 5(1)(a) of the *Palermo Convention* creates two different organised crime offences: (1) a conspiracy offence, and (2) an offence for participating in an organised criminal group. It has been argued that the two different offences are designed for implementation by the two different legal traditions: The conspiracy offence contained in paragraph (i) is seen as more suitable for adoption in common law jurisdictions, while the participation offence under (ii) may be more palatable for continental, civil law countries (some of which do not permit simple criminalisation of an agreement[43]).[44] The later parts of this study, however, show that some common law jurisdictions have also opted for the second model.

Article 5(1)(a)(i)

The first model contained in art 5(1)(a)(i) combines elements of conspiracy ("agreement to commit a serious crime") with the additional requirement that the conspiracy is done for the purpose of obtaining a financial or other benefit.

Figure 2 Elements of art 5(1)(a)(i) *Convention against Transnational Organised Crime*

Art 5(1)(a)(i)	**Elements of the offence**
(Physical) elements	• Agreement to commit a serious crime (art 2(b)); • Between two or more persons [accused with one or more other persons] • (where required by domestic law: (overt) act in furtherance of the agreement)
Mental elements	• Purpose of agreement/crime: obtaining financial or other material benefit; • Intention to enter the agreement (art 5(1), chapeau).
Procedural matters	Purpose and intent may be inferred from objective factual circumstances, art 5(2).

The first model of the organised crime offence under the *Palermo Convention* is, for the most part, identical with the conspiracy offence discussed Part 4 of this submission (though it does not use the term). The Convention also accommodates those jurisdictions that under their domestic law require proof of an act in furtherance of the agreement, ie the over act requirement discussed earlier.[45]

There is one noticeable difference which is the requirement that the purpose the agreement is directed at obtaining financial or material benefits. This eliminates from art 5(1)(a)(i) those conspiracies that are aimed at committing non-profitable crimes and restricts the application to offences with an economic dimension. A second and more subtle difference with procedural significance can be found in art 5(2) which facilitates the proof of the mental elements. The

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43 See, for example, art 115 *Penal Code* (Italy).

44 Dimitri Vlassis, "The United nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 92; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 197; Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 170-171; Alexandra Orlova & James Moore, "'Umbrellas' or 'Building Blocks'?: Defining International Terrorism and Transnational Organised Crime in International Law" (2005) 27(2) *Houston Journal of International Law* 267 at 286-287.

45 See Section ?? above. Cf Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 171.

purpose and intention required under art 5(1)(a)(i) may be inferred from objective factual circumstances, thus lowering the threshold of the burden of proof placed on the prosecution.

The shortcomings of conspiracy in relation to organised prosecutions are discussed in Part 4 of this study. Article 5(1)(a)(i) does not remove these issues; it simply repeats them. The first of the two types of organised crime offences in the *Palermo Convention* essentially advocates the universal adoption of the conspiracy offence specifically in relation to conspiracies aimed at offences that may generate material benefits for the accused.

Article 5(1)(a)(ii)

The *Convention against Transnational Organised Crime* offers a second, different type of organised crime offence in art 5(1)(a)(ii). In contrast to paragraph (i), the offence under art 5(1)(a)(ii) adopts a model that makes the participation in a criminal organisation a separate offence. State Parties may implement this second type as an alternative to the offence under paragraph (i), or they may — as has been done in some jurisdictions — implement both types cumulatively (art 5(1)(a) "either or both").

Figure 3 Elements of art 5(1)(a)(ii) *Convention against Transnational Organised Crime*

Art 5(1)(a)(ii)	**Elements of the offence**
Physical elements	• Taking an active part in a) Criminal activities of the organised criminal group (art 2(a)); [or] b) Other activities of the organised criminal group [with special knowledge, see below].
Mental elements	• Intention [to actively participate] (art 5(1) chapeau); • Knowledge of o Aim and general criminal activity of the organised criminal group, or o The organised criminal group's intention to commit crimes. • If (b) above: knowledge that participation will contribute to achieving the criminal aim.
Procedural matters	Intention and knowledge may be inferred from objective factual circumstances, art 5(2).

Liability under art 5(1)(a)(ii) requires that an accused "takes active part in" certain activities of an organised criminal group (as defined in art 2(a). The participation has to be "active" in the sense that it does make an actual contribution to the group's activities and is not completely unrelated to them. The accused's participation may be (a) in the group's criminal activities or also (b) in other, non-criminal activities if the accused knows that his/her contribution will contribute to achieving a criminal aim.[46] The physical elements of the offence thus limit liability to conduct that contributes to the criminal activities or criminal aims of the group; other participation such as providing food to a criminal group would not be sufficient. It is debatable whether acts such as supplying a firearm or fixing a criminal group's motorbikes would be enough to meet these requirements.

Liability under art 5(1)(a)(ii) is further restricted to persons who intentionally participate in the above mentioned activities and who have actual knowledge of the aims and activities or the criminal intentions of the organised criminal group. This excludes from liability any person who may unwittingly contribute to a criminal organisation or who is recklessly indifferent about the nature and activities of the group. As with the aforementioned offence, art 5(2) facilitates the proof of the mental elements; the intention and knowledge required under art 5(1)(a)(ii) may be inferred from objective factual circumstances.

[46] David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 198; Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 172.

The key feature of the second offence under art 5(1)(a) is the involvement of a criminal organisation. In short, this type of organised crime offence attaches liability to deliberate, purposeful contributions to criminal organisations, not on the pursuance of an agreement. It does not require proof of membership or of any ongoing role in the organisation; art 5(1)(a)(i), in contrast, requires that the accused is part of the agreement, is a co-conspirator. Unlike conspiracy, the participation offence does not require a "meeting of the minds".[47]

The application of art 5(1)(a)(ii) is significantly broader than existing inchoate offences as it allows for the criminalisation of persons who are even more remotely connected with criminal activities. It also extends liability beyond the current regime of secondary (or accessorial) liability (see Figure # below). For liability under this offence to arise, it is not always required that any criminal offences have been planned, prepared, or executed. A person may be liable under paragraph (ii) merely for contributing to activities that are ultimately designed to achieve a criminal aim but without being criminal activities themselves. There is also no requirement to show an overt act, which limits the application of the conspiracy offence in some jurisdictions.[48]

Figure 4 Extension of criminal liability under art 5(1)(a)(ii) *Convention against Transnational Organised Crime*

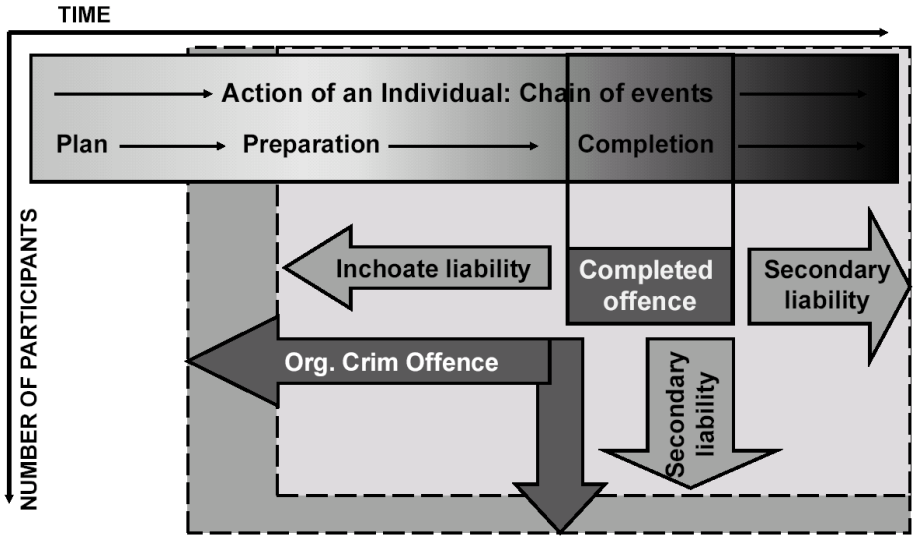

Figure 4 above illustrates that art 5 (1)(a)(ii) extends the spectrum of criminal liability in two ways: First, it can attach criminal responsibility to events that occur well before the preparation (and sometimes the planning) of specific individual offences. Second, it can create liability for participants that are more remotely connected to individual offences than those accessories liable under existing models of secondary liability. Paragraph (ii) thus creates new avenues to hold low-level 'enhancers' and facilitators of organised crime groups criminally responsible for their contributions. It also renders organisers and financiers of criminal organisations liable who are not physically involved in the organisations' criminal activities, but who control, plan, and 'mastermind' these operations.

Both offences under art 5(1)(a) — if implemented and enforced properly — are prophylactic and can serve as tools to prevent the commission of criminal offences by organised crime groups. The *Palermo Convention* extends criminal liability beyond existing concepts of attempt and accessorial liability. A further extension can be found in art 5(1)(b) which requires State Parties to criminalise the "organising, directing, aiding, abetting, facilitating or counselling [of] the commission of serious crime involving an organised criminal group" thus enabling the prosecution of accomplices, organisers and arrangers as well as lower levels of participants that assist criminal organisations in

47 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 249.

48 See Part 4 below.

their activities.[49] Moreover, art 10 of the Convention serves as a tool to hold commercial enterprises responsible for assisting the operations of criminal organisations and for laundering the assets deriving from crime, for corruption, and the obstruction of justice.[50]

The extensions of criminal liability created by the *Convention against Transnational Organised Crime* are significant and are not without controversy. One of the weaknesses of the international system is that the *Palermo Convention* leaves responsibility for the adoption and design of measures against organised criminal groups with State Parties; it neither predetermines a particular conceptualisation of the offence, nor does it establish an offence under international law, nor does it spell out any limitation on the extensions of criminal liability. From the provisions and definitions in the *Palermo Convention* it is not exactly clear where criminal liability for participation in an organised criminal group begins and where it ends.

On the other hand, it must remembered that the Convention is a milestone in an area where international collaboration is only in its infancy. Criminal justice is seen by many, if not most countries, as a cornerstone of national sovereignty.[51]

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49 Cf Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 172-173.

50 Cf arts 6, 8, 23 *Convention against Transnational Organised Crime*. See further Roger Clark, "The United Nations Convention against Transnational Organized Crime" (2004) 50 *Wayne Law Review* 161 at 176.

51 Cf Dimitri Vlassis, "The United Nations against Transnational Organized Crime and its Protocols: A New Era in International Cooperation" in *The Changing Face of International Criminal Law* (2002) 75 at 76.

Part 3: International Legislative Arrangements (Domestic Laws)

3.1 Canada

3.1.1 Background

In 1997, together with New Zealand,[52] 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.[53] The Hell's Angels are said to be Canada's most violent criminal organisation with a presence throughout the country. The group is strictly hierarchical (often violently enforced) based on a division into regional chapters and maintains a strong social and clearly visual identity, using logos, outfits, tattoos, and other emblems. In Canada, but also in Australia and New Zealand, the Hell's Angels are mainly involved in the production and distribution of methamphetamines and in the security industry.[54]

In early 1995, the Liberal Government under then Prime Minister Jean Chrétien began to explore measures to define criminal organisations, identify the characteristics of these groups, and develop methods to objectively determine membership.[55] The explosion of a car bomb in Hochelaga-Maisoneuve in Montréal, Québec, in August 1995, which killed an innocent youth,[56] further fuelled public concerns over levels of organised crime and a petition signed by 65,000 people from Québec demanded the adoption of new legislation against outlaw motorcycle gangs.[57] Québec mayors and the Québec Minister for Justice and the Attorney-General Serge Menard asked the Federal Government to act against biker gangs by criminalising membership in a gang,[58]

3.1.1.1 Bill C-95 (1997)

A private member's *Bill to amend the Criminal Code (criminal organization)* was introduced in the House of Commons on February 29, 1996 (Bill C-203)

> to provide that every one who, without lawful excuse, lives wholly or in part on any property, benefit or advantage from a criminal organisation is guilty of an indictable offence and liable on conviction to a term of imprisonment of not less than one year and not more than ten years.[59]

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52 See Part 3.2 below.

53 See further Paul Cherry, *The Biker Trials* (2005) 1-47.

54 UNODC, *Results of a Pilot Survey of Forty Selected Organized Criminal Groups in Sixteen Countries* (2002) Appendix, group 27.

55 Canada, House of Commons, *Debates* (28 March 1995) Hon Allan Rock (Minister for Justice and Attorney-General).

56 In this incident, Daniel Desrochers, an 11 year old boy playing in a schoolyard was killed by flying metal shard from a nearby car bomb explosion; Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury.

57 Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senator Roberge.

58 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section; Kent Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44(1) *Criminal Law Quarterly* 1 at 1; Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 247.

59 Bill C-203, an *Act to amend the Criminal Code (Criminal Organizations)*, summary p 1a.

The Bill lacked sufficient support to pass.[60] It was then modified and tabled as a new private member's Bill in the Senate on June 18, 1996,[61] but again this proposal failed. Both Bills proposed to insert a definition of 'criminal organisations' into the *Criminal Code*,[62] criminalise living in whole or in part off the proceeds of organised crime, and introduce three presumptions for situations in which a person is said to be living off the proceeds of organised crime.[63] Concerns were expressed about the wide-ranging police powers under these proposals and possible violations of Canada's human rights charter. Moreover, the presumptions about organised crime associations under these bills were seen as unduly broad and vague.[64]

A Government-sponsored *National Forum on Organized Crime*, held in Ottawa on September 27-28, 1996, further discussed and examined the patterns and levels of organised crime in Canada and made recommendations for legislation on this issue.
This forum led to the preparation of anti-gang legislation that was proposed in 1997 by the then Minister of Justice and Attorney-General Mr Allan Rock, and the Solicitor General of Canada, Mr Herb Gray.[65] Specific provisions relating to criminal organisations were eventually added to the *Criminal Code* on April 17, 1997[66] with the *Bill to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* (Bill C-95) which received royal assent on April 25, 1997.[67]

The Act was set out as "the government's first step in developing an integrated plan to combat" criminal gang activity.[68] It sought to "provide better means to deal with gang-related violence and crime" by focussing on three specific objectives:[69]

- depriving criminal organizations and their members of the proceeds of their criminal activities and the means to carry out these activities;
- […] deterring those criminal organizations and their members from resorting to violence to further their criminal objects; [and]
- […] provide law enforcement officials with effective measures to prevent and deter the commission of criminal activity by criminal organizations and their members, […].

To this end, the Act, inter alia, added a definition of the term 'criminal organisation' to s 2 *Criminal Code* (Canada) and inserted a new offence for participating and contributing to the activities of criminal organisations into s 467.1. This offence was partly modelled after §186.22(a) *Street Terrorism Enforcement and Prevention* ("*STEP*") *Act* (California) of 1988.[70]

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60 See further Canada, House of Commons, *Debates* (6 May 1996) Mr Réal Ménard (Hochelaga-Maisonneuve, BQ).

61 Bill S-10, an *Act to amend the Criminal Code (Criminal Organizations)*.

62 Proposed s 462.51 *Bill to amend the Criminal Code (criminal organization)* 1996 (Canada).

63 Proposed s 462.52 *Bill to amend the Criminal Code (criminal organization)* 1996 (Canada),

64 Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senators Bryden, Lewis.

65 Canada, Department of Justice, *Federal Government introduces national anti-gang measures* (17 Apr 1997), available at http://canada.justice.gc.ca/en/nes/nr/1997/prgang.html (accessed 28 June 2007); Don Stuart, *Canadian Criminal Law* (5th edn 2007) 731.

66 Canada, Department of Justice, *Federal Government introduces national anti-gang measures* (17 Apr 1997), available at http://canada.justice.gc.ca/en/nes/nr/1997/prgang.html (accessed 28 June 2007).

67 Chapter 23 (Bill C-95). The legislation has been attacked for not receiving proper consideration by Parliament: Cristin Schmitz, "Anti-gang legislation speeds through Ottawa" (2 May 1997) 16 *The Lawyers Weekly* 48; Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 457-458.

68 Canada, Department of Justice, *Fact Sheet: Bill C-95 – National Anti-Gang Measures* (May 1997), available at http://canada.justice,gc,ca/en/news/fs/c95fs_e.html (accessed 28 June 2007).

69 *Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* 1997 (Canada), Preamble.

70 The STEP Act provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations* ("RICO") *Act*, 18 USC 1961; see further Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 461-463.

Figure 5: Elements of former s 467.1 *Criminal Code* (Canada), 1997-2001[71]

Former s467.1(1)	Elements of the offence
Physical elements	(1) participation in or substantial contribution to the activities of a criminal organisation; (2) being party to the commission of an indictable offence for the benefit of, at the discretion of or in association with the criminal organisation for which the maximum penalty is imprisonment for five years or more; (3) any or all of the members of the criminal organisation engage in or have, within the preceding five years, engaged in the commission of a series of indictable offences under this or any other Act of Parliament for each of which the maximum punishment is imprisonment for five years or more.
Mental elements	(4) knowledge of (3)
Penalty	Imprisonment for a maximum of 14 years

The elements of this offence (sometimes called "gangsterism"[72]) shown in Figure 5 above have been referred to as a "5-5-5" pattern[73] requiring five members or more, engaging in activities punishable by five years or more, and at least one of the members has engaged in indictable offences in the preceding five years. The essence of the offence under former s 467.1 was that it raised the penalty for serious offences to up to 14 years imprisonment if the offence was committed in some connection to a criminal organisation.[74] At the request of the 1996 Forum, membership in a criminal organisation was not added as a separate criminal offence as it was seen as "unnecessary and perhaps even questionable from a constitutional standpoint."[75] The Act also made specific references to the events of August 1995 which triggered this legislation by recognising that "the use of violence by organised criminal gangs has resulted in death or injury to several persons, including innocent bystanders, and in serious damage to property"[76] and by adding a special offence for unlawful possession of explosive substances in ss 82 and 231 *Criminal Code* (Canada).[77] The introduction of the new offences was accompanied by new powers for the forfeiture of proceeds of crime in ss 490.1-490.9.[78] The new legislation also included a peace bond designed to target gang leadership (s 810),[79] new provisions on consecutive sentencing (s 718.2), and measures to support police surveillance of gang activity, especially by way of wiretapping (ss 183, 186).[80]

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71 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 94.

72 From the French gangstérisme meaning organised crime/criminal organisation.

73 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 202.

74 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section.

75 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section; Canada, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 48 – Evidence (5 Mar 1997) Senator Carstairs (Chair); Don Stuart, *Canadian Criminal Law* (5th edn 2007) 732.

76 *Act to amend the Criminal Code (criminal organizations) and to amend other Acts in consequence* 1997 (Canada), Preamble.

77 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 254-255

78 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 255.

79 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 253-254.

80 See further Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 251-253.

The amendments introduced in 1997 were widely seen as a rushed and reactionary measure by the Government in the lead up to a Federal election. As a result, the Bill received little scrutiny in both Houses of Parliament or in any parliamentary committee.[81] The new offence and law enforcement powers were seen as unnecessary, and creating "guilt by association".[82] There have also been concerns about possible violations of the Canadian Constitution, the *Charter of Rights and Freedom*. Many considered the legislation as too vague, grossly disproportionate, and wider than necessary to achieve its objective,[83]but all challenges of the legislation before the courts emained unsuccessful.[84]

The offence introduced in 1997 was rarely used and had little, if any, effect in preventing or suppressing organised crime in Canada. Only a small number of prosecutions were carried out under s 467.1 and even fewer convictions have been recorded.[85] In some provinces such as Québec and Manitoba the legislation was more frequently used than elsewhere and led to massive trials of large numbers of people.

3.1.1.2 Bill C-24 (2001)

The provisions relating to criminal organisations in the Canadian *Criminal Code* were subjected to significant changes in 2001. In November 1999, the House of Commons in Ottawa instructed the Standing Committee on Justice and Human Rights "to conduct a study of organised crime [and] analyse the options available to Parliament to combat the activities of criminal groups".[86] A Sub-Committee on Organised Crime was formed in April 2000 and an interim report was released six months later which made eighteen recommendations to combat criminal groups more effectively.[87]

Some of the recommendations, and the changes to the *Criminal Code* that followed, were once again triggered by organised crime related events in Québec, especially the attempted murder on September 12, 2000 of journalist Michael Auger who had exposed criminal organisations in Montréal.[88] Québec ministers asked the Federal Government to step up the fight against outlaw

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81 The Bill received Royal Assent only eight days after it was first introduced in the House of Commons, two days before Parliament was dissolved for a federal election. Cf Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 246 (also reprinted in Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1 Sep 1997) *Alan D Gold Collection of Criminal Law Articles*); Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 458.

82 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 248; Donald Stuart, *Canadian Criminal Law* (5th edn 2007, 732.

83 Section 7 *Charter of Rights and Freedom*;. Cf Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 255-262 with reference to *Heywood* (1994) 34 C.R. (4th); Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 454, 468-470; Christopher Blakesley, "The Criminal Justice System Facing the Challenge of Organized Crime" (1998) 69 *International Review of Penal Law* 69 at 86, 93.

84 *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Carrier* [2001] QF No 224 (Que SC); *R v Beauchamp* [2002] QJ No 4593 (Que SC); *R v Doucet* (2003) 18 CR (6th) 103 (Que SC).

85 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 375.

86 Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

87 Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

88 A personal story of this event was later published by Michel Auger, *The Biker Who Shot Me: Recollections of a Crime Reporter* (2002).

motorcycle gangs. In September 2000, Ministers of Justice from all provinces endorsed a *National Agenda on Organized Crime* and, inter alia, agreed to review legislative and regulatory tools.[89]

Bill C-24 which was presented to Parliament in 2001 and entered into force on January 7, 2002.[90] The purpose of the new legislation was to

> [provide] broader measures for investigation and prosecution in connection with organized crime by expanding the concepts of criminal organization and criminal organization offence and by creating three new offences relating to participation in the activities – legal and illegal – of criminal organizations, and to the actions of their leaders. (Preamble)

The specific intention of this Bill was to expand the application of the gangsterism offence beyond OMCGs to other criminal organisations in pursuit of profit and other groups involved in the perpetration of economic crime.[91]

The *Act to amend the Criminal Code (organized crime and law enforcement) and to make consequential amendments to other Act* of December 18, 2001[92] modified the definition of 'criminal organisation' and transferred it from s 2 to s 467.1(1). The Act substituted the former participation offence with three new separate offences for participation in a criminal organisation, s 467.11; commission of offence for a criminal organisation, s 467.12; and instructing the commission of a criminal offence, s 467.13.[93] The legislation also resulted in amendments to the *Proceeds of Crime (Money Laundering) Act*, wider immunity systems for law enforcement officers (ss 25.1, 25.2 *Criminal Code* (Canada)), additional resources for the RCMP (Royal Canadian Mounted Police) to target organised crime, and created new offences for intimidating witnesses, jurors, prosecutors, judges, guards, journalists, and politicians.[94] Moreover, the amendment brought Canada's organised crime provisions in line with the *Convention against Transnational Organised Crime*.[95]

3.1.2 Criminal organisations

Section 467.1(1) *Criminal Code* (Canada) defines 'criminal organisation' as[96]

> a group, however organized, that
>
> (a) is composed of three or more persons in or outside Canada; and
>
> (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.
>
> It does not include a group of persons that forms randomly for the immediate commission of a single offence.

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89 Canada, Department of Justice, *Newsroom: Federal Action against Organized Crime* (5 Apr 2001), available at http://canadajustice.ca/en/news/nr/2001/doc_26098.html (accessed 28 June 2007).

90 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 737.

91 *R v Lindsay* (2004) 182 CCC (3d) 301.

92 Chapter 32 (Bill C-24).

93 The Bloc Québecois opposed these changes and proposed instead that "membership in a criminal organization be made a crime"; Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

94 Section 423.1 *Criminal Code* (Canada).

95 Canada, Department of Justice, *Newsroom: Federal Action against Organized Crime* (5 Apr 2001), available at http://canadajustice.ca/en/news/nr/2001/doc_26098.html (accessed 28 June 2007). Canada signed the *Convention against Transnational Organised Crime* on 14 Dec 2000 and ratified it on 13 May 2002. The amending Act, however, made no specific reference to the Convention.

96 See also s 2 *Criminal Code* (Canada) 'criminal organization'.

The current definition under s 467.1 is a modified, "streamlined"[97] version of the definition of criminal organisation introduced into s 2 *Criminal Code* (Canada) in 1997.[98] Prior to the amendment in 2001, as was mentioned earlier, it was required that the group consisted of five or more members with previous criminal involvement ("any or all of which engage in have within the previous five years engaged in the commission of a series of" indictable offences punishable by five years imprisonment or more, the so-called 5-5-5 pattern). The threshold of the old definition was thus considerably higher and was designed

> so as to be applicable only to serious federal offences and to those who have, as one of their primary activities, the commission of serious indictable offences.
>
> By limiting the definition in this way, only those people assisting in groups which are engaged in serious crimes that form a pattern of criminal activity will be subject to the increased power of investigations these proposals contemplate.[99]

The high threshold of the 1997 definition meant that few groups qualified as criminal organisations and others simply reorganised to avoid the requirement that the group include at least one person with a recent serious criminal record.[100]

The 2001 amendment broadened the definition of criminal organisation by removing the 5-5-5 requirement,[101] reducing the minimum number of participants to three,[102] and expanding the scope of offences that define criminal organisations to all serious crimes.[103]

The current definition of criminal organisation in s 467.1(1) combines a structural/organisational element with criteria that relate to the purpose and/or activities of the group.[104] These elements are discussed separately in the following sections.

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97 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 375.

98 Former s 2 *Criminal Code* (Canada), inserted in 1997, amended in 2001, defined criminal organization as "any group association or other body consisting of five or more persons, whether formally or informally organized, (a) having as one of its primary activities the commission of an indictable offence under this or any Act of Parliament for which the maximum punishment is imprisonment for five years or more, and (b) any or all of the members of which engage in or have, within the preceding five years, engaged in the commission of a series of such offences".

99 Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury.

100 Cf *R v Terezakis* [2007] BCCA 384.

101 Cf Recommendation 5, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

102 Cf Recommendation 3, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

103 Cf Recommendation 4, Canada, House of Commons, Sub-Committee on Organized Crime of the Standing Committee on Justice and Human Rights (Paul DeVilliers, chair), *Combatting Organised Crime* (Oct 2000) available at http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=362&JNT=0&SELID=e24_&COM=162 (accessed 19 Nov 2007).

104 Cf *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 56 per Fuerst J.

Figure 6 "Criminal organisation", s 467.1(1) *Criminal Code* (Canada)[105]

Terminology Elements	**Organised Criminal Group**
Structure	• a group composed of three or more persons in or outside Canada.
Activities or objectives	• facilitation or commission of one or more serious offences; • if committed, the offences would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

The decision whether the offences under ss 467.11-467.13 involve a criminal organisation is made on a case by case basis; it is only binding for the parties to the case and there is no in rem judgment, no continuing labelling of any one group and no formal listing of criminal organisations.[106] Groups that have been found by the courts to be criminal organisations include, for example, the Hell's Angels Motorcycle Club,[107] the Bonanno Family of La Cosa Nostra,[108] and locally operating drug trafficking networks.[109]

3.1.2.1 A group of three or more persons in or outside Canada, s 467.1(1)(a)

The first element of the definition relates to the constitution of the criminal organisation. The group must comprise at least three people and the definition in s 467.1(1) *Criminal Code* (Canada) requires proof of some association between them. While it is not necessary that the three (or more) persons are formal members to constitute the group ("however organised"), s 467.1(1)(a) is understood to require some internal cohesion between them and more than mere association of the persons with the organisation.[110] "That limitation", argues Justice Holmes, "serves to exclude from the ambit of the definition random groupings or mere classifications of people based on, for example, personal characteristics and attributes."[111] It excludes "persons who are not functionally connected to that criminal purpose or activity, irrespective of their links to organisations with legitimate purposes and activities that include persons in the criminal group."[112] Mackenzie JA in *R v Terezakis* [2007] BCCA 384 noted (at para 34):

> The underlying reality is the criminal organisations have no incentive to conform to any formal structure recognised in law, in part because the law will not assist in enforcing illegal obligations or transactions. That requires a flexible definition that is capable of capturing criminal organisations in all their protean forms. [...] Nonetheless, the persons who constitute 'the group, however, organised' cannot be interpreted so broadly as to ensnare those who do not share its criminal objectives.

Establishing the structural element of the definition involves an inquiry into the persons actually constituting the group. In many cases, it will be difficult to identify three or more persons and establish that they form a criminal group. To facilitate proof of this element, the specific offence under s 467.11 allows the use of certain indicia to prove that an accused is associated with a criminal organisation.[113]

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105 Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

106 *Ciarniello v R* [2006] BCSC 1671 at para 67 per W F Ehrcke J.

107 *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice); *R v Lindsay* (2004)182 C.C.C. (3d) 301; *R v Speak* (2005) WL 3360402 (9 Aug 2005, Ont Superior Court of Justice); *R v Myles* (2007) 48 CR (6th) 108 (Ont Superior Ct of Justice).

108 *United States v Rizzuto* (2005) 209 CCC (3d) 325.

109 *R v Trang* [2001] ABQB 623.

110 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 377-378; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 205.

111 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 76 per Holmes J.

112 *R v Terezakis* [2007] BCCA 384 at para 33 per Mackenzie JA.

113 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

Section 467.1 explicitly excludes those groups from the definition that only form randomly without any ongoing purpose. The definition recognises that "organised crime […] is not isolated; it operates on a sustained basis, seeks control of an area of business, and strives for goals beyond the individual criminal act."[114] Thus, three or more persons who "gather in a group for the purpose of organising a single, planned criminal activity on an ad hoc basis such as, for example, a group planning a bank robbery" [115] "would not be considered a criminal organisation."[116]

3.1.2.2 Facilitating or committing of one or more serious offences, s 467.1(1)(b)

The second element of the definition in s 467.1(1) relates to the purpose and activities of the criminal organisation. The group must have "as one its main purposes or main activities the facilitation of one or more serious offences", s 467.1(1)(b). The facilitation of serious offences can be one of several purposes of the criminal organisations, it need not be the sole one. The definition thus recognises "that criminal organisations often blend their criminal operations with legitimate operations."[117]

Facilitating or committing serious offences may either be the purpose of the organisation or its main activity.[118] If the organisation actually engages in serious offences this must be a significant and not just incidental part of the organisation's activities. Alternatively, the serious offences may constitute the purpose, the raison d'être, of the organisation (without any requirement that the organisation actually engages in criminal activity).[119]

"Serious offence" is further defined in s 467.1(1) as "an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more". In addition, other offences may be prescribed by regulation; under s 467.1(4) "the Governor in Council may make regulations prescribing offences that are included in the definition of 'serious offence'". The definition of serious crime is flexible enough to cover a great range of criminal activities without identifying specific types of criminal acts. In *R v Lindsay* (2004) 182 CCC (3d) 301 it was held that:

> There is no such thing as a 'type' of crime 'normally' committed by criminal organisations. Accordingly, the conduct targeted by the legislation does not lend itself to particularisation of a closed list of offences.

The definition of serious crime excludes groups involved in relatively minor crime from the scope of s 467.1,[120] but the fact that the Governor-General may prescribe other offences opens up an avenue to add list of crimes without parliamentary review.[121]

According to Mark Levitz & Robert Prior, the definition in s 467.1(1)

> contemplates two distinct types of action on the part of the group. The first is where persons who constitute the group commit offences themselves that are for the benefit of the group or for the benefit of

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114 Andreas Schloenhardt, *Migrant Smuggling – Illegal Immigration and Organised Crime in Australia* (2003) 98, with reference to M Cherif Bassiouni & Eduardo Vetere, "Organized Crime and its Transnational Manifestations" in M Cherif Bassiouni (ed), *International Criminal Law, Volume I Crimes* (2nd ed, 1999) 883 at 883; Donald Hermann, "Organised Crime and White Collar Crime: Prosecution of Organised Crime Infiltration of Legitimate Business" (1985) 16 *Rutgers Law Journal* 589 at 591.

115 Andreas Schloenhardt, *Migrant Smuggling – Illegal Immigration and Organised Crime in Australia* (2003) 98.

116 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 379.

117 *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

118 The terms are understood in their usual meaning: *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst CJ.

119 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378, 379.

120 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 79 per Holmes J

121 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 738.

> any person constituting the group (including, presumably, themselves). […] The second type of conduct involves facilitating the commission of offences.[122]

In practice, most cases that have arisen under s 467.1, involve criminal groups that engage in the trafficking and sale of illicit drugs.[123] An example for the first type of action identified by Levitz & Prior involves syndicates that themselves traffic and sell drugs, benefiting as a group through the profits. The second category includes instances in which a criminal organisation provides protection or security for illegal activities, for instance, illegal gambling, illegal brothels et cetera.[124] Proof of "facilitating or committing" does neither require knowledge of the particular offence that is facilitated nor knowledge that an offence has actually been committed, s 467.1(2).

This second element of the definition characterises the nature of criminal organisations and the activities and purposes that set them apart from other legitimate enterprises.[125] There remains, however, some concern in academic circles that the definition could potentially capture legitimate organisations. One example given involves Aboriginal gangs in western Canada that also engage in legitimate expressive and community activities. The new definition introduced in 2001 is seen by some as a tool to "criminalise legitimate dissent" by these groups[126] if that dissent amounts to a serious offence.

In *R v Accused No 1* (2005) 134 CRR (2d) 274 Justice Holmes further held that the definition may also

> include persons who do not personally engage in or support or subscribe to the serious offence of the group, so long as they are part of the 'group' and that the group has as one of its main purposes or activities the facilitation or commission of a serious offence or offences (para 61).

He argued that "Parliament intended the most encompassing concept of a 'group'" and that the group is defined by its main purpose and its activities and not by the people who compose it.[127] This view was supported on appeal: *R v Terezakis* [2007] BCCA 384 at para 56 per Chiasson JA.

3.1.2.3 Material benefit, s 467.1(1)(b)

The third and final element of the definition of criminal organisation in s 467.1 *Criminal Code* (Canada) relates to the possible result of the serious offences. Unlike the earlier definition of criminal organisation, it is now required that the criminal activities, if committed, result in a material benefit for the organisation. It is necessary to show that the organisation was or would somehow be advantaged by these offences. This includes financial and other material benefit, though the benefit need not be economic. The interpretation of what may constitute a material benefit is left to the courts: *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 58 per Fuerst J. In *R v Leclerc* [2001] JQ No 426 (Court of Québec – Criminal and Penal Division), for instance, it was held that providing a criminal organisation with an increased presence on a particular territory (ie turf in the illicit drug market) can be a benefit. This, third element, remark Levitz & Prior, excludes groups "of the Robin Hood and the Merry Men type", "as neither the group nor its members benefited from [their] offences."[128]

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122 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378-379.

123 See, for example, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice); *R v Speak* (2005) WL 3360402 (9 Aug 2005, Ont Superior Court of Justice)

124 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378-379.

125 Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures*, (2005) 8 with reference to *Re Lindsay & Bonner v R* (182 C.C.C. (3d) 301).

126 Kent Roach, "Panicking over Criminal Organizations: We Don't Need Another Offence" (2000) 44(1) *Criminal Law Quarterly* 1 at 2.

127 *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 63, 66 per Holmes J.

128 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

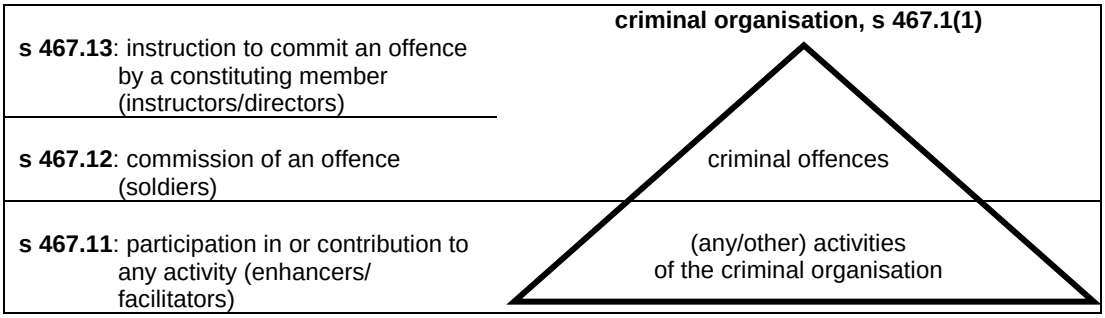
Questions have been raised whether the elements of the criminal organisation definition and its reference to material benefit is overly broad, but the Supreme Court of Ontario confirmed in *R v Lindsay* (2004)182 C.C.C. (3d) 301 that the objective of the legislation, hindering the organised criminal pursuit of profit, was legitimate and "does not trench on legitimate 'non-regulated' or 'non-criminal conduct" [at para 44 per Fuerst J].[129]

3.1.3 Relevant offences

Sections 467.11-467.13 create three offences associated with criminal organisations. These provisions are of a peculiar nature in that they are substantive offences but also operate simultaneously as sentence enhancers to other offences.[130]

The three sections are set out in a hierarchy depending on the accused's level of involvement in the organisation. At the bottom of that hierarchy is the "enhancer" or "facilitator" offence which creates liability for mere participation in and contribution to the activities of criminal organisations, s 467.11. This is followed by the more serious offence in s 467.12 which criminalises the commission of an offence for a criminal organisation. Section 467.13 creates the most serious offence for directing criminal organisations. Sections 467.11(2), 467.12(2) and 467.13(2) all exempt certain matters that would otherwise have to be proven by the prosecution.[131]

Figure 7: criminal organisation offences, ss 467.11-47.13 *Criminal Code* (Canada)



It is noteworthy that membership in a criminal organisation alone is not an offence; "merely being in the group is not illegal".[132] The offences in ss 467.11 and 467.12 do not even require that the accused is part of the group that constitutes the criminal organisation. Section 467.13, in contrast, requires this link.[133]

A separate definition (which bears no further meaning for s 467) of 'criminal organisation offence' is set out in s 2 *Criminal Code* (Canada), meaning:

(a) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organisation, or

(b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, and offence referred to in paragraph (a).

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129 Cf Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to Global and Domestic Pressures* (2005) 8.

130 Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 463. See also Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245, who argues (at 262-263) that "the consecutive penalty provisions in Bill C-95 offend the constitutional requirement of proportional punishment".

131 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 830.

132 *R v Terezakis* [2007] BCCA 384 at para 35 per

133 Cf *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

3.1.3.1 Participation in activities of criminal organisation, s 467.11(1)

Section 467.11(1) makes it an offence to participate in or contribute to the activities of criminal organisations:

> Every person who, for the purpose of enhancing the ability of a criminal organisation to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organisation is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

The offence under s 467.11(1) — sometimes referred to as the "enhancer" or "facilitator" offence[134] — is the least serious of the three offences. The section substituted former s 467.1(1)(a) *Criminal Code* (Canada) by broadening the application of the participation offence and lowering the requirements for the physical and mental elements (the 5-5-5 pattern).

Figure 8 below displays the elements of the offence under s 467.11 which are discussed separately in the following sections. It has to be noted that there is, at present, little decided case law and judicial guidance on this offence.

Figure 8: Elements of s 467.11 *Criminal Code* (Canada)

467.11(1)	**Elements of the offence**	
Physical elements	• **participation in/contribution to any activity of a criminal organization (s 467.1(1))**	
Procedural matters	To determine this element the Court may, inter alia, consider (s 467.11(3)) whether the accused: (a) uses a name word, symbol or other representation that identifies, or is associated with, the criminal organization; (b) frequently associates with any of the persons who constitute the criminal organization; (c) receives any benefit from the criminal organization; or (d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization	It is not necessary for the prosecution to prove that (s 467.11(2)): (a) the criminal organization actually facilitated or committed an indictable offence; (b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence
Mental elements	• **knowledge** of the nature of the participation/contribution • **purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence**	
Procedural matters	It is not necessary for the prosecution to prove that (s 467.11(2)): (c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; the accused knew the identity of any of the persons who constitute the criminal organization.	
Penalty	Imprisonment for up to 5 years	

Physical element

Participation in or contribution to any activity of a criminal organisation

The physical element of s 467.11 requires that an accused participated in or contributed to the activities of a criminal organisation (as defined in s 467.1(1)). The terms "contribution" and "participation" are not further defined in the *Criminal Code*; they can involve a positive act or an

[134] David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 201.

omission, a failure to act.[135] Section 467.11(1)(3) enables the use of certain indicia that assist in establishing the physical element, for instance, by proving the use of symbols and other insignia of the gang. These indicia are, however, not conclusive evidence of any participation or contribution and they cannot be used as a basis for inferring any mental element.[136]

The physical element is designed to capture persons who in one way or another — and without actually carrying out any criminal offences (see s 467.12) or directing them (s 467.13) — enhance the ability of a criminal organisation to carry out its activities. Liability under s 467.11 may thus involve persons outside the criminal organisation who have some interaction with the group even if they are not a part of the group.[137] Accordingly, it has been remarked that this provision "could target anyone" and not just members of the organisation.[138]

Section 467.11 does not require that the accused participates in or contributes to actual criminal activities, s 467.11(2)(b); it can be "any" activity. There is also no requirement that "the criminal organisation actually facilitated or committed an indictable offence", s 467.11(2)(a). The offence applies to low level members of criminal organisations and persons loosely associated with them without being formal members, including persons who may have never been violent or may have not engaged in any prior criminal activity.[139] "The act of participation set out in the Code", remarks David Freedman, "is not linked in any real way with criminality of the group or its constituent elements."[140]

Mental elements

The offence under s 467.11(1) requires proof of two mental elements: (1) knowledge of the nature of the participation or contribution, and (2) proof of a purpose (or an intention) to enhance the ability of a criminal organisation to facilitate or commit an indictable offence.

Knowledge

The knowledge requirement is void of practical relevance as it only relates to the knowledge that participation or contributions are made. It is expressly not required that the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organisation or that the accused knew the identity of any of the persons who constitute the organisation, s 467.11(2)(c), (d). It has been argued that this is an "almost complete erosion of the aspect of knowledge"[141] and essentially creates strict liability (absolute responsibility)[142] for this element.[143] However, suggestions that the offence under s 467.11 (and also under ss 467.12 and 467.13) lack the minimum constitutionally required mental element were dismissed in *R v Lindsay* (2004)182 C.C.C. (3d) 301.[144]

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135 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 379.

136 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 381.

137 *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

138 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 740; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 206.

139 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 248; cf Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 102.

140 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208. See also Figure # above.

141 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28.

142 Strict liability means, essentially, liability without the requirement proof a (subjective) fault element; see further Kent Roach, *Criminal Law* (3rd ed 2004) 186-198.

143 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 102; Don Stuart, *Canadian Criminal Law* (5th edn 2007) 740.

144 Eileen Skinnider, *Some Recent Criminal Justice Reforms in Canada — Examples of Responding to*

Purpose

Lastly, s 467.11 requires that the accused acted with the specific intent that his or her actions enhance the organisation's ability to carry out its illegal activities. This must have been the purpose, the reason for/goal of the accused's contribution. Whether or not that purpose succeeds or fails is immaterial.[145]

The breadth of the elements of s 467.11 enables the criminalisation of persons that would otherwise not be liable under complicity or conspiracy provisions. Furthermore, a person may be convicted of the offence under s 467.11(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4). "The flexibility of the criminal organisation concept", notes Freedmann, "is twinned with an expansive notion of participation."[146] For example, a person who knowingly lets premises to a biker gang not just to collect rent but also to enable the group to carry out their criminal activities would be liable under s 467.11.[147] A person making a purchase or frequent visits to a shop run by a criminal organisation, knowing the nature of the group, would be liable under this provision if members of the gang are present at the time of purchase.[148]

It is debatable whether criminal liability should be extended in that way. The legislator designed the offence to capture those who support criminal organisations, however minor or rudimentary that support might be. But it has been argued that "a person who supplies hot dogs to a gang for their annual picnic […] would not be guilty of an offence […]."[149] Others have criticised this offence for "leaving the landlord, the accountant, the lawyer in harm's way" especially given the exceptions listed in s 467.11(3).[150] Some authors see this offence as creating 'guilt by association' and suggest that a requirement of "taking an active part in the organisation" as set out in the *Palermo Convention* would be more meaningful.[151]

3.1.3.2 Commission of offence for criminal organisation, s 467.12(1)

Under s 467.12(1) it is an offence to commit an indictable offence for a criminal organisation:

> Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organisation is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Unlike s 467.11, this second offence is designed to capture people who actually commit criminal offences for a criminal organisation (sometimes referred to as the "soldier" offence)[152]; accordingly the penalty for offences under this section is more severe. An example for a s 467.12 offence would be debt-collection for a criminal organisation by means of threat or violence.[153]

Global and Domestic Pressures (2005) 8

145 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 831; Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 381.

146 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 218.

147 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 381.

148 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208.

149 Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Yvan Roy, Senior General Counsel, Criminal Law Policy Section.

150 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28.

151 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 208.

152 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 209.

153 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 383.

Figure 9: Elements of s 467.12 *Criminal Code* (Canada)

467.12	**Elements of the offence**
Physical elements	• **commission of an indictable offence** • **benefit of/at the direction of/in association with a criminal organisation (s 467.1(1))**
Mental elements	• **intention** to commit the offence for the benefit of, a the direction of, or in association with a group, • **knowledge** about the involvement of the criminal organisation
Procedural matters	It is not necessary for the prosecution to prove that the accused knew the identity of any of the persons who constitute the criminal organization, s 467.12(2)
Penalty	Imprisonment for up to 14 years

Physical elements

The first physical element of s 467.12 requires that the accused has committed an indictable offence — another offence within this offence. This may be any indictable offence; unlike the definition of criminal organisation in s 467.1(1) this is not restricted to serious offences. Thus, s 467.12(1) requires proof of the physical elements of that offence.[154] In *United States v Rizzuto* (2005) 209 CCC (3d) 325, for instance, the indictable offence involved a conspiracy to commit murder for the benefit of, at the discretion of, or in association with the Bonnino Family of La Cosa Nostra.

Secondly, it is necessary to establish a nexus between the indictable offence committed by the accused and a criminal organisation. Section 467.12(1) requires that the accused committed the other offence "to the benefit of, at the direction of, or in association with a criminal organisation". *R v Leclerc* [2001] J Q No 426 understood the term "at the direction" as receiving instructions from members in authority. Thus it has to be established that the direction given was given on behalf of the group.[155] "In association with" is said to connote a linkage with a criminal organisation or some form of cooperative approach or contemplates where affiliation with the organisation enhances the ability to commit the offence.[156] It is left to the courts to determine the precise nature and parameters of the relationship between the accused and the criminal organisation.[157]

As with s 467.11, an accused under s 467.12 need not be a member of the organisation.[158] Moreover, a person may be convicted of the offence under s 467.12(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4).

Mental element

The mental element of the offence in s 467.12(1) *Criminal Code* (Canada) requires an intention to commit the offence for the benefit of, at the direction of, or in association with a group with knowledge about the involvement of the criminal organisation.[159] There is explicitly no requirement to show that the accused knew the identity of any of the persons who constitute the criminal organisation. The exclusion under s 467.12(2) has been described as "excluding an essential element of criminal conduct. Mens rea is not an element if organised criminals are your target."[160]

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154 David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 831.

155 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

156 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J; Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

157 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 59 per Fuerst J.

158 *R v Terezakis* [2007] BCCA 384 at para 35 per Mackenzie JA.

159 *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 64 per Fuerst J; cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

160 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28.

In essence, unlike the other criminal organisation offences in Canada, s 467.12 does not create or expand liability for conduct that would not otherwise be criminal. The purpose and effect of this section is to aggravate liability for an indictable offence committed by the accused if this offence was committed in some connection to a criminal organisation. If liability under s 467.12 can be established, this will result in a significantly higher penalty as the sentence for the offence runs consecutively to that of the predicate offence.[161] The fact that an offence was committed for the benefit or at the direction of, or in association with the criminal organisation is also an aggravating circumstance on sentencing under s 718.2(a)(iv). It has been held that this outcome does not violate the bar on compound criminality (cf *R v Kienapple* [1975] 1 S.C.R. 729 at 747-748) as "the presence of the additional 'criminal organisation' and mens rea requirements differentiates the participation offence from the predicate offence substantially […]"[162] enough. Suggestions that the elements of s 467.12 are impermissibly vague and overly broad were dismissed in *R v Lindsay* (2004)182 C.C.C. (3d) 301 at para 60 per Fuerst J.

3.1.3.3 Instructing commission of offence for criminal organisation, s 467.13(1)

Section 467.13(1) — also referred to as the "instructing offence"[163] — makes specific provisions for directors and other key leaders of criminal organisations:

> Every person who is one of the persons who constitute a criminal organisation and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organisation is guilty of an indictable offence and liable to imprisonment for life.

Figure 10: Elements of s 467.13 *Criminal Code* (Canada)[164]

467.13	**Elements of the offence**
Physical elements	• **instruction to commit an offence for the benefit of, at the direction of, or in association with the criminal organisation** • **person who constitutes the criminal organisation (s 467.1(1))**
Procedural matters	It is not necessary for the prosecution to prove that (s 467.13(2)): (a) an offence other than the offence under subsection (1) was actually committed; (b) the accused instructed a particular person to commit an offence.
Mental elements	• **knowledge** of the nature of the instruction and its underlying purpose; • **knowledge** that the he or she is a member of a criminal organisation**.**
Procedural matters	It is not necessary for the prosecution to prove that the accused knew the identity of all of the persons who constitute the criminal organization, s 467.13(2)(c)
Penalty	Life imprisonment

Physical elements

The offence under s 467.13 first requires the direct or indirect instruction of another person to commit an offence for the benefit of, at the direction of, or in association with the criminal organisation. The term "instructing" is not further defined in the *Criminal Code*. It has been suggested that the term "connotes some power" and reflects a hierarchy between the accused who instructs and the instructee.[165] The instructions need not be directed at a member of the

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161 David Freedman, "The New Law of Criminal Organizations in Canada" (2006) 85(2) *Canadian Bar Review* 171 at 209.

162 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 209 with reference to *R v Creighton* [1993] 3 S.C.R. 3.

163 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 214.

164 Cf *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

165 *R v Accused No 1* (2005) 134 CRR (2d) 274 at paras 91, 93 per Holmes J; David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 216.

organisation or at any specific person.[166] There is also no requirement that the instructions specify a particular offence and, unlike ss 467.11 and 467.12, the offence is not limited to indictable offences; "it suffices if they are of a general nature, for instance, instructions to assault rival gang members".[167] It is irrelevant whether or not the predicate offence instructed is actually committed.[168]

The second physical element of s 467.13(1) refers to the status of the accused by requiring that he or she is "one of the persons who constitute the criminal organisation". The legislation is ambiguous whether or not the accused has to be a member of the organisation. In reality, this may frequently be the case, but Freedman notes that the "power to compel the person instructed […] need not emanate from the instructor's membership in a criminal organisation under the statute. As such, any linkage between the instructor and the instructed is left at large".[169] More recent case law and scholarship, however, have held that the offence requires that accused is a member of the organisation.[170]

A person may be convicted of the offence under s 467.13(1) as a party or counsellor, not merely as a single or co-principal, s 467.1(4).

Mental elements

The mental elements of this offence require proof that the accused knew the nature and purpose of the instruction. Furthermore, there seems to be consensus that it is also necessary to show that an accused knows his or her role in the organisation. In *R v Accused No 1* (2005) 134 CRR (2d) 274 Justice Holmes held that

> s 467.13 should be read as requiring that the accused knew all of the relevant circumstances comprised in the description of the offence; those include that the accused is one of the persons who constitute a criminal organisation. This conclusion flows from both the common law preference for subjective knowledge as to the key elements of a serious criminal offence, and from the *Charter* requirement for subjective mens rea in relation to offences of significant stigma.

This view was supported in the appeal case, *R v Terezakis* [2007] BCCA 384, where Mackenzie JA held (at para 38) that it would "overstrain the wording to extend it to persons who may share an innocent purpose but who are unaware of and do not share the main purpose or activity of facilitation or commission of serious offences." Freedman also notes that "[a] failure to prove subjective knowledge on the part of an accused that he or she is a member of a criminal organisation is not a flaw in the legislation but a circumstance in which a conviction is inappropriate."[171] "[T]he Crown must prove that the accused knew the facts that by law caused him or her to be one of the persons constituting a criminal organisation." It does, however, "not mean the Crown must prove that the accused knew the group to which he or she belonged was in law a criminal organisation."[172] This additional mental element is important to enable a person to determine whether or not he or she is a person constituting the criminal organisation. It has been held that without this additional requirement, s 467.13 would be overly broad and apply to members of an almost limitless variety of groups.[173]

There is no requirement to proof any additional specific intent. In particular, it is not necessary "to prove that the accused knew the identity of all of the persons who constitute the criminal

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166 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 96 per Holmes J.

167 Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 384.

168 *R v Terezakis* [2007] BCCA 384 at para 36 per Mackenzie JA.

169 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 216.

170 *R v Terezakis* [2007] BCCA 384 at paras 62 and 73 per Chiasson JA; David Watt & Michelle Fuerst, *Tremeear's Criminal Code* (2007) 832.

171 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 217.

172 *R v Accused No 1* (2005) 134 CRR (2d) 274 per Holmes J.

173 *R v Accused No 1* (2005) 134 CRR (2d) 274 at para 131 per Holmes J

organisation", s 467.12(2)(c). This facilitates the prosecution of senior executives in very large syndicates who may not know the identity of all constituting members, including those located abroad.

The mental elements of this offence are quite minimal, especially considering the very high penalty attached to this offence. Accordingly, s 467.13 has been criticised for attaching life imprisonment to an offence that does not require proof of a specific intent.[174]

Given the ambiguity of the status of an accused in the criminal organisation and his or her knowledge of that status, Justice Holmes of the Supreme Court of British Columbia held in *R v Accused No 1* (2005) 134 CRR (2d) 274 at 153 that s 467.13 was constitutionally invalid and "that s 467.13 is of no force and effect." In a more recent decision, the Saskatchewan Court of the Queen's Bench distanced itself from that decision, applying (without further analysis) the reasoning by Justice Fuerst in *R v Lindsay* (2004) 182 CCC (3d) 301 to s 467.13 arguing that this section withstands constitutional challenge.[175] The decision in *R v Accused No 1* (2005) has recently been overturned by the British Columbia Court of Appeal in *R v Terezakis* [2007] BCCA 384. Here, the court confirmed that the offence under s 467.13 along with ss 467.11 and 467.12 do not infringe on the freedom of association, are not vague or otherwise constitutionally flawed.

3.1.4 Observations and remarks

Canada's organised crime provisions are among the most developed in the region. While the definition of criminal organisation is largely identical to similar concepts adopted in New Zealand, some parts of Australia, and under international law, the criminal offences are remarkably different and more diversified than those in operation elsewhere. The hierarchy of offences set out in ss 467.11-467.13 captures different types and levels of involvement with criminal organisations and offers higher penalties for those more closely associated with the group. 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. The Canadian provisions operate simultaneously as new offences for criminal organisations and as aggravations to already existing offences.

The criminal organisation offences initially found modest application given the high threshold of the definition of criminal organisation. The amendments in 2001 allowed for a wider application of the offences though accurate figures for the number of prosecutions and convictions under the offences are not available. Based on the reported case law, it appears that the majority of prosecutions under the criminal organisation offences involve criminal groups that engage in the trafficking and sale of illicit drugs.[176] There are also cases that involved extortion, fraud, and money laundering.[177]

Scope of the offences

Most of the concern about Canada's organised crime offences relates to the breadth of the offences, covering everything from the most serious involvement to the most minor association with criminal organisations. Moreover, the offences under ss 467.11-467.13 can be extended by the conventional principles of criminal liability;[178] ie an accused could be liable for "attempting to participate in a criminal organisation".

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174 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28.

175 *R v Smith* (2006) 280 Sask R 128 per Zarzeczny J.

176 See, for example, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Supreme Court of Quebec); *R v Myles* (2007) 48 CR (6th) 108 (Ont Superior Ct of Justice).

177 See, for example, *R v Sbrolla* (2003) WL 23526433 (Ont S.C.J.); *R v Lindsay* (2004) 182 CCC (3d) 301.

178 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 207.

This broad scope of the definition of criminal organisation in s 467.1 and of the criminal offences in ss 467.11-467.13 is no accident. The reform in 2001 was deliberately designed to capture a great range of organisations and criminalise a myriad of ways in which people can associate with criminal gangs. The very high threshold created by the old provisions was too restrictive and was only able to capture very formalised groups which had serious criminals in their ranks.

The elements of the current definition are designed more flexible as to allow the criminalisation of a broader range of organisations, not just outlaw motorcycle gangs that wear clearly visible insignia and are structured very systematically. The danger created by the new laws is that all types of organisations with some connection to criminal activities could potentially fall within the definition in s 467.1. It is not surprising that most of the challenges before the courts to date have attacked the legislation for being too broad and overly vague.

The threshold of the mental elements of the new offences is also remarkably low, especially when compared to the high penalties associated with the offences. Questions remain about the imposition of such severe penalties on offences that do not require proof of any specific intention. It is to be expected that future cases will further challenge the broad application of the offences and continue to test their compatibility with Canada's *Charter of Rights and Freedoms*.

Despite the breadth of the offences and the definition of criminal organisation, some critics argue that the provisions do not seem to capture sophisticated criminal networks loosely based on kinship rather than on firm hierarchical structures. Michael Moon, for instance, remarks: "At best the legislation attacks the symptoms of organised crime, ie the activities of individual gang members, yet ignores the symptoms between them — the organisation within which these individuals commit their acts."[179] Suggestions have been that the legislation only targets the most visible and publicised, the most 'slow and stupid' groups, those using logos and insignia who can easily be identified. Allan Castle noted that "all successful prosecutions in Canada to date have been against gangs with a relatively public structure; other patterns and more clandestine groups have not been explored."[180]

Necessity

In practice, the section 467 offences have found limited application, as was perhaps to be expected. Prosecutors and courts continue to use other substantive offences and there are at present only isolated cases which have been tried under ss 467.11-467.13 and that could not have been tried otherwise. It is perhaps unsurprising that the most prominent cases involved prosecutions under s 467.13 which attracts the highest penalty and deals with the core leaders of criminal organisations.

From the beginning, there have been many doubts about the necessity of the criminal organisation laws in Canada.[181] Freedman, for instance, asks:

> Is the situation really any different than in the past, or are these laws merely pandering to public hysteria about organised crime? Worse still, are these laws really a rather cynical way of unjustifiably expanding the range of police powers?[182]

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179 Michael A Moon, "Outlawing the Outlaws: Importing R.I.C.O.'s Notion of 'Criminal Enterprise' into Canada to Combat Organized Crime" (1999) 24 *Queen's Law Journal* 451 at 466.

180 Allan Castle & Andreas Schloenhardt, "Mafias and Motorbikes: Fighting Organised Crime in Canada and Australia" presentation at the Liu Institute for Global Issues, The University of British Columbia, Vancouver (BC), 6 Nov 2007.

181 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 732; Canada, Senate, *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, Issue 63 – Evidence (24 Apr 1997) Alan Borovoy, Canadian Civil Liberties Association.

182 David Freedman, "The New Law of Criminal Organizations in Canada" (2007) 85(2) *Canadian Bar Review* 171 at 176.

Despite the stated goals of the legislation, there has been no noticeable decline in organised crime activities in Canada since the introduction of these laws in 1997, and the biker gangs who were the main target of these laws at the time of their inception continue to thrive and control large parts of the illicit drug market throughout Canada. The recent spate of gangland killings in Vancouver raises further doubts about the adequacy and effectiveness of organised crime laws in Canada, especially if non-conventional, non-hierarchical syndicates are involved.[183] Donald Stuart remarked that "[i]t is highly unlikely that this blunderbuss set of laws will solve the public safety problem of biker or other gangs committed to rebellion and lawlessness."[184]

Mass trials

Of great practical relevance is the fact that the introduction of the organised crime offences resulted in a number of mass trials that exceeded the capacity of the criminal justice system. Manitoba and Québec in particular saw several attempts to charge a great number of people at once using the new *Criminal Code* provisions. Cases involving criminal organisations in Alberta and Ontario equally involved a great number of defendants.[185]

The Manitoba trial, for instance, involved an Aboriginal street gang known as the Manitoba Warriors that engaged in low level drug and weapons offences — the group beared little, if any, resemblance to an international crime syndicate. The trial took place in a purpose-built high security courthouse and initially involved 35 accused (who each was confined in a separate cubicle in the courtroom). Two minor participants entered guilty pleas to participation in a criminal organisation at the early stages of the trial. Over the following twenty months, fifteen others entered into guilty pleas. Five others pleaded guilty later, two persons were acquitted, and the case against one person continued beyond January 2001. Many observers commented that the trial was excessively expensive and lengthy and ultimately only resulted in relatively minor penalties, the longest being a sentence of 4.5 years for drug trafficking.[186]

In Québec, the trial of members of the Hells Angels initially involved charges against 42 accused who were to be tried in a purpose-built court building. The trial was eventually severed into two separate trials. The first, involving 12 members of a biker gang ended on September 11, 2003 with nine accused pleading guilty to charges of murder, conspiracy for murder, drug trafficking, and acts of gangsterism: *R v Stockford* [2001] QJ No 3834; *R v Stadnick* (2004) REJB 2004-70735 (unreported, 27 Sep 2004, Quebec Superior Court of Justice). The accused were later sentenced to terms between 15 and 20 years depending on their role in the criminal gang.[187]

The case law generated thus far creates some concern that the labelling of a group as a criminal organisation in one case has a flow-on effect and may result in a quasi blacklisting of some groups. For example, the decision in *R v Lindsay* in 2004 which considered the Hells Angels motorcycle group as a criminal organisation has been frequently referred to in other decisions, although this finding ought to be made on a case-by-case basis.

Many critics see these laws as a dangerous extension to criminal liability and to police powers, designed to satisfy the public's demand for action, but ill suited to seriously disrupt organised

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183 See, for example, Mike Faille, "The search for a bulletproof solution" (10 Nov 2007) *Globe and Mail* S1-S3; Ian Bailey, "Fatal gunplay strikes again in Vancouver" (23 Jan 2008) *Globe and Mail* 3.

184 Donald Stuart, "Politically Expedient but Potentially Unjust Criminal Legislation against Gangs" (1998) 69 *International Review of Penal Law* 245 at 264.

185 See, for instance, *R v Fok* [2001] ABQB 79; *R v Fok* [2001] ABQB 150; *R v Trang* [2001] ABQB 623; *Chan* (2004) 15 C R (6th) 53; *R v Lindsay* (2004) 182 CCC (3d) 301.

186 Donald Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 *Manitoba Law Journal* 89 at 96-97; Don Stuart, *Canadian Criminal Law* (5th edn 2007) 735-736.

187 Anne-Marie Boisvert, "Mega-trials: The Disturbing Situation in Quebec" (2004) 15 *Criminal Reports (Articles) (6th)* 178; see also Paul Cherry, *The Biker Trials: Bringing down the Hells Angels* (2005).

crime in Canada. "The extensive police powers", notes Donald Stuart, "read like a police wish list."[188] William Trudell views the legislation as the result of a scare campaign and remarks that

> serious organised criminal activity […] should not be used to frighten the public into accepting massive changes to legislation which fundamentally alters the Criminal Law as know it. […]
>
> [T]he attack on 'organised crime' is a 'folk devil', a transitory perhaps cyclical exaggeration by the police and media sparked by one event, and seized by politicians, all for their own purposes without solid foundation. It is akin to the burning of witches in another era.[189]

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188 Don Stuart, *Canadian Criminal Law* (5th edn 2007) 731. Cf Canada, Senate, *Debate*, issue 94 (23 April 1997), Hon Richard J Stanbury: "Bill C-95 has been enthusiastically received by police organizations from across the country […]."

189 William M Trudell, "The Bikers Are Coming… The Bikers Are Coming…" (2001) 22(3) *For the Defence* 28 at 28.

3.2 New Zealand

New Zealand first introduced organised crime provisions into the *Crimes Act 1961* in 1997 — under very similar circumstances and in the same year as Canada.[190] The legislation was amended five years later with the *Crimes Amendment Act 2002* (NZ), significantly broadening the application of the organised crime offence. The following Sections briefly outline the offence as first introduced in 1997 and then explore the current provisions in greater detail.

3.2.1 Former s 98A *Crimes Act 1961* (NZ), 1997-2002

In 1996, the *Harassment and Criminal Associations Bill* was introduced into the New Zealand Parliament, inter alia, "to place restrictions on the activities of criminal associations or gangs".[191] The legislation was the Government's response to growing concerns over gang crimes in New Zealand. The media in New Zealand reported widely about the activities of outlaw motorcycle gangs and organised criminal groups of Maori and Pacific Islander background, however, no empirical evidence was ever presented to support the perception that organised crime and other gang activity was increasing.[192]

At the heart of this legislative package stood the *Crimes Amendment Act (No 2) 1997* (NZ) which introduced a new offence entitled "participation in [a] criminal gang" in s 98A *Crimes Act 1961* (NZ) Part V— Crimes against Public Order. Like Canada, this offence was originally modelled after §186.22(a) *Street Terrorism Enforcement and Prevention* ("*STEP*") *Act* (California) of 1988.[193]

In its original form, s 98A(1)(a) defined the term "criminal gang" as a formal or informal association of three or more persons where at least three of the members had been convicted (within a specified time frame)[194] of certain serious offences, such as drug offences, money laundering, serious violent offences, or other offences attracting a minimum penalty of 10 years imprisonment or more.[195] The definition thus established a very high threshold and limited the application of the term to criminal groups that are or have been engaged in very serious offences, including those typically associated with organised crime. The elements of former s 98A limited the application to groups and participants in New Zealand and did not encompass activities that occurred across borders or outside New Zealand.[196] In contrast to the definition of "organised criminal group" in the *Palermo Convention*, former s 98A(1) did not have the purpose of the group's criminal activity as an element. It was argued that "the precision of the definition would be lost" if the objective or purpose of the group would be included as "[d]etermining the 'purpose' of an association would involve a variety of factual considerations that are less clear cut […]".[197]

Under s 98A(2) it was an offence, punishable by up to three years imprisonment, to

(a) participate in any criminal gang knowing that it is a criminal group; and

(b) intentionally promote or further any conduct by any member of that group that amounts to an offence or offences punishable by imprisonment.

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190 See Part 3.1 above.

191 *Harassment and Criminal Associations Bill 1996* (No 215-1), Explanatory Note, ii.

192 *Harassment and Criminal Associations Bill 1996* (No 215-1), Explanatory Note, ii. Cf Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 833.

193 The STEP Act provisions are modelled on the US *Racketeer Influenced and Corrupt Organisations* ("RICO") *Act*, 18 USC 1961; see further Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 833.

194 Former s 98A(1)(c) *Crimes Act 1961* (NZ).

195 These requirements resemble the Canadian 5-5-5 rule introduced in 1997, see Section ?? above.

196 NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

197 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 836.

In comparison to the new offence in New Zealand and to other contemporary organised crime offences (such as the one in New South Wales), former s 98A(2) was very narrowly construed. Participation in criminal organisations would only result in criminal liability if it deliberately supported criminal conduct of other gang members. Seen this way, the offence was a further extension to provisions on accessorial, derivative liability.[198] Liability under former s 98A(2) was derivative as the source of liability was not the offence definition;[199] it depended on the commission of a principal offence: "any conduct by any member of that group that amounts to an offence […]", s 98A(2)(b).

The consequence of the very high thresholds of the criminal group definition and of the offence of participating in such a group meant that very few cases qualified for prosecution under these provisions. The offence was very rarely used during the five years of operation in this form. Between 1997 and 2002, only sixteen prosecutions and two convictions for participation in an organised criminal group were recorded, see Figure 13 below.[200] The maximum penalty imposed by the courts for offences under s 98A was a three-year sentence.[201] There was also no evidence that the introduction of the new provisions had any noticeable impact on the actual and perceived levels of organised crime activity in the country.

3.2.2 Current s 98A Crimes Act 1961 (NZ), 2002-

In 2002, s 98A *Crimes Act 1961* (NZ) was amended to implement the UN *Convention against Transnational Organised Crime* into domestic law, to bring the *Crimes Act* provisions in line with the obligations under the Convention and its Protocols, and to "demonstrate New Zealand's determination to combat transnational organised crime in all its manifestations."[202] The new legislation expanded the application of the participation offence "to align it more closely with the Convention"[203] and also introduced two new offences relating to migrant smuggling and trafficking in persons, ss 98C, 98D *Crimes Act 1961* (NZ). Furthermore, the legislation extended the application of the offence under s 98A beyond the geographical boundaries of New Zealand to offences that occur extraterritorially, s 7A *Crimes Act 1961* (NZ).[204]

3.2.2.1 Organised criminal group

"Organised criminal groups" [205] are defined in s 98A(2) as groups of three or more people who have as one of their objectives to obtain material benefits[206] from offences punishable by at least 4

198 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 834.

199 IH Dennis, "The Mental Element for Accessories" in P Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (1987), 40 at 41.

200 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004), available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

201 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 901 (2004) available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

202 NZ, House of Representatives, *Debates* (30 May 2002), Transnational Organised Crime Bill, Second Reading (Hon Phil Goff, Minister for Justice), available at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=14166 (accessed 7 Aug 2007).

203 *Transnational Organised Crime Bill 2002* (NZ), Explanatory Note, 2.

204 Cf art 15 *Convention against Transnational Organised Crime*; see further NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 1.

205 A separate definition of "organised criminal enterprise" can be found in s 312A *Crimes Act 1961* (NZ). This definition only applies in relation to obtaining of evidence. Section 312A defines 'organised criminal enterprise' as "a continuing association of 3 or more persons having as its object or as 1 of its objects the acquisition of substantial income or assets by means of a continuing course of criminal conduct."

206 The Foreign Affairs, Defence and Trade Committee recommended "substituting the term 'material benefits' for the phrase 'substantial income and assets'", NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 2.

years imprisonment (s 98A(2)(a) and (b))[207] or to commit certain serious violent offences (s 98A(2)(c) and (d)).[208] The new definition applies to both domestic (s 98A(2)(a) and (c)) and transnational organised criminal groups (s 98A(2)(b) and (d)).[209] Similar to the definition in the *Palermo Convention*, the New Zealand definition features elements relating to the structure and objective of criminal organisations and does not require proof of any actual criminal activity.

Figure 11 "Organised criminal group", s 98A(2) *Crimes Act 1961* (NZ)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 98A(3)): o Some of them are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o Its membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from offences punishable by at least 4 years imprisonment (a) in New Zealand or (b) equivalent elsewhere; or • Serious violent offences (s 312A(1)) punishable by ten years imprisonment (c) in New Zealand or (d) equivalent elsewhere.

Structure

The single structural requirement of this definition relates to the number of people involved in the organised criminal group. Unlike international law, New Zealand's definition does not require proof of any structure or the existence of the group for some period of time. Membership is also not a separate element of this definition.

Section 98A(3) states that the internal organisational arrangements of the group are irrelevant and that a hierarchy, division of labour, and continuing membership are not essential ingredients to establish the existence of an organised criminal group. But it has been held that subsection (3) simultaneously recognises that a degree of structure and organisation exists between the persons involved in the group:[210] "[T]he organised criminal group charged involves a degree of organisation for criminal purposes and planning" that is not already a feature of other special offences: *R v Lasike & ORS* [2006] NZHC 1009 para 34 per Asher J. J Bruce Robertson notes that the provision

> contemplates the common phenomenon of organised criminal groups which have a core of full members and a penumbra of aspirants to membership, such aspirants being involved to greater or lesser extent in criminal offending by full members of the group.[211]

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207 The Foreign Affairs, Defence and Trade Committee considered retaining the structure of former s 98A by adding additional specific offences to the list in former s 98A(1) but preferred "a generic provision that defines the offences caught by reference to the maximum penalty." NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

208 See art 5 *Convention against Transnational Organised Crime*. Cf *R v K* [1995] 3 NZLR 159 at 193; *R v Matau* [1994] 2 NZLR 631. "Serious violent offence" is defined in s 312A(1) *Crimes Act 1961* (NZ).

209 Article 5 *Convention against Transnational Organised Crime*; NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 2. The Convention does not require application to groups without international connections, cf Christine Grice, New Zealand Law Society, *Submission on the Transnational Organised Crime Bill* (28 Mar 2002), available at www.nz-lawsoc.org.nz/hmtrasorgcrime.asp (accessed 2 July 2007).

210 Cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

211 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 210.

The definition in s 98A(1) encompasses a range of structures, ranging from hierarchical, traditional organisations, to more loosely structured social networks without formal roles for the participants: *R v Cara* [2005] 1 NZLR 523 per Potter J. It is possible that lawful organisational structures may also be captured by this element of the definition.[212]

It has also been held that an organised criminal group under s 98A may be formed for the commission of a single offence; it is not required that the group is aimed at continuing criminal activity: *R v Cara* [2005] 1 NZLR 823 per Potter J. On the other hand, it has been argued that groups "randomly formed for the immediate commission of an offence" do not fall under s 98A.[213] Proof of offending by members of the group does not suffice to proof the existence of an organised criminal group: *R v S* (13 May 2004, HC Gisborne, T032566, per Paterson J).

Objectives

The objective to achieve one of the aims stated in s 98A(2)(a)-(d) is the central feature of organised criminal groups in New Zealand. One or more of these objectives must be the common intention among the group members though it is possible that only one person has this objective and subsequently recruits or employs others on a continuing basis to further this goal.[214] The objective(s) of the group may relate to two kinds of offences:

- either offences punishable by four years imprisonment or more from which the group may obtain a material benefit (s 98A(2)(a) and (b)), or
- serious violent offences, punishable by imprisonment for ten years or more (s 98A(2)(c) and (d)).

The first objective in paragraphs (a) and (b) reflect the provisions in the *Palermo Convention*, targeting criminal organisations that aim to commit serious offences in order to make financial or other material profit. The offences must attract a penalty of at least four years imprisonment in New Zealand, or equivalent if committed abroad, thus effectively limiting the scope of this objective to serious property offences and other serious offences which may generate benefits for the organised criminal group, such as drug supply and trafficking, trafficking in persons, et cetera.

The second possible objective of organised criminal groups marks a sharp departure from the requirements in international law. In New Zealand, organised criminal groups can also consist of syndicates aiming to commit serious violent offences which do not generate any economic advantage for them, s 98A(2)(c) and (d). 'Serious violent offences' are further defined in s 312A(a) *Crimes Act* 1961 (NZ) and relate to offences that involve the loss of life, serious bodily injury, serious threats of bodily injury, or the obstruction of justice. The group's objective must relate to offences punishable by at least ten years imprisonment. This objective expands the definition of organised criminal group beyond the traditional parameters of organised crime and allows this provision and the participation offence in s 98A(1) to be used to criminalise gangs seeking to engage in very violent crimes.

3.2.2.2 Participation offence

Under s 98A(1) *Crimes Act 1961* (NZ):

> Everyone is liable to imprisonment for a term not exceeding 5 years who participates (whether as a member or an associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group; and—
>
> (a) knowing that his or her participation contributes to the occurrence of criminal activity; or

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212 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 209.

213 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 209.

214 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 209, cf *R v Davies* [1995] 3 NZLR 530 at 534-535.

(b) reckless as to whether his or her participation may contribute to the occurrence of criminal activity.

The offence under s 98A(1) combines a very loosely termed physical element with two mental elements (see Figure # below).

Figure 12 Elements of s 98A(1) *Crimes Act 1961* (NZ)

S 98A(1)	Elements of the offence
Physical elements	• participation (whether as a member or an associate member or prospective member) • in an organised criminal group (s 98A(2)).
Mental elements	• knowledge of the nature of the group; • knowledge or recklessness as to whether the participation may contribute to the occurrence of criminal activity, s 98A(1)(a) or (b).
Penalty	5 years imprisonment

Physical elements

The single physical element of the offence in s 98A(1) is the requirement that the accused participated in an organised criminal group as defined in subsection (2). The term "participation" is not further defined and its meaning remains uncertain.

The discussion of the participation element has focussed specifically on the example of a mechanic who repairs motorcycles for (members of) an outlaw motorcycle gang. The question whether that person could (and should be) be held liable for 'participation' in that gang has been controversial and cannot be answered definitely on the basis of the legislation.[215] The lack of a definition of the term 'participation' in organised crime laws — not just in New Zealand — is seen by some as "a grave flaw" as it is unclear to whom the offence applies.[216]

The amendment of the offence under s 98A in 2002 caused concerns that the term 'participation' may infringe on the freedom of association. It was stated from the outset that the terms 'participation' and 'association' would not be treated as synonymous as to avoid conflict with ss 16 and 18 *Bill of Rights Act 1990* (NZ) and to maintain consistent interpretation.[217] The application of the participation offence may, however, extend to passive participation or participation by mere presence.[218] It has been suggested to limit the offence to 'active' participation to ensure that the legislation is construed strictly.[219] This would also bring the offence in line with art 5(1)(a)(ii) *Palermo Convention*.

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215 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 23-25, 29.

216 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837 (in reference to former s 98A *Crimes Act 1961* (NZ)). Mullins further suggested to apply the Californian interpretation of "participation" under §186.22(a) to former s 98A: "The Californian Appeals Court in *People v Green* held that part of the actus reus for conviction under §186.22(a) consists of a person devoting substantial effort to the activities of the gang. Mere association or passive membership was held to be insufficient for a criminal offence [227 Cal App 3d 69s (1991) citing *Scales v United States* 367 US 203 at 223 (1961)]. This interpretation conforms with the principle that culpable participation is to be construed as conduct rather than mere association, which is the nature of status." (at 837).

217 NZ, Parliament, *Debates* (30 May 2002), Transnational Organised Crime Bill, Second Reading (Hon Phil Goff, Minister for Justice), available at www.beehive.govt.nz/ViewDocument.aspx?DocumentID=14166 (accessed 7 Aug 2007); NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3-4.

218 *R v Mitford* [2005] 1 NZLR 753 at para 59.

219 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837 (in reference to former s 98A *Crimes Act 1961* (NZ)); cf NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 4.

Mental elements

Section 98A(1) requires that the accused knew the nature of the group he or she participated in, ie that it is an organised criminal group pursuing one of the stated objectives in subsection (2). Paragraphs 98A(1)(a) and (b) further require proof that an accused knows or is aware that through his or her conduct he/she does or could contribute to the occurrence of criminal activity. There is no requirement that the participation makes an actual contribution to any criminal offence. J Bruce Robertson also argues that it is not necessary "that the accused knew with any great particularity either the nature of the intended conduct or the scope of any common purpose at the particular time in question." [220] An "intention to promote or further" criminal conduct (former s 98A) is no longer a mental element of the offence.

"The gist of this offence", notes Justice Baragwanath in *R v Mitford* [2005] 1 NZLR 753 at para 50, "is in knowingly taking part as a member of the group which has come together to commit the proscribed activity, whether or not any substantive offence has been committed." In this case, the act of participation involved reprisal violence and demanding with menaces (so-called taxing) on behalf of the Black Power gang in South Auckland.

Criminal responsibility for the offence under s 98A may arise on the basis of mere recklessness. While it is required that an accused knows the nature of the group, it suffices if he or she is reckless, ie has some awareness of the possibility that his or her participation may contribute to the occurrence of criminal activity.[221] The low threshold required to establish recklessness has led to criticism that liability for the offence extends beyond "criminal participation" to "mere participation". On this point, the New Zealand Law Society remarked:

> [T]he provisions may catch law-abiding adult family members or social or business contacts of a participant in an organised criminal group. Such innocent contacts might well be considered to be 'participants' simply because they were aware that the person with whom they had innocent dealings was a participant in an organised criminal group.[222]

Others, in contrast, argue that the recklessness requirement is sufficient to limit liability to accused who

> deliberately run a known risk when it was unreasonable in the circumstance to do so. This is a high threshold. This clearly excludes from liability any unwitting associates, such as a secretary of a company, or those who have good reasons, such as social contacts and family members.[223]

3.2.3 Observations

Like Canada, New Zealand introduced special provisions for participating in criminal organisations in addition to existing conspiracy provisions some time before the *Convention against Transnational Organised Crime* was drafted. Mirroring the developments in Canada, the thresholds of the original definition of organised criminal group and the associated offence were very high and the provisions found very limited practical applications.

The amendments to s 98A *Crimes Act 1961* (NZ) in 2002 resulted in a "dramatic increase in the bringing of prosecutions",[224] see Figure 13 below. The number or people prosecuted for the participation offence jumped from only two in 2002, to 70 in 2003, and up to 156 in 2004. The

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220 J Bruce Robertson (ed), *Adams on Criminal Law* (4th student ed, 2005) 210.

221 *R v Cunningham* [1957] 2 QB 396. See further *R v Harney* [1987] 2 NZLR 576 at 579; *R v Tihi* [1989] 2 NZLR 29 at 32; cf *R v Tihi (No 2)* 14 June 2006, HC Tauranga CRI2003-047-00415 per Heath J.

222 Christine Grice, New Zealand Law Society, *Submission on the Transnational Organised Crime Bill* (28 Mar 2002), available at www.nz-lawsoc.org.nz/hmtrasorgcrime.asp (accessed 2 July 2007).

223 NZ, Foreign Affairs, Defence and Trade Committee, *Transnational Organised Crime Bill 2002* (NZ), Commentary, 3.

224 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004) available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

greater number of prosecutions and convictions, beginning in 2003, demonstrates the much greater use of the new offence which was seen as "more applicable to the gang situation in New Zealand."[225]

Figure 13 Number of people prosecuted and convicted under s 98A *Crimes Act 1961* (NZ), 1997-2006[226]

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
prosecutions	0	0	8	3	2	2	70	156	42	54
convictions	0	0	0	1	1	0	10	19	5	11

The increasing numbers of prosecutions and convictions that followed the amendment in 2002 is unsurprising given the broader scope of the new definition of organised criminal group and of the participation offence in s 98A *Crimes Act* 1961 (NZ). The current provisions are capable of capturing more diverse types and much greater numbers of criminal groups and allow for the criminalisation of persons more remotely connected to the activities of criminal organisations.

Questions about the appropriate limitations of criminal liability for organised crime offences have been discussed in earlier parts of this study. Of particular concern in New Zealand is the inclusion of recklessness as a possible mental element of the participation offence which creates a considerable expansion to the application of the offence. Moreover, lack of any firm structural requirements and the inclusion of groups aiming to commit "serious violence offences" broaden the scope of the offences beyond organised crime committed for economic reasons. It is perhaps comforting to note that New Zealand courts have been reasonably modest and restrictive in interpreting the new laws, though there are few safeguards to prevent more interventionist courts from applying the provisions much more widely in future cases. Despite these concerns, other jurisdictions, such as New South Wales, have adopted provisions similar to that of New Zealand and, as will be shown, have broadened their application even further.

Figure 13 shows that after a considerable increase in the number of prosecutions and convictions between 2002 and 2004, the number of people prosecuted and convicted for offences under s 98A fell again slightly in more recent years. It is unclear what factors contributed to this decline and whether these figures are reflective of any decrease in the level of organised crime activity in New Zealand. There is, at present, no empirical evidence to suggest that the legislation has deterred or otherwise prevented participation in organised crime groups. In May 2007, the New Zealand Government did remark that "the full potential of that legislation has not been realised, and [that] a review of section 98A is under way to find ways of making it more effective."[227] No information about proposed amendments was available at the time of writing.

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225 NZ, House of Representatives, *Debates* (16 Feb 2004), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 899 (2004), available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

226 NZ, House of Representatives, *Debates* (21 May 2007), Questions for Written Answer (Hon Phil Goff, Minister for Justice), 8498 (2007), available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

227 NZ, House of Representatives, *Debates* (16 May 2007), Questions for Written Answer (Hon Mark Burton, Minister for Justice), 8326 (2007), available at www.parliament.nz/en/NZ/PB/Debated/QWA (accessed 2 July 2007).

3.3 China

3.3.1 Context and Background

3.3.1.1 Patterns of organised crime in China

Organised crime has been present in China for many centuries and many Chinese triads are based on traditions and networks that have their origin in imperial times. The word 'triad' means the unity of the three essential elements of existence: heaven, earth, and humanity. It is well documented that triads first emerged in the 12th century and were well established throughout China during the Qing dynasty (1644-1911). The triads also exercised significant political influence, during the Mongol occupation in the 1200 and 1300s and, more recently, in the Boxer rebellion of 1899-1901 and the 1911 revolution. Dr Sun Yat-Sen, founder of the Republic of China, was himself a triad member, and General Chiang Kai-shek and the KMT nationalist movement were also strongly supported by secret societies, including the so-called 'Green Gang' which later retreated with Chian Kai-shek to Taiwan.[228]

After the Communists seized power in 1949, triads and other criminal syndicates were largely eradicated.[229] Starting in the 1950s, the Government in Beijing launched several campaigns to systematically suppress the triads and their influence. These campaigns frequently involved great numbers of arrests and executions and also forced many syndicates to shift to Hong Kong, and to a lesser degree, to Macau and Taiwan.[230]

The transition from a centralised planned economy to a socialist market economy that began in China in 1978 under Deng Xiaoping has brought with it new levels of organised crime. The economic reforms were also accompanied by rising unemployment in some parts of the country and by a breakdown of social-control mechanisms throughout China. These developments led to a resurgence of domestic syndicates and also to a greater influx of criminal organisations from Hong Kong, Macau and abroad that try to infiltrate China and take advantage of its rapid modernisation and economic growth.[231] Moreover, there are frequent reports of criminal organisations receiving protection or active collaboration from corrupt government officials. This problem is exacerbated by the "political manipulation of the market" where "[m]any officials who hold power in the allocation of resources are ready to sell their power to criminal gangs in exchange for material benefits."[232]

It is said that in the 1980s, organised crime initially emerged in the southern Guangdong, Hainan, and Hu'nan provinces and later gradually spread north and west across the country.[233] Among the

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228 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 91–92; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87–88; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 54; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 2–3; Ernst Eitel, *Europe in China* (1895) 227.

229 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 78*;* Mei Jianming, "China's Social Transition and Organised Crime", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 204 at 207.

230 Cf Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 92; Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 336–337.

231 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 95–106; Mei Jianming, "China's Social Transition and Organised Crime", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 204 at 207–211; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 90; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 85; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 at 186.

232 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 95–96. See also Børke Bakken, "Comparative Perspectives on Crime in China", in Børke Bakken (ed), *Crime, Punishment and Policing in China* (2005) 64 at 88–92.

233 Zhao Guoling "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its*

most notorious groups are the 14K,[234] Wo Shing Tong, and Sun Yee On groups from Hong Kong and Macau, and the several groups that spread from Taiwan into Fujian province.[235] According to some statistics, in the late 1980s approximately 30,000-40,000 criminal organisations were known to police, and some 150,000 members of criminal organisations were arrested annually. These figures grew dramatically in the mid 1990s when on average 140,000 gangs were uncovered, 530,000 gang members captured, and 390,000 cases dealt with each year.[236] Other sources report that "over the past 20 years, mafia-style gang crime has increased sevenfold".[237]

This apparent surge in organised crime activity — seen by some observers as "an organisational and potentially political threat to the communist regime"[238] — led to the adoption of a new policy and enforcement campaign in 2001 known a "Yanda zhengzhi douzheng", or "Strike Hard and Rectification Struggle". This strategy focuses specifically on three categories of criminal activity including crimes committed by large mafia-style criminal syndicates and other organised criminal groups. The two key features of the 'Yanda' policy are severity of punishment (including heavy mandatory punishment) and swiftness in the criminal process dealing with criminals.[239]

3.3.1.2 Criminal Law in China

China's current criminal law bears many similarities to the tradition and pattern of Continental and Russian penal codes. The *Criminal Law of the People's Republic of China*, China's principal criminal law statute, was first introduced in 1979, following a period that had no comprehensive codification of the criminal law. The current *Criminal Law* was introduced in 1997 and was part of an extensive reform of China's criminal justice system, substituting the *Criminal Law* 1979 which had become largely obsolete.[240]

Prior to the reforms of 1997, China's criminal law only contained provisions that rudimentary dealt with organised crime. The *Criminal Law* 1979 (China) in art 22 followed European and particularly Soviet criminal laws by creating liability for complicity, ie "a crime committed jointly and intentionally by two or more persons". This general provision was ill-suited to criminalise organised crime. The reference to ringleaders "who perform the role of organising, planning and leading criminal groups or criminal assemblies" in former art 86 was largely relevant only for counterrevolutionary offences. Chinese scholars remarked that

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Control in the People's Republic of China (2004) 301 at 301–302.

234 The 14K, named after their first headquarter at No 14 Po Wah Road in Guangzhou, was established in 1947 by General Kot Sio Qong who fled to Hong Kong with his followers in 1949; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 88.

235 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 100 (with reference to original sources in Mandarin).

236 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 265; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 93 (with reference to primary sources in Mandarin).

237 Susan Trevaskes, "Severe and Swift Justice in China" (2007) *British Journal of Criminology* 23 at 25 with reference to Chinese primary sources (in Mandarin).

238 An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 79.

239 Susan Trevaskes, "Severe and Swift Justice in China" (2007) *British Journal of Criminology* 23 at 23–26; Murray Tanner, "Campaign Style Policing in China and its Critics", in Børke Bakken (ed), *Crime, Punishment and Policing in China* (2005) 171–181; Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 251; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 95.

240 See further, Cai DingJian, "China's Major Reform in Criminal Law" (1997) 11 *Columbia Journal of Asian Law* 213–218.

> these provisions could not be effectively used to punish offenders, who either actively participated in or led and actively organised a criminal organisation, but who could not be proven to have carried out specific criminal acts.[241]

China's current criminal law differentiates between two types of criminal association: criminal groups and criminal organisations of a triad/syndicate nature. Since the amendment in 1997, the *Criminal Law* contains two provisions relating to these two types of organised crime: The first one, art 26 is a general extension of criminal liability for cases involving "criminal groups" (see Section 7.2 below). The second provision, art 294, is a specific offence for large criminal syndicates ("criminal organisations with an underworld character"; see Section 7.3).[242] China also signed the *Convention against Transnational Organised Crime* on December, 12 2000; it was adopted by the Standing Committee of the National People's Congress on August 27, 2003.

3.3.2. Extension of criminal liability, Article 26

Article 26 *Criminal Law* 1997 (PRC) extends liability for principal offences to certain members, associates, and leaders of criminal groups. This provision is part of Chapter III, Section 2 which sets out the general principles of criminal liability for joint crimes; in contrast to art 294, the principles in art 26 are not a specific offence; they apply to all offences under the *Criminal Law* 1997 (China).

> Article 26 *Criminal Law* 1997 (China)
>
> A principal criminal refers to any person who organises and leads a criminal group in carrying out criminal activities or plays a principal role in a joint crime.
>
> A criminal group refers to a relatively stable criminal organisation formed by three or more persons for the purpose of committing crimes jointly.
>
> Any ringleader who organises or leads a criminal group shall be punished on the basis of all the crimes that the criminal group has committed.
>
> Any principal criminal not included in Paragraph 3 shall be punished on the basis of all the crimes that he participates in or that he organises or directs.

Paragraph 2 of this article defines the term 'criminal group' as an organisation of three or members with a "relatively" firm structure and with the purpose to jointly commit criminal offences (see Figure 14 below).

Figure 14 "Criminal group", art 26[2] *Criminal Law* (PRC)[243]

Terminology Elements	**Criminal Group**
Structure	• three or more persons; • relatively stable organisation.
Activities	• [no element]
Objectives	• committing joint crimes.

The concept of criminal group in art 26 is very simple: the only requirements are three or more persons who are somewhat organised and who plan to jointly commit criminal offences. The

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241 Yu Zhigang, Chinese People's University, cited in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 94.

242 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 269; Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 97.

243 Cf Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 269.

definition is not limited to a specific nature of planned offences and there is no requirement that any offences are actually committed. In comparison to other definitions of criminal group and criminal organisation, the Chinese model is much looser and broader. It has been observed that

> [m]any ordinary crimes committed by more than two offenders, which are not considered criminal in the Western context, are regarded in China as organised crime, and such crime has often attracted severe punishment under the *Criminal Law* 1997.[244]

It needs to be noted, however, that leading, organising, participating in or being a member of a criminal group (within the meaning of art 26) are on their own not criminal offences. The chief purpose of art 26 is to hold organisers and other ringleaders criminally responsible as principals for any actual offences committed by a criminal group.[245] This article thus extends liability beyond the usual parameters of secondary liability and conspiracy. But more importantly, art 26[3] and [4] ensure that ringleaders and other directors of criminal groups face the same penalty as those actually carrying out the crimes. Ronald Keith and Zihiqui Lin note that "the underlying intention of art 26 was to punish severely all of the individuals involved in criminal organisations."[246]

3.3.3. Offence for Criminal Syndicates, Article 294

Article 294 *Criminal Law* 1997 (China) was introduced in 1997 as part of China's systematic campaign to suppress organised crime.[247] The article contains a special offence relating to criminal syndicates.

> Article 294 *Criminal Law* (China)
>
> Whoever organises, leads, or takes an active part in organisations in the nature of criminal syndicate to commit organised illegal or criminal acts through violence, threat or other means, such as lording it over the people in an area ['plays the tyrant in a locality'], perpetrating outrages, bullies and oppresses or cruelly injures or kills people, thus seriously disrupting economic or social order shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years; other participants shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.
>
> Members of foreign criminal organisations ["the mafia abroad"] who recruit members within the territory of the People's Republic of China shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.
>
> Whoever, in addition to the offences mentioned in the preceding two paragraphs, commits any other offences shall be punished in accordance with the provisions for several crimes.
>
> Any functionary of a State organ who harbours an organisation in the nature of criminal syndicate or connives at such an organisation to conduct criminal activities shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or deprivation of political rights; if the circumstances are serious, the person shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years.

3.3.3.1 Criminal organisations of a syndicate/triad nature

The offence under art 294 *Criminal Law* 1997 (China) applies only to large criminal organisations with a syndicate, triad or "underworld" character. Article 294 does not further define the meaning of "organisation in the nature of criminal syndicate." In the literature, the term has found a variety of translations such as 'underworld character' and 'triad types'.

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244 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 98. Cf An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 83.

245 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102.

246 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 97.

247 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 249.

From an outside perspective, it is difficult to draw a clear line between the term "criminal group" used in art 26 and the criminal syndicates referred to in art 294. It is perhaps more useful to see this as a continuum of criminal organisation in which the latter type is generally understood as the more serious and more powerful organisation: "In China the criminal syndicate is seen as the ultimate representation of organised crime."[248] Chinese authors have explained the type of organisation referred to in art 294 as "underworld crime",[249] "the union of criminal organisation or an organised criminal network". Underworld crimes are seen "as the most serious organised crime [that] have a larger scale of organisation and cause more serious harm than the formal organised crime organisation."[250] Ding Mu-Ying & Shan Chang Zong define underworld crimes as:

> [A] criminal organisation having a long-term target, a hierarchy, rules and stable members, with the aim of pursuing economic interests, committing crimes by means of intimidation, violence and bribery.[251]

Zhang Xin Feng notes that local criminal groups generally are more loosely structured based on family and kinship (frequently referred to as guanxi[252]) that can often be found in rural areas.[253] Triad syndicates, in contrast,

> usually assign explicit organisers and ringleaders, with stable principals above a huge membership. They are patriarchally bound with stringent rules and discipline and are armed with both weapons and advanced means of communication. They commit crimes such as murder, robbery, hostage-taking, rape, extortion, and trafficking in drugs and merchandise. In certain metropolitan areas, they have gone from such predatory crimes as over robbery, kidnapping and extortion to covert dealings such as producing and trafficking in drugs, snake-heading illegal immigrants, smuggling, fraud, the ownership of casinos, and prostitution.[254]

Scholarly opinion remains divided about the interpretation of this term. In 2000, the Supreme People's Court offered some direction by issuing a set of "Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature."[255] The key requirements of this document are set out in the following table.

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248 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* 249 at 249.

249 Zhao Guoling "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 301 further separates criminal syndicates from a Mafia-type "underworld society". He argues: "The criminal syndicate is a proper legal concept in PR China, indicating those criminal groups with the nature and characteristics of underworld society but smaller in scale and degree. The syndicate stands between the criminal group and the underworld society. [...] The 'underworld society' is an English term referring to those criminal organisations that have the capacity to exercise an illegal control over people or society on a large scale."

250 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 270; cf Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 301.

251 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

252 Cf An Chen, "Secret Societies and Organised Crime in Contemporary China" (2005) 9(1) *Modern Asian Studies* 77 at 93.

253 Cf Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 ay 187.

254 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 250.

255 See Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

Figure 15 Interpretation of "Criminal organisation of a syndicate nature", art 294[1] *Criminal Law* 1997 (China)[256]

Terminology Elements	**Criminal organisation with a syndicate/underworld/triad nature**
Structure	• tightly developed organisational structure that comes with internal rules of conduct and discipline, a significant membership, the presence of leaders, and long-standing members;
Activities	• bribery, threatening, inducing or forcing state functionaries to participate in the organisation's illegal activity and to provide illegal protection; • use of violence, or the threat of violence, and disruption as it engages in racketeering and the monopolising if commercial establishments, organising violent brawls, trouble making, physical assault of innocents, and other criminal activities that seriously undermine social and economic order.
Objectives	• Financially independent and the purpose of its criminal activity is financial gain.

The "explanations" provided by the Supreme People's Court combine elements relating to the structure and activities of criminal syndicates with a requirement reflecting their economic objective.

Structure

To fall within the scope of art 294, it is necessary to prove that the criminal syndicate has firm organisational structures, clear hierarchies, a pool of members, and one or more leaders. This reflects the generally held view that "[c]riminal syndicates in PR China normally have a specific leading group with a fixed core, rigorous internal duty division and strict discipline."[257] It also marks a difference to criminal groups within the meaning of art 26 which includes small and loose associations.

According to Mu Ying and Chang Zong, the hierarchical organisation of 'underworld' syndicates "is the most important feature":

> It shows in three aspects: (1) the organising activities and plans are long-term and the members are stable and obstinate; (2) the criminal organisation has a hierarchy in which the subordinates are obedient to superiors, who usually do not commit crimes directly in order to avoid being accused; (3) there are certain rules inside.[258]

Article 294 has been specifically tailored to suit the organisational model used by Chinese triads. The structural requirements also fit Mafia-type groups and even outlaw motorcycle gangs with strong hierarchies and a clear division of ranks and duties. This model, however, does not accommodate loose networks of individuals that act in concert but are not bound by formal rules and membership.

Activities

According to the Supreme People's Court's explanations, criminal syndicate are characterised by two activities. First, it is required that they engage in one of several violent or coercive activities.

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256 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin). Cf Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 272.

257 Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 302 (with many case examples).

258 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

Second, it is necessary to show that the syndicates collaborate with government officials by way of corruption or coercion.

The first of these elements refers to activities commonly associated with organised crime, including, for example, threats, violence, monopolising criminal markets, or controlling geographical areas.[259] The use of threats and intimidation are used by criminal organisations as enforcement tools. The creation of fear is a way to maintain order and discipline, to prevent disobedience and also to facilitate the conduct of the organisations' criminal activities. Intimidation and violence are crucial instruments for resolving conflicts, silencing potential witnesses and eliminating business rivals and law enforcement agents who interfere with the criminal organisations' operations.[260]

The second activity of 'criminal organisations of a syndicate nature' is the involvement of government officials ("state functionaries") who are bribed, threatened or otherwise forced to support the criminal organisation. While corruption and bribery are common phenomena associated with organised crime and are also well documented in China, this requirement has often been difficult to prove in cases involving charges under art 294. Keith and Lin note that in some cases it has been impossible to prove the involvement of state officials in the syndicate and accordingly the criminal organisation could not be tried under art 294.[261] Due to these outcomes, on April 28, 2002 the Standing Committee of the National People's Congress issued legislative interpretations stating that "while state functionaries can be members of a criminal organisation, this is not a necessary element that determines the existence of such organisation."[262]

Objectives

The fourth and final element of the Supreme People's Court's explanations relates to the criminal syndicates' objective. As with many other definitions of criminal organisations discussed in this study, the purpose of the criminal syndicate must relate to financial or other material benefit. The court held that criminal syndicates of a triad nature have to be "financially independent and the purpose of its criminal activity is financial gain". "The basic object of underworld crime", note Mu-Ying and Chang Zong,

> is to pursue economic interests, but not political aims [...]. In order to meet this [objective], they usually (1) provide illicit goods and services to reap colossal profits such as trafficking drugs and controlling prostitution, etc; (2) commit some plundering activities such as large scale stealing, robbing, blackmailing and collecting '[protection] fees', etc; (3) use the [proceeds of crime] to infiltrate the legal commercial areas with potential profits, but the means they use are usually illegal.[263]

3.3.3.2 Organising, leading, participating in a criminal syndicate

Article 294 creates three separate offences for persons associated with criminal organisations of a syndicate nature:

- organising, leading or participating in this type of criminal organisation, para [1];
- entering China to develop or spread foreign criminal organisations, para [2]; and
- harbouring or conniving these organisations, para [4].[264]

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259 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

260 Andreas Schloenhardt, *Migrant Smuggling* (2003) 109.

261 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 103.

262 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 104 (with reference to original source in Mandarin).

263 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at 271.

264 Ding Mu-Ying & Shan Chang Zong, "The Punishment and Prevention of the Organised Crime, Smuggling Crime, and Money Laundering in China" (1998) 69 *International Review of Penal Law* 265 at

Article 294[1]

The first and principal offence under art 294 creates criminal liability for key leaders and participants of criminal organisations, punishable by up to ten years imprisonment. Lower ranking members and associates of criminal syndicates face so-called "principal punishments"[265] of up to three years fixed-term imprisonment,[266] criminal detention (of up to six months),[267] public surveillance,[268] or "supplementary punishment"[269] by deprivation of political rights.[270]

Figure 16 Elements of art 294[1] *Criminal Law* 1997 (China)

Art 294[1]	Elements of the offence
(Physical) elements	• organising, leading or taking active part in; • criminal organisation of a syndicate/triad nature.
(Mental) elements	• Intention • Purpose: to commit criminal acts through violence, threats or other means [...] thus seriously disrupting economic or social order.
Penalty	○ Organisers, leaders, "active" participants: 3-10 years fixed-term imprisonment; ○ Other participants: up to 3 years fixed-term imprisonment, criminal detention, public surveillance, or deprivation of political rights.

Under art 294[1], it is an offence to organise, lead, or actively participate in a criminal syndicate. In contrast to art 26, leading, organising, participating in — and also being a member of a criminal syndicate ("other participants") — are offences in their own right.[271]

The offence requires proof of two (physical) elements relating to the nature of the organisation ("criminal organisation of a triad nature") and to the type of involvement ("organising, leading, taking an active part in"). Further, it is necessary to show that an accused participated in or organised the syndicate in order "to commit organised criminal or illegal acts through violence or other means" which may "seriously disrupt economic or social order". Article 294[1] features as non-exhaustive list of criminal activities including, for example, injuring or killing people, or controlling a geographical area by way of extortion ("playing the tyrant in a locality"). Liability under China's *Criminal Law* 1997 is limited to intentional acts (unless liability for negligence is specifically provided).[272]

As mentioned before, higher penalties apply for key organisers, leaders, and active participants, while lower penalties are provided for other participants. The Supreme People's Court further ruled that:

> Ordinary members of criminal organisations with a triad nature who only take part in the criminal organisation due to 'threats or deception' and who have not committed any crime are not deemed guilty of the crime of participating in a criminal organisations with a triad nature. [273]

269; Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 250.

265 Article 33 *Criminal Law* 1997 (China).

266 Articles 45, 46 *Criminal Law* 1997 (China).

267 Articles 42–44 *Criminal Law 1997* (China).

268 Articles 38–41 *Criminal Law* 1997 (China)

269 Article 34 *Criminal Law* 1997 (China).

270 Articles 54–58 *Criminal Law* 1997 (China).

271 Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 103.

272 Articles 14-15 *Criminal Law* 1997 (China).

273 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

The Court also held that government officials "who lead, organise, or participate in a criminal organisation with a triad nature will be more severely punished than an ordinary citizen who commits the same crime."[274]

Article 294[2]

In the second paragraph of art 294, Chinese criminal law contains a separate offence for foreign criminal organisations attempting to infiltrate or recruit in China. This paragraph can be seen as a direct response to the growing presence of criminal organisations with roots in Hong Kong, Macau, Taiwan and elsewhere outside the mainland. The Chinese translation of art 294 distinguishes between domestic, triad-style syndicates [para 1] and foreign "mafia-type" organisations [para 2].[275]

Article 294[4]

The fourth paragraph of art 294 *Criminal Law* 1997 (China) is specifically aimed at suppressing the bribery of government officials by creating a separate offence for state functionaries who harbour or connive criminal organisation with a syndicate nature. In serious circumstances, officials may face penalties of up to ten years fixed-term imprisonment.

3.3.4 Observations

China's criminal offences relating to organised crime are a peculiar mix of general extensions to criminal liability and specific offences. Further, the *Criminal Law* 1997 (China) combines domestic phenomena with foreign influences. The relevant offences reflect the concept of organised crime in the *Convention against Transnational Organised Crime* while also capturing the unique features of Chinese triads. Corruption and bribery — which have plagued China in the last two decades — also feature very prominently in China's organised crime offences and have been a principal target of enforcement action, often resulting in heavy sentences and executions.

In combination, arts 26 and 294 cover a much broader spectrum of criminal organisations than international law and Western criminal laws (such as Canada and New Zealand). In part, this has been explained by the fact that organised crime is understood differently in China and is interpreted much broader than similar Western concepts. But on the other hand, the previous discussion has shown that even Chinese scholars remain uncertain about the true boundaries of organised crime and about the distinction between criminal groups (art 26) and "criminal organisations of a triad nature" (art 294).[276]

While official statistics show very high numbers of arrests and prosecutions involving criminal organisations, without further research of the domestic patterns and dimensions of organised crime in China, it is not possible to make conclusive statements about the impact of China's organised crime offences. There is, at present, no evidence to suggest that organised crime in China is declining, but there is equally nothing to support the view that organised crime is further escalating in recent years. China's strong stand and tough enforcement action against criminal organisations under the Yanda policy is well documented. However, some critics have argued that the criminal offence in the *Criminal Law* 1997 are too soft to effectively suppress organised crime. Zhao Guoling, for instance, remarks that

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274 Supreme People's Court, *Explanations for the Applications of Law Concerning the Adjudication of Cases Involving Criminal Organisations with a Triad Nature*, in Ronald Keith & Zhiqui Lin, *New Crime in China* (2006) 102 (with reference to the original source in Mandarin).

275 Zhang Xin Feng, "Organised Crime in Mainland China and its Counter-Measures against Cross-border Organised Crime", in Roderic Broadhurst (ed), *Bridging the Gap: A Global Alliance Perspective on Transnational Organised Crime* (2002) 249 at 249.

276 Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 306.

> The maximum penalty of ten years imprisonment is too lenient and is not sufficient for a crime with such huge social consequences. [...] punishment as over ten years imprisonment, life imprisonment and even death should be introduced for serious offenders.[277]

[277] Zhao Guoling, "Organised Crime and Its Control in PR China", in Roderic Broadhurst (ed), *Crime and its Control in the People's Republic of China* (2004) 301 at 306.

3.4 Hong Kong SAR

Hong Kong, along with Macau, is one of two Special Administrative Regions (SARs) of the People's Republic of China. After over 155 years under British rule, Hong Kong was returned to China on July 1, 1997. This handover was agreed upon in the *Joint Declaration on the Question of Hong Kong* between China and the UK of December 19, 1984.[278] This declaration sets out Hong Kong's status under Chinese rule and the *Basic Law,* the SAR's quasi-constitution. The *Joint Declaration* creates a "one country, two systems" policy and ensures that Macau maintains a "high degree of autonomy" over all matters except foreign affairs and defence and also stipulates that Hong Kong's laws (referred to as ordinances), including its criminal law, continue operation beyond the 1997 handover.

3.4.1 Organised Crime in Hong Kong

Organised crime features very prominently in the history of Hong Kong for two principal reasons: first, the former colony has been a major transit point for narcotic drugs and, second, Hong Kong is a major base for a great number of triad societies.

3.4.1.1 Opium and other illicit drugs

When Hong Kong was established as a British colony in 1841 it "was founded on opium".[279] For almost a century, revenues from the opium trade were among the most important sources of government income and the drug trade was regulated and controlled to protect and ensure this source of revenue.[280] Legislation to prohibit the sale of opium and criminalise other aspects of the drug trade began in 1932 and gradually led to a complete prohibition. But this development coincided with the shift of many triads from mainland China to Hong Kong and the subsequent emergence of a flourishing black market for illicit drugs, both for local consumption and for export to other countries in the region, in North America, and Europe. Karen Joe Laider et al remark that

> the withdrawal of the Hong Kong government from the opium trade had the effect of turning the entire drug trade over to organised crime. From this point onward the drug trade would be more or less free to follow consumer demand as well as the dictates of organised crime.[281]

Today, heroin and other opium based substances continue to be brought into Hong Kong from Myanmar via China, while most amphetamine-type stimulants and their precursors (especially ephedrine) usually originate in mainland China.[282]

3.4.1.2 Criminal organisations in Hong Kong

Organised crime in Hong Kong is often synonymous with Chinese triad societies. A great number of triad societies maintain a presence in the former colony since the 1800s. The victory of the communists in mainland China and the rigid suppression of triads that followed caused many organisations and their members to shift to Hong Kong and take advantage of Hong Kong

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278 Signed at Beijing, Dec 19, 1984, 1399 UNTS 60.

279 The First Opium War lasted from 1839-1842, culminating in the Treaty of Nanking, which opened up China to trade and ceded Hong Kong to the British Empire. See further Ernst Eitel, *Europe in China* (1895) 75–95.

280 Alfred McCoy, "From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade" (2000) 28 *Fordham Urban Law Journal* 307 at 317–318; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 3–4.

281 Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 7.

282 Alfred McCoy, "From Free Trade to Prohibition: A Critical History of the Modern Asian Opium Trade" (2000) 28 *Fordham Urban Law Journal* 307 at 344; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 9, 11; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 185.

booming and liberal market economy. Jon Vagg noted that the economic differential between China and the then British colony (which has been maintained in the 'one country, two systems' policy) accompanied by "an attempt to impose various kinds of border controls can in some circumstances constitute an opportunity for criminal activity."[283] Other writers have described Hong Kong as "the undisputed capital of modern day triads".[284] When Hong Kong returned to Chinese rule in 1997, it was widely expected that the triads would suspend their presence in Hong Kong and relocate elsewhere. However, most observers agree that "the reverse turned out to be the case".[285]

In 1999, Hong Kong Police reported that it was aware of fifty triad societies operating in the SAR, of which fifteen to twenty regularly come to the attention of local authorities.[286] It has been estimated that there are between 30,000 and 160,000 triad members in Hong Kong.[287] The 14K, Who Shing Wo (the Wo groups), and Sun Yee On groups are among the most notorious Hong Kong triads.[288] Their activities cover a great range of illegal undertakings including the smuggling of various contraband such as cigarettes, artefacts, and motor vehicles;[289] migrant smuggling from China into Hong Kong but also to destinations further afield such as North America, Australia, and Europe;[290] trafficking in persons;[291] prostitution and the brothel industry;[292] illegal gambling, also including online betting and soccer gambling;[293] loan sharking and debt collection;[294] and large-scale credit card and identity card fraud.[295]

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283 Jon Vagg, "The Borders of Crime: Hong Kong-China Cross-Border Activity" (1992) 32(3) *British Journal of Criminology* 310 at 310.

284 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178 referring to a US Senate Committee report.

285 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 84–85.

286 Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999. For a list of triad societies and other criminal groups in Hong Kong see James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 208; and also Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 49.

287 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 47; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 18. James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 206 cited reports stating that "1 out of every 20 residents of Hong Kong may be a member or affiliate of an organized criminal group".

288 Yiu Kong Chu, "Hong Kong Triads after 1997" (2005) 8(3) *Trends in Organised Crime* 5 at 9-11. Cf James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 207.

289 Jon, "The Borders of Crime: Hong Kong-China Cross-Border Activity" (1992) 32(3) *British Journal of Criminology* 310 at 311–319.

290 Andreas Schloenhardt, *Migrant Smuggling* (2003) 141–142; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 183–184; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 183 at 190–191.

291 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 188.

292 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 52; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 7.

293 Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 361–362; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 53; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 7/

294 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 187; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 6–7.

295 HKSAR v Lee Tsung Lin [2002] 2 HKLRD H9; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 186.

Many triad activities are accompanied by threats, extortion, violence, and kidnappings which are used to eliminate or threaten competitors, witnesses, members of the triads, but also business and political figures.[296] To increase profits, raise funds, and to conceal their criminal activities and proceeds of crime, the larger criminal organisations also operate multiple legitimate enterprises.[297] Legal activities of triad societies in Hong Kong frequently involve local transport companies and the film industry.[298]

In the literature and among law enforcement agencies, there is some disagreement about the structure and organisation of triads. Chinese triad societies are traditionally portrayed as strictly hierarchical organisations with firm membership structures, clear assignments of roles and duties, and strict codes of discipline. Lo Shiu-Hing, for instance, found that triads are generally

> led by a dragon head with the assistance of incense masters who are responsible for rituals and initiation, red poles who are fighters, straw sandals who deal with liaison and communication work, white fans who are the planners and administrators, and ordinary members.[299]

One characteristic of triad societies is the use of visual or audible identifiers. Triads traditionally use initiation rituals, insignia, symbols, and tattoos. Procedures such as slitting fingertips and mingling or sucking blood, pricking the middle fingers or marking the finger with red dots are used to initiate members and create a sense of belonging. Triads also use youth and street gangs as a pool for new recruits.[300] Historically, triad membership cannot be terminated and is based on the premise 'once a member, always a member'. The rituals employed by triads visually label new and existing members, and mark them for life. Triads also use hand signals and group jargon — sometimes referred to as 'triad language' — to communicate.[301]

But not all criminal organisations in Hong Kong are of the same design and structure as traditional triad societies and some reports suggest that many groups have adopted more flexible structures and are better described as non-hierarchical, decentralised collections of several criminal groups[302] (similar perhaps to the chapter-structure of outlaw motorcycle gangs). The Big Circle

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296 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 4–5; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 53; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 176; James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 210.

297 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 57.

298 James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 209–210.

299 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177. See also Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999.

300 Cf Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 522; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87, 89–90; Karen Joe Laidler, *The Hong Kong Drug Market* (2000) 10; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 6.

301 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 263, 279–281; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 87; Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 178.

302 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 476–486; James McKenna, "Organised Crime in the Former Royal Colony of Hong Kong", in Patrick Ryan & George Rush (eds), *Understanding Organised Crime in Global Perspective* (1997) 205 at 207; Yiu Kong Chu, "Global Triads: Myth or Reality?", in Mats Berdal & Mónica Serrano (eds), *Transnational Organized Crime & International Security* (2002) 184; Ip Pau Fuk, "Organised Crime in Hong Kong", paper presented at the *Organised Crime and the 21st Century Seminar*, The University of Hong Kong, 26 June 1999.

Gang (or Big Circle Boys), for instance, is Hong Kong's biggest non-triad group and is based on a non-hierarchical network of many mainland Chinese who reside in Hong Kong illegally, but the name of this triad has also been used by gangs in Macao and North America with no obvious connection to the Hong Kong based syndicate.[303] Profits usually remain with local gangs and are not collected centrally.[304] It has been found that especially in the illicit drug trade and also in the human smuggling business, many organisations are based on loose, informal connections between people that collaborate if and when opportunities — legitimate and illegitimate — arise. For these groups, the triad system may only be relevant in order to establish connections between individuals. Sheldon Zhang and Ko-lin Chin, for instance, believe that

> The market conditions and operational requirements of human smuggling and heroin trafficking are vastly different from those of the entrenched triad societies or other established Chinese crime groups. Their lack of involvement in these transnational activities is not coincidental; rather, it is determined by the deficiencies inherent in their traditional organisational structure.[305]

Many triad societies are also closely connected to the business sector, senior administrators, and corrupt government officials in Hong Kong and now also in mainland China. Bertil Lintner remarked that: "While the criminals live outside the law, they have never been outside society."[306]

3.4.2 Organised and Serious Crime Ordinance

In Hong Kong, criminal law is a mixture of common law and statutes. The general principles of criminal liability are largely based on English common law while most of the special offences are set out in the *Crimes Ordinance* which came into operation on December 31, 1972. The *Crimes Ordinance* also contains provisions for attempts (s 159G) and conspiracy (s 159A) which are for the most part based on English models. The *Convention against Transnational Crime*, which has been signed by China, now also applies to Hong Kong.

In addition to the *Crimes Ordinance*, Hong Kong has specific provisions for organised crime, especially triad groups, in the *Organised and Serious Crime Ordinance*[307] and the *Societies Ordinance*. The *Organised and Serious Crime Ordinance* was enacted in 1994

> to create new powers of investigation into organised crimes and certain other offences and into the proceeds of crime of certain offenders; provide for the confiscation of proceeds of crime; make provisions in respect of the sentencing of certain offenders; create an offence of assisting a person to retain proceeds of crime; and for ancillary and connected matters.[308]

The principal purpose of this ordinance is to enable law enforcement agencies to combat organised crime more effectively by using special powers of investigation.[309] Secondly, the Ordinance facilitates forfeiture and the seizure of illegitimate assets[310] and contains special provisions regarding criminal procedure and the prosecution and sentencing of offenders.[311] Unlike the *Societies Ordinance*, the *Organised and Serious Crime Ordinance* does not create new offences, it does not establish membership in a criminal organisation as a crime, and it does not

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303 Lo Shiu-Hing, "Cross-Border Organised Crime in Greater South China" (1999) 5(2) *Transnational Organised Crime* 176 at 177; Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 91; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 51.

304 Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 51.

305 Sheldon Zhang & Ko-lin Chin, "The Declining Significance of Triad Societies in Transnational Illegal Activities" (2003) 43 *British Journal of Criminology* 469 at 478.

306 Bertil Lintner, "Chinese Organised Crime" (2004) 6(1) *Global Crime* 84 at 89.

307 Chapter 455, No 82 of 1994, reprinted in Hong Kong SAR, Department of Justice, *Bilingual Laws Information System*, www.justice.gov.hk (14 Mar 2001).

308 Long title *Organised and Serious Crime Ordinance 1994* (Hong Kong)

309 Sections 2-7, 24E *Organised and Serious Crime Ordinance 1994* (Hong Kong). Cf Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 10.

310 *Ibid*, ss 8-24D, 25-26.

311 *Ibid*, ss 27-30.

place penalties on the organisation itself. The following sections analyse the definition of organised crime under this ordinance and outline other relevant provisions.[312]

3.4.2.1 Definition of organised crime

The interpretation of relevant terms used in the *Organised and Serious Crime Ordinance* is set out in s 2:

> "organized crime" (有組織罪行) means a Schedule 1 offence that-
>
> (a) is connected with the activities of a particular triad society;
>
> (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or
>
> (c) is committed by 2 or more persons, involves substantial planning and organization and involves-
>
> (i) loss of the life of any person, or a substantial risk of such a loss;
>
> (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or
>
> (iii) serious loss of liberty of any person;

This definition of organised crime captures three separate types of associations:
(a) triad societies,
(b) associations planning to commit certain (serious) offences, and
(c) associations committing certain serious offences.

All three types require some connection to one of the offences set out in Schedule 1 of the *Organised and Serious Crime Ordinance*. This schedule contains a list of offences found in nineteen different statutes and at common law ranging from murder, assault, kidnapping, importation, immigration and drug offences to gambling offences, triad offences, loan sharking, and offences involving firearms or other weapons. In general, the Schedule 1 offences are serious offences which are frequently carried out by criminal organisations to gain material profit or to facilitate their illegal operations. Parts (a) and (b) of the definition of organised crime do not require that these offences have actually been committed. The list effectively limits the application of the ordinance — and the powers available to law enforcement under that ordinance — to certain serious offences if these are carried out by certain criminal groups.

The following sections discuss the three types separately although there is significant overlap between them.

(a) Triad societies

Triad societies (三合會) are further defined in s 2 *Organised and Serious Crime Ordinance 1994* (Hong Kong) as

> any society which-
>
> (a) uses any ritual commonly used by triad societies, any ritual closely resembling any such ritual or any part of any such ritual; or
>
> (b) adopts or makes use of any triad title or nomenclature.

This first type of organised crime is designed to cover traditional Chinese triad societies which are based on shared rituals or triad rules and whose activities are connected with one of the offences under Schedule 1 of the ordinance. Triads unconnected with these particular kinds of crimes do not fall within the scope of the ordinance, but may be covered by the *Societies Ordinance*.

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[312] The analysis is based on the official English versions of Hong Kong law provided by the Hong Kong Department of Justice.

(b) Two or more persons planning certain offences

The second type of organised crime under Hong Kong's *Organised and Serious Crime Ordinance* captures associations of two or more people for the purpose of committing two or more Schedule 1 offences. It is not required that the persons involved actually carry out any of these offences, but it is necessary to show that their activities "involves substantial planning and organisation" thus excluding random and spontaneous associations from the definition.

Figure 17 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (b)

Terminology Elements	**Organised crime**
Structure	• association of two or more persons • Substantial planning and organisations
Activities	[none required]
Objectives	• Solely pr partly in purpose of committing two or more Schedule 1 offences.

(c) Two or more persons committing certain offences

Only the third type of organised crime requires the actual commission of a Schedule 1 offence. The threshold under (c) is higher than that of type (b) as it is necessary to show that the offence also resulted in the actual or potential loss of life (i), in actual or potential serious bodily or psychological harm (ii), or in serious loss of liberty of any person (iii). As with (b) it is necessary to show that the association involved at least two or more persons and substantial planning and organisation. In comparison, there appears to be significant overlap between (b) and (c) and any organised crime activity covered under (c) is also automatically covered by (b).

Figure 18 Definition of organised crime, s 2 *Organised and Serious Crime Ordinance* (Hong Kong), (c)

Terminology Elements	**Organised crime**
Structure	• "association of two or more persons • Substantial planning and organisations
Activities	• Commission of a Schedule 1 offence; • Offence involves (i) Loss of the life of any person, or a substantial risk of such a loss; (ii) Serious bodily or psychological harm to any person, or a substantial risk of such a harm; or (iii) Serious loss of liberty of any person.
Objectives	[none required]

3.4.2.2 Other provisions

It was mentioned earlier that the *Organised and Serious Crime Ordinance* (Hong Kong) does not create any specific offences for criminal organisations or for the persons associated with organised crime. The ordinance only contains an offence for dealing with proceeds of crime, ie money laundering, s 25.[313]

The remaining sections of the ordinance, ss 3-32, almost exclusively create law enforcement powers that may be utilised in the investigation of 'organised crime' as defined in s 2. These

[313] See further Alain Sham, "Money laundering laws and regulations: China and Hong Kong" 92006) 9(4) *Journal of Money Laundering Control* 379 at 390–391.

include powers to conduct searches and obtain information,[314] powers relating to the confiscation of property and proceeds of crime,[315] restraining orders,[316] and provisions for remittance agents and money chargers.[317]

3.4.3 Societies Ordinance

Hong Kong's *Societies Ordinance* is the SAR's chief legal instrument against triads and other unlawful societies and it creates a myriad of criminal offences for persons involved in and associated with these groups. The origins of this ordinance can be traced back to the very early days of British colonial rule in Hong Kong. A first ordinance "for the suppression of the Triad and Other Secret Societies" was enacted as early as 1845.[318] This ordinance criminalised membership in these societies and also provided that persons found to be members were to be branded on the right cheek after they served their sentence and then deported to China (where many of the deportees were arrested, tortured, and executed). At that time, it was estimated that 75 percent of Hong Kong's Chinese population were triad members and accordingly the application of the ordinance was limited to persons of Chinese origin.[319]

Nine months after its enactment, the ordinance was amended to limit the application to triads only and exclude other secret societies. The offences were also limited to persons intending to be involved in triads and exempting those who were forced or coerced to be involved or who had no knowledge about the nature of the society.[320] A new *Triad and Unlawful Societies Ordinance* was introduced in 1887,[321] substituting the earlier laws and, again, expanding the application to include triads as well as other societies that pursue purposes "incompatible with the peace and good order of the Colony", s 1. This ordinance was in operation for 24 years and was replaced in 1911 by a new ordinance against unlawful societies which introduced a registration system to separate legitimate, registered societies from unlawful ones.[322] This system was substituted by the *Societies Ordinance* in 1920, which used a model similar to that now found in the *Organised and Serious Crime Ordinance*. It differentiated between three kinds of unlawful societies: triads, societies using triad rituals, and other societies pursuing unlawful purposes, s 3(a)-(c).[323]

The current *Societies Ordinance* was first introduced in 1949[324] and up until today remains of great practical relevance insofar as criminal offences for triad organisations and certain other "unlawful societies" are concerned. The purpose of this ordinance is the creation of a registration system for all Hong Kong societies, including "any club, company, partnership or association of persons".[325] "The *Societies Ordinance*", notes A Chen,

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314 Sections 3-6 *Organised Crime Ordinance 1994* (Hong Kong).

315 Sections 8-13, 16-23 *Organised Crime Ordinance 1994* (Hong Kong).

316 Sections 14, 15 *Organised Crime Ordinance 1994* (Hong Kong).

317 Sections 24A–24E *Organised Crime Ordinance 1994* (Hong Kong).

318 *An Ordinance for the suppression of the Triad and other Secret Societies within the Island of Hongkong and its Dependencies*, No 1 of 1945. Cf Ernst Eitel, *Europe in China* (1895) 227–228; Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 23, 38; Ko-Lin Chin, "Triad Societies in Hong Kong" (1995) 1(1) *Transnational Organised Crime* 47 at 58.

319 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 264; Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 3.

320 No 12 of 1845. See further Ernst Eitel, *Europe in China* (1895) 228.

321 No 8 of 1887.

322 No 47 of 1911.

323 See further Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 265.

324 No 28 of 1949. Relevant amendments were made in 1964 (Ordinance No 36 of 1964), 1992 (No 75 of 1992), and 1997 (No 118 of 1997).

325 Section 2(1) *Societies Ordinance 1997* (Hong Kong).

> Requires all persons who want to form any association of any kind other than certain excepted categories to apply to the Registrar of Societies (who is in practice the Commissioner for Police) for registration and to submit the proposed constitution of the organisation for scrutiny and approval.[326]

Registered societies are the subject of extensive control and monitoring requirements while associations that fail to gain registration are considered to be "unlawful societies". The ordinance also contains extensive provisions for the prohibition of certain societies and the criminalisation of persons establishing, directing, recruiting for, associating with, or otherwise supporting triad or unlawful societies.

3.4.3.1 Unlawful societies

The offences and prohibitions under the ordinance apply to triad societies and unlawful societies as defined in s 18:

> (1) For the purposes of this Ordinance, "unlawful society" (非法社團) means-
>
> (a) a triad society, whether or not such society is a registered society or an exempted society and whether or not such society is a local society; or
>
> (b) a society in respect of which, or in respect of whose branch, an order made under section 8 is in force.
>
> (2) (Repealed 75 of 1992 s. 11)
>
> (3) Every society which uses any triad ritual or which adopts or makes use of any triad title or nomenclature shall be deemed to be a triad society.

This definition differentiates between two types of illegal societies. The first type involves triad societies which are not further defined in the ordinance. Groups using triad rituals et cetera are by virtue of subs (3) also treated as triads.[327] The second type refers to societies that have been prohibited by virtue of s 8 of the Ordinance because they are seen as a threat to national security, public safety, public order, or to the protection of rights and freedoms of others and failed to gain registration.[328] The prohibition may also be applied to political organisations.[329] The power to prohibit organisations is vested in the Secretary for Security who acts on the recommendation of the Societies Officer appointed under the Ordinance.[330]

The distinction between unlawful societies and triad societies is a significant one as higher penalties apply for offences associated with triads. The distinction reflects the concern of Hong Kong authorities over the local triad problem which is seen as more dangerous compared to other types of criminal organisations, including foreign organised crime groups.

3.4.3.2 Offences associated with unlawful societies

Sections 19-23 *Societies Ordinance 1997* (Hong Kong) set out a range of offences for persons associated with unlawful societies. The main objective of these offences is to deter people from joining or supporting criminal organisations.[331] Each offence is divided into two subsections which provide different penalties for 'unlawful societies', subsections (1), and higher penalties for triad societies, subsections (2). The offences cover a range of different roles a person may occupy within the organisation and criminalises various forms of associations with unlawful societies and

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326 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 5_6.

327 "Triad ritual means any ritual commonly used by triad societies, any ritual closely resembling any such ritual and any part of any such ritual"; s 2(1) *Societies Ordinance 1997* (Hong Kong).

328 Section 8(1)(a) *Societies Ordinance 1997* (Hong Kong).

329 Section 8(1)(b) *Societies Ordinance 1997* (Hong Kong).

330 Section 8(1)-(4) *Societies Ordinance 1997* (Hong Kong).

331 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

triads. Figure 19 provides a summary of the existing offences which are discussed separately in the following sections.

Figure 19 Offences and penalties under the *Societies Ordinance 1997* (Hong Kong)

Offences	Unlawful societies	Triad societies
Managers, assistant managers, office bearers	S 19(1) 3yrs/HKD100,000	S 19(2) 15yrs/HKD100,000
Members, acting as members, attending meetings Paying money, giving aid, control of books, accounts, seals, lists of members etc	S 20(1) 1yr/HKD20,000 (1st offence) -	S 20(2) 3yrs/HKD100,000 (1st offence) S 20(2) 3yrs/HKD100,000 (1st offence)
Allowing premises to be used	S 21(1) 1yr/HKD50,000 (1st offence)	S 21(2) 3yrs/HKD100,000
Recruitment of members	S 22(1) 2yrs/HKD50,0000	S 22(2) 5yrs/HKD250,000
Procuring aid/support	S 23(1) 2yrs/HKD50,000	S 23(2) 5yrs/HKD 250,000

Managing unlawful societies

The first and most serious of these offences applies to persons involved in the management of triads and unlawful societies, s 19 *Societies Ordinance*.

> (1) Save as is provided in subsection (2), any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assistant in the management of any unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of HKD100,000 and to imprisonment for 3 years.
>
> (2) Any office-bearer or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $100,000 and to imprisonment for 15 years.

Under subsection (1) "any office-bearer[332] or any person professing or claiming to be an office-bearer and any person managing or assisting in the management of any unlawful society shall be guilty of an offence". A higher penalty of up to fifteen years imprisonment or a fine of HKD100,000 applies if the unlawful society is a triad society, s 19(2). Section 28(2) *Societies Ordinance* establishes a presumption (rebuttable by the defendant) that any person found in possession of "any books, accounts, writings, lists of members, seals, banners or insignia of or relating to any triad society" is considered to assist in the management of a triad society.

This offence is specifically designed for the core directors and leaders of criminal organisations and accordingly provides the highest penalties. The offence also extends to persons "professing or claiming" to be an office bearer, though it has been held that such conduct need to involve more than mere admissions to police.[333] Persons convicted for the offence under s 19 may also be barred from becoming an office bearer in any (legitimate) society for up to five years, s 24 *Societies Ordinance*.

Membership in an unlawful society

Section 20(1) criminalises membership in unlawful societies as well as persons who act as members, who attend meetings of these societies, or who deliberately give money or other aid to

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332 The term 'office bearer' is further defined in s 2 *Societies Ordinance 1994* to include "any person who is the president, vice president, or secretary or treasurer [...] or who is a member of the committee or governing body of such society [...]" or who holds an analogous positon.

333 *Chung-Wai v R* [1980] HKLR 593 at 601 per Addison J.

these societies. Persons recruiting members or seeking contributions and other support for unlawful societies and triads are criminalised separately in ss 22, 23 *Societies Ordinance*.

> (1) Save as is provided in subsection (2), any person who is or acts as a member of an unlawful society or attends a meeting of an unlawful society or who pays money or gives any aid to or for the purposes of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment-
>
> (a) in the case of a first conviction for that offence to a fine of $20,000 and to imprisonment for 12 months; and
>
> (b) in the case of a second or subsequent conviction for that offence to a fine of $50,000 and to imprisonment for 2 years.

Subsection (2) provides an aggravated offence for members and other supporters of triad societies.

> (2) Any person who is or acts as a member of a triad society or professes or claims to be a member of a triad society or attends a meeting of a triad society or who pays money or gives any aid to or for the purposes of the triad society or is found in possession of or has the custody or control of any books, accounts, writing, lists of members, seals, banners or insignia of or relating to any triad society or to any branch of a triad society whether or not such society or branch is established in Hong Kong, shall be guilty of an offence and shall be liable on conviction on indictment-
>
> (a) in the case of a first conviction for that offence to a fine of $100,000 and to imprisonment for 3 years; and
>
> (b) in the case of a second or subsequent conviction for that offence to a fine of $250,000 and to imprisonment for 7 years.

The offence in s 20 is aimed a criminalising mere membership in any unlawful society or triad. There is no additional requirement that an accused under this section also needs to engage in the criminal activities of the society; these activities may be taken into account to raise the sentence: *Kam Moon et al v R* [1964] 614 at 623-624 per Hogan CJ. It is also possible to participate in the offence under s 20(2) by way of aiding, abetting, or procuring: *HKSAR v Wong Fuk Tak & Others* [2000] HKLRD (Yrbk) 189.

Membership is not further defined in the ordinance and it remains unclear just how formal a person has to be accepted into the group to be seen as a member. Liability is extended to cover informal associations with the group such as persons "acting as members" and persons giving aid or money to the organisation. This also includes persons attending meetings of unlawful societies and s 28(3) establishes a rebuttable presumption that any person found in a place used for triad meetings is considered to have been attending meetings.[334]

For cases involving unlawful societies, subsection (1) provides a penalty of HKD20,000 or one year imprisonment for first offenders and imprisonment for 2 years or a fine of HKD50,000 for second or subsequent convictions. Higher penalties apply if triad societies are involved: HKD100,000 or three years imprisonment for first offenders; HKD250,000 or seven years imprisonment on second and subsequent convictions. Persons convicted for the offence under s 20 may also be barred from becoming an office bearer in any (legitimate) society for up to five years, s 24 *Societies Ordinance 1997*.

In determining the severity of the penalty for any offence under ss 19-23 the court or magistrate has to consider whether or not the accused has discontinued her or his membership of the triad society. There have been extensive debates about the question if and how membership in a triad society ends. Many cases have relied on the traditional notion that triad membership is inextinguishable, while more modern interpretations suggest that members can terminate their

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[334] In *R v Wong Sik Ming* [1996] HKLY 289 the High Court held that there is no requirement to have formality about the meeting of a triad society but that meetings on a street (eg discussing matters outside a bar) does not suffice.

membership.[335] Some triad members have deliberately made admissions to the police in order to break their oath and thus trying to break their connection to the society.[336]

A triad renunciation scheme was established in 1988 to allow non-active members to formally renounce their membership.[337] The *Societies Ordinance* sets out a process that involves a formal application to the Renunciation Tribunal, ss 26A-26N.

Claiming or professing to be a triad member

The offence in s 20(2) also extends to persons "claiming to be members" of triads. It is not uncommon for some individuals to claim or otherwise pretend to be a triad member without actually participating in any group.[338] The purpose of this offence is "the condemnation and prevention of overt and positive claims made to members of the public with the intention of obtaining an advantage by the person who utters such a claim by intimidating the person to whom the claim is made": *Ngchi-Wah v R* [1978] HKLR 101 at 103.

The offence in s 20(2) and a similar provision in s 19(2) have caused considerable controversy in a number of judicial decisions. In summary, the case law seems to suggest that a charge of "being a member" prevails as the more serious charge over "claiming to be a member". Prosecutorial practice has been to lay charges of claiming only if there is insufficient evidence to support a charge of being a member. As claiming does not require proof of actual membership, the courts have developed high thresholds for convictions. In particular, mere admissions to police,[339] wrongful beliefs by the accused that he/she is a member,[340] or the use of triad language alone do not suffice to establish liability though this may be used as supporting evidence.[341] The claiming or professing must be accompanied by a specific state of mind. In *Cheng Chung-Wai v R* [1980] HKLR 593 it has been argued that

> the utterer must intend to cause or at least foresee the probability of causing some impact or reaction on the part of the person addressed. Such would arise if the utterer intended or hoped the addressee would be intimidated in some way or caused him to act to his detriment or sought some advantage.

Liability under subsection 20(2) is also extended to criminalise bookkeepers, accountants, and persons who "have custody or control of any [...] lists of members, seals, banners or insignia of or relating to any triad society or to any branch of a triad society". In *R v Sit Yat Keung* [1986] HKLR 434 it was held that it is necessary to show that the accused was in conscious possession of any of the items listed, that these items relate to triad societies, and that the accused knows "full well their nature and import". It is not necessary to show that the accused possessed the items for a criminal purpose. Under s 28(s) any person found in possession of these items is presumed to be a triad member.

Allowing premises to be used by unlawful societies

Section 21 *Societies Ordinance* contains a special offence for owners and occupiers who knowingly provide meeting space for unlawful societies and triads or who otherwise allow these groups to use such a space. As with all other offences, higher penalties apply if triad societies are involved and also if the accused is facing a second or subsequent conviction.

> (1) Save as is proved in subsection (2), any person who knowingly allows a meeting of an unlawful society, or of members of an unlawful society, to be held in any house, building or place belonging to or

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335 H, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 4-5.
336 *Cheng Chung-Wai v R* [1980] HKLR 593 at 600.
337 Carol Jones & Jon Vagg, *Criminal Justice in Hong Kong* (2007) 501.
338 Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.
339 *Ngchi-Wah v R* [1978] HKLR 101 at 103; *Cheng Chung-Wai v R* [1980] HKLR 593.
340 *Cheng Chung-Wai v R* [1980] HKLR 593.
341 Kingsley Bolton et al, "The Speech-Act Offence: Claiming and Professing Membership of a Triad Society in Hong Kong" (1996) 16(3) *Language & Communication* 263 at 272; H Litton, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 4.

> occupied by him, or over which he has control, shall be guilty of an offence and shall be liable on conviction on indictment in the case of a first conviction for that offence, to a fine of $50,000 and to imprisonment for 12 months and in the case of a second or subsequent conviction for that offence, to a fine of $100,000 and to imprisonment for 2 years.
>
> (2) Any person who knowingly allows a meeting of a triad society, or of members of a triad society, to be held in any house, building or place belonging to or occupied by him, or over which he has control, shall be guilty of an offence and shall be liable on conviction on indictment in the case of a first conviction for that offence, to a fine of $100,000 and to imprisonment for 3 years and in the case of a second or subsequent conviction for that offence, to a fine of $200,000 and to imprisonment for 5 years.

Recruiting for unlawful societies

In order to dismantle criminal organisations and reduce their membership base, the *Societies Ordinance* contains a separate offence for persons recruiting members for unlawful societies. Under s 22(1),

> any person who incites, induces or invites another person to become a member of or assist in the management of an unlawful society and any person who uses any violence, threat or intimidation towards any other person in order to induce him to become a member or to assist in the management of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $50,000 and to imprisonment for 2 years.

Section 22(2) contains an aggravated offence if the recruitment is made on behalf of a triad society:

> (2) Any person who incites, induces or invites another person to become a member of or assist in the management of a triad society and any person who uses any violence, threat or intimidation towards any other person in order to induce him to become a member or to assist in the management of a triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $250,000 and to imprisonment for 5 years.

Collecting funds or seeking other support for unlawful societies

The offence in s 23 *Societies Ordinance* is designed for persons collecting funds or seeking other forms of support for unlawful societies and triads. Subsection (1) provides a penalty of HKD50,000 or two years imprisonment if the support is sought for unlawful societies. Higher penalties of up to five years imprisonment of a fine of HKD250,000 apply to cases involving triad societies.

> (1) Save as is provided in subsection (2), any person who procures or attempts to procure from any other person any subscription or aid for the purposes of an unlawful society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $50,000 and to imprisonment for 2 years.
>
> (2) Any person who procures or attempts to procure from any other person any subscription or aid for the purposes of a triad society shall be guilty of an offence and shall be liable on conviction on indictment to a fine of $250,000 and to imprisonment for 5 years.

3.4.4 Remarks

Hong Kong maintains a very complex and sophisticated system to control associations in its territory, prohibit criminal organisations, and punish the activities of their members. In comparison to most other organised crime laws reviewed in this submission, Hong Kong's legislation is much more established, tracing back over 150 years, and supported by extensive judicial interpretation and academic scholarship.

In many ways, Hong Kong's organised crime offences are local responses to a local problem. The key offences under the *Societies Ordinance* are specifically designed to prevent associations with triad societies and to suppress their activities. Many of the criteria used to define triads, such a triad initiation rituals and triad language, are unsuited for other criminal organisations. The *Societies Ordinance* reserves the highest penalties for persons participating in, associating with, or

otherwise supporting triads. Other criminal organisations may classify as 'unlawful societies' which are the subject of significantly lower sanctions.[342]

Official statistics and the extensive case law demonstrate that the offences under the *Societies Ordinance* are frequently used and that a considerable number of triad members are prosecuted and convicted each year. Some critics have argued that the offences under the *Societies Ordinance* are used too frequently and that especially during the 1980s these offences were the preferred charge in many prosecutions.[343] Moreover, the presumptions about the existence of triad societies and triad membership in s 28 facilitate the work of police and prosecutors and may contribute to the high number of cases.

In the 1980s and 90s, a great number of cases involved charges of membership in a triad and very many convictions were based on evidence given by undercover police operatives[344] or by so-called police triad experts who simply confirmed the accused's membership.[345] This practice further fuelled concerns about the powerful role the Hong Kong Police occupies in relation to triad control and suppression. Critics have pointed to the collusion between police and societies registration authority: the Registrar of Societies and the Commissioner of Police used to be the same person.[346] This essentially gave police the authority to ban any association in Hong Kong, though appeals against a refusal of registration are possible, s 12 *Societies Ordinance*.

Unlike many other jurisdictions, Hong Kong criminalises mere membership in triads and other unlawful societies and also extends liability to persons "claiming or professing" to be a member or office-bearer in a triad. This raises concerns about the freedom of association. Moreover, many questions remain about the ways in which to renounce triad membership. In order to avoid the concerns about the membership offence, H Litton suggested "to abandon [the] over-reliance on the amorphous statutory charge of 'being a triad member" and instead use charges under ss 22, 23 *Societies Ordinance* or lay charges for the actual offences committed.[347]

The legislation in operation in Hong Kong antedates the *Convention against Transnational Organised Crime* and adopts a different concept of organised crime. There is some similarity between Hong Kong's *Societies Ordinance* and the systems recently proposed in places like South Australia and Queensland. Many provisions in these jurisdictions rely heavily on the use of insignia and other visual identifiers as evidence for the existence of criminal groups and to establish membership in them. Moreover, South Australia is currently introducing mechanisms that allow for the prohibition (so-called "declaration") of organisations pursuing illegitimate goals and that criminalise any association with these organisations. The mechanisms share many characteristics with the Hong Kong system.[348]

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342 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 5.

343 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9.

344 See, for example, *Hksar v Fu Ming Yung & Others* [2001] HKEC 1428; *HKSAR v Lam Yan Ming* [2004] HKEC 254.

345 See also Damien Cheong, *Hong Kong Triads in the 1990s* (2006) 9. See, for example, *HKSAR v mak Chi Hing* [2001] HKEC 140.

346 A Chen, "Editorial: Civil liberties in Hong Kong: freedoms of expression and association" (1989) 19 *Hong Kong Law Journal* 4 at 6.

347 H Litton, "Editorial: So-called 'Triad Experts'" (1986) 16 *Hong Kong Law Journal* 3 at 7.

348 See Part 5 below.

3.5 Macau SAR

3.5.1 Context and overview

3.5.1.1 Organised crime in Macau

In Macau, organised crime has been closely associated with the gambling industry since the Portuguese colonial Government legalised gambling in 1847. Today, Macau has the biggest casino industry in the world, valued at over USD 10 billion/year, even surpassing the revenue made by Las Vegas casinos.[349] Chinese triads, secret societies, and other criminal organisations have operated in Macau under Portuguese rule and continue to do so following Macau's return to China as a Special Administrative Region (SAR) in 1999. Since the first casino franchise was granted in 1937, several criminal organisations saw the gambling industry as an easy way to launder illicit money,[350] including embezzled funds from mainland China.[351] In recent years, there have been several reports about Macau's banking and finance sector being used for money laundering and offshore investment of funds from North Korea.[352] There have also been frequent allegations about prostitution, loan sharking, extortion, and the collection of protection money from people associated with the casino industry.[353] The 14K, Wo On Lok, and the Big Circle Gang (Dai Huen Chai), have been identified as the most important triad societies in Macau, especially in the 1980s and 90s.[354]

Further fuelling the influence of organised crime in Macau has been the fact that up until a reform in 2001-2 the casino industry was highly concentrated. In 1962, the Government decided to grant a monopoly to a single private organisation, STDM, the Sociedade de Turismo e Diversoes de Macau, which had exclusive control of all gambling. Because Macau's economy largely depends on revenue from gambling and associated tourism, the STDM and its owner Stanley Ho, became extremely influential, including in administrative and legislative circles. Allegations of corruption have been widespread and the regulation of the casino industry and its finances remained marginal, also to attract foreign visitors and compete with other gaming centres in the region and beyond.[355] Triad members, too, have allegedly participated in regional elections or have otherwise attempted to influence political processes.[356]

3.5.1.2 Criminal law in Macau

Together with Hong Kong, Macau is one of two Special Administrative Regions (SARs) of the People's Republic of China. Macau, the oldest colony in Asia, was under Portuguese rule until it was returned to China on December 20, 1999. This handover was agreed upon in the 1987 *Joint Declaration of the Government of the People's Republic of China and the Government of Portugal*

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349 Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

350 Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 300.

351 Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

352 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 176.

353 Veng Mei Long, Angela, "The 'Bate-Ficha' Business and Triads in Macau Casinos" (2002) 2 *Queensland University of Technology Law & Justice Journal* 83 at 89–90; Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 187–188.

354 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 180–182.

355 Veng Mei Long, Angela, "The 'Bate-Ficha' Business and Triads in Macau Casinos" (2002) 2 *Queensland University of Technology Law & Justice Journal* 83 at 83-84; Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 298, 301; Mary-Anne Toy, "A bet bigger than Vegas" (1 Apr 2006) *The Age*.

356 Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 189.

on the Question of Macau.[357] This declaration sets out Macau's status under Chinese rule and Macau's *Basic Law,* the SARs quasi-constitution. The *Joint Declaration* creates a "one country, two systems" policy and ensures that Macau maintains a "high degree of autonomy" over all matters except foreign affairs and defence and also stipulates that Macau's laws, including its criminal law, continue operation beyond the 1999 handover.[358] In accordance with Macau's *Basic Law*, China has extended the application of the *Convention against Transnational Organised Crime* to Macau.[359]

Macau's criminal law, including its general principles, are guided by the *Penal Code* (Macau) (*Código Penal*)[360] which follows the tradition of Continental European criminal codes, especially Portugal's *Penal Code*. The *Penal Code* (Macau) of 1995 contains relevant provisions relating to complicity[361] and attempts,[362] but has no separate offence for conspiracy. The Code does, however, contain a special offence entitled "criminal associations" (associação criminosa) in art 288.

In addition to the *Penal Code*, Macau has a separate organised crime statute. The *Law on Secret Societies* was originally introduced on February 4, 1978 by the Legislative Assembly,[363] but it was never rigorously enforced.[364] Following a wave of violent turf wars between rival triads and political assassinations in the mid 1990s,[365] this Law was eventually repealed. It has been substituted on July 30, 1997 with a more comprehensive *Organised Crime Law* (*Lei da Criminalidade Organizada*) which continues to apply today.[366] The *Organised Crime Law 1997* (Macau) is divided into four chapters: (I) penal provisions, (II) criminal procedure, (III) additional matters, and (IV) final and transitional provisions. At the heart of the legislation is the definition of 'association or secret society' in art 1, which is further discussed below. This definition is followed in art 2 by an offence of directing, promoting or otherwise associating with secret societies/associations. Articles 3 to 13 contain a range of other specific offences relating to organised crime.

It has to be noted that there are, at present, no official English translations of Macau laws; the following analysis is based on unofficial translations of the official Portuguese version of the *Código Penal* and the *Lei da Criminalidade Organizada.*

3.5.2 Criminal associations, *Penal Code* (Macau)

Macau's *Penal Code* contains a specific offence for criminal associations (associação criminosa) in art 288. The term 'criminal association' has no separate definition in the legislation. Under art 288(1) it is an offence, punishable by three to ten years imprisonment, to establish or promote an "organisation or association designed to or engaging in criminal conduct". The same penalty applies under art 288(2) to persons who supply these organisations with arms, ammunition, or other weapons, or who provide them with a meeting place, or facilitate these groups to recruit new members. Organisers and directors of criminal associations are liable to imprisonment between five and twelve years under art 288(3).

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357 Signed at Beijing, 13 Apr 1987, 1498 UNTS 228.

358 See further Frances Luke, "The Imminent Threat of China's Intervention in Macau's Autonomy" (2000) 15 *American University International Law Review* 717 at 721–725.

359 Macau SAR, *Advise of the Chief Executive No 30/2004* (31 Aug 2004).

360 No 11 of 1995.

361 See arts 20-24 *Penal Code* (Macau).

362 See arts 20-24 *Penal Code* (Macau).

363 No 5 of 1978.

364 Angela Veng Mei Leong, "Macau Casinos and Organised Crime" (2004) 74 *Journal of Money Laundering* 298 at 301; Sabrina Adamoli et al, *Organised Crime around the World* (1998) 142.

365 Sabrina Adamoli et al, *Organised Crime around the World* (1998) 141; Frances Luke, "The Imminent Threat of China's Intervention in Macau's Autonomy" (2000) 15 *American University International Law Review* 717 at 740, 747; Lo Shiu-Hing, "Cross-border Organized Crime in Greater South China" (1999) 5(2) *Transnational Organized Crime* 176 at 182.

366 No 6 of 1997.

3.5.3 Secret society/associations, *Organised Crime Law 1997* (Macau)

In addition to the offence in the *Penal Code*, Macau has a separate *Organised Crime Law* which contains specific provisions for so-called "associations or secret societies".

3.5.3.1 Definition of secret society/associations

Article 1 *Organised Crime Law 1997* (Macau) defines "associations or secret societies" as organisations constituted for the purpose of obtaining illegal advantages or other benefits. Further, it is required that the "existence of the association is manifested in an accord, agreement or in other ways" aimed at committing one or more of the 21 different crime types set out in art 1(1)(a)-(v). Article 1(2) stipulates that in order to prove the existence of a secret society or association it does not matter whether or not (a) the organisation has a designated seat or meeting place; (b) the members know each other and meet periodically (regularly), (c) the organisation's command, leadership or organisational hierarchy is ad hoc and not ongoing, or (d) the organisation has a written agreement (convention) setting out its constitution, activities, division of duties, and distribution of profits.

Figure 20 Definition of secret societies/associations, art 1(1) *Organised Crime Law 1997* (Macau)

Terminology Elements	**Association or secret society (associação ou sociedade secreta)**
Structure	• "constituted organisation" Irrelevant whether or not (art 1(2)): (a) the organisation has a designated seat or meeting place; (b) the members know each other and meet periodically; (c) the organisation's command, leadership or organisational hierarchy is ad hoc and not ongoing; (d) the organisation has a written agreement (convention) setting out its constitution, activities, division of duties, and distribution of profits.
Activities	[none required]
Objectives	• agreement (or other) to commit one or more of the offences specified in subparas (a)-(v); • obtaining advantages or [other] illicit benefits.

In the absence of accurate translations, it is difficult to offer a thorough analysis of the definition in art 1 and discuss the interpretation of relevant terms. It is, however, possible to make some general observations about the structure and contents of this definition. In particular, it is noteworthy that the general concept of 'associations and secret societies' does not differ greatly from other models of criminal organisations discussed in this study. The definition in art 1(1) combines a basic structural element with two requirements relating to the purpose and aims of the organisation.

The structural element is, for the most part, limited to the word "constituted" (organização constituída) and the explanations in art 1(2) which render a number of indicia irrelevant. In particular, there is no requirement that the organisation is formally structured, organised, or incorporated, or that all members know each other (and thus operate as a team). It appears, however, that completely random, informal clusters of people engaging or planning to engage in criminal activities cannot constitute a secret society or association.

The Macau definition does not require proof of the commission of any actual criminal offences. As with many similar definitions elsewhere, the emphasis is on the objectives of the criminal group. It is necessary to show that the organisation seeks to gain illicit profits ("advantages or benefits") through the commission of certain criminal offences. In Macau — contrary to many other jurisdictions — the *Organised Crime Law 1997* sets out a specific range of criminal offences envisaged by the association. This includes a list of 21 subparagraphs (a) to (v) that contains

many offences commonly associated with organised crime, such as, homicide,[367] offences against the person,[368] abduction and kidnapping,[369] rape,[370] trafficking in persons, extortion,[371] exploitation of the prostitution of others, loan sharking (usury),[372] robbery,[373] illegal immigration, illegal gambling, trafficking in fauna, artefacts, explosives and firearms, document and credit card fraud, and corruption.

In some ways, the concept of criminal organisations under Macau law reflects the specific organised crime problem of this city state. This is demonstrated, for instance, in the terminology 'secret society' and in some of the offences listed in art 1(1)(a)-(v) such as loan sharking, extortion, and illegal gambling. On the other hand, the definition is broad enough to capture a great range of criminal organisations. Unlike its predecessor, the *Law on Secret Societies 1978*, the application of the current law is not limited to Chinese triads or secret societies. In comparison to other definitions, there is also no minimum requirement relating the number of members comprising the organisation.

The scope of application is, however, limited by the types of offences that the organisation aims to carry out. The list in art 1(1)(a)-(v) is exhaustive and associations seeking to commit offences not included in this list are not covered by the provisions of the *Organised Crime Law 1997*. While this list contains very many offence typically associated with organised crime, legislating an exhaustive list of offences allows no flexibility to respond to new types of organised crime if and when they arise.

3.5.3.2 Offences relating to secret societies/associations,

Article 2(1)-(3) *Organised Crime Law* 1997 (Macau) stipulates a number of offences relating to secret societies/associations. The offences and their penalties differ depending on the level of involvement in/with the criminal group. Article 2(4) and (5) set out a number of aggravations and sentence enhancers.

Funding or promoting a secret society/association, art 2(1)

Under art 2(1) it is an offence to establish or promote an association or secret society. The offence is punishable by imprisonment between 5 and 12 years.

Supporting a secret society/association, art 2(2)

Paragraph (2) of art 2 criminalises participation in a secret society/association as well as a range of activities that are carried out in support of these associations. These activities include:

(a) supplying arms, ammunition, or other weapons to members of criminal associations;
(b) providing or collecting funds in order to recruit or entice new members, or promote the organisation;
(c) accounting and bookkeeping for criminal associations, for their members, or for their "ritual ceremonies" (cerimónias rituais);
(d) participating in meetings or ritual ceremonies of the association;
(e) wearing or using signs and codes of a criminal association.

Offences under art 2(2) are punishable by imprisonment for 5 to 12 years.

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367 Articles 128–134 *Penal Code* (Macau).
368 Articles 137–142 *Penal Code* (Macau)
369 Articles 147–149 *Penal Code* (Macau).
370 Article 154 *Penal Code* (Macau).
371 Article 216 *Penal Code* (Macau).
372 Article 219 *Penal Code* (Macau).
373 Article 204 *Penal Code* (Macau).

Directing a secret society/association, art 2(3)

Article 2(3) provides the most serious offence for persons who "exercise the functions of a director or leader" of a secret/society association, regardless whether or not they use the symbols, codes, or other characteristics of the group. This offence is punishable by 8 to 15 years imprisonment.

3.5.3.3 Specific Offences, arts 3–13 *Organised Crime Law 1997* (Macau)

In addition to the general offences in art 2, Macau's *Organised Crime Law 1997* contains a series of specific offences relating to organised crime. These offences can be committed by individuals, but also by corporate organisations ("collective persons"), art 14.

The offences under arts 3 and 4 apply only if they are carried out by secret socities/associations (as defined in art 1). They include:

- Article 3: extortion and collection of protection money for a secret society/association, punishable by two to ten years imprisonment;
- Article 4: maintaining membership in or other relationships with ("invoking to belong") a secret society or association or "its elements" , punishable by imprisonment of one to three years.

The remaining offences in arts 6 to 13 are commonly associated with organised crime, but these offences do not require proof of a secret society or association. The aim of these offences is to criminalise conduct that may aid the criminal organisation in its operation and to punish offences frequently carried out by criminal associations. These offences include:

- Article 6: using identity documents to obtain illicit benefits, cause a detriment, or enable or obstruct an activity, punishable by one to five years imprisonment;
- Article 7: trafficking in persons, punishable by imprisonment of two to eight years; trafficking in minors aged 14 years or younger is punishable by five to fifteen years imprisonment (art 7(3));
- Article 8: exploitation of the prostitution of others, punishable by one to three years imprisonment. Prostitution itself is a separate offence under art 35, punishable by a fine of MOP 5,000.
- Article 9: molestation, exposure, and other illegal conduct in public, punishable by imprisonment of up to one year;
- Article 10: conversion, transfer, or dissemination of illegal goods, punishable (depending on the circumstances, art 10(1)(a), (b), and (c)) by one to twelve years imprisonment;
- Article 11: Illegal gambling, punishable by imprisonment of one to five years;
- Article 12: Possession of explosives and inflammable substances;
- Article 13: Obstruction of justice.

The penalties specified in arts 2, 3, 7, 10(1)(a) and (b) may be accompanied by special penalties set out in art 18 which include, for instance, prohibitions to exercise public functions, work in public office, contact specific persons, frequent specified places, expulsion from the territory of Macau[374] et cetera. If these offences are carried out repeatedly, penalties may be increased by an additional five years, art 20.

3.5.4 Observations

In summary, Macau has very comprehensive organised crime legislation including a suite of criminal offences along with specific procedural and enforcement measures. The legislation reflects the specific features and dimensions of traditional, local criminal organisations, but also captures the wider aspects of organised crime.

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[374] See also art 33 *Organised Crime Law 1997* (Macau).

The *Organised Crime Law 1997* in particular contains many interesting elements specifically designed to address the problem of Chinese triads and secret societies. This is reflected in the terminology of this statute, but also in the types of conduct it criminalises. References to "secret societies", "ritual ceremonies", and "signs and codes", for example, target very unique features of Chinese organised crime. Many of the specific offences referred to, such as loan sharking, illegal gambling, extortion, and payment of protection money are aimed at activities local triads and secret societies traditionally engage in.

On the other hand, the scope of Macau's *Organised Crime Law 1997* is broad enough to capture a diverse range of criminal organisations. The application of the statute is largely determined by the objectives of the association and thus applies to any "constituted organisation" seeking to gain illicit profit or other benefits from a range of criminal activities.

It is, however, this list of criminal activities set out in art 1(1)(a)-(v) that also severely restricts the application of the *Organised Crime Law*. The statute singles out an exhaustive list of crime types and only applies to organisations seeking to engage in one of these offences. The legislator has thus set clear boundaries for the application of the law. A group of youth spraying graffiti on a wall or engaging in some other property damage is thus outside the scope of this statute. On the other hand, any new and emerging crime types engaged in by associations or secret societies will require statutory amendment which may involve a lengthy bureaucratic process and may prevent flexible law enforcement responses.

A second, albeit minor problem stems from the apparent overlap between the offence for criminal associations in art 288 *Penal Code* (Macau) and the provisions under the *Organised Crime Law 1997*. The distinction between criminal associations (art 288 *Penal Code*) and associations or secret societies (art 1 *Organised Crime Law 1997*) is not fully clear and there is some uncertainty whether or not the two terms are mutually exclusive. It appears that in comparison, secret societies/ associations are treated as the more serious, perhaps more dangerous type of criminal organisation as the offences for directing, establishing, promoting, and supporting secret societies/associations attract higher penalties than the same conduct in relation to criminal associations. Moreover, the requirements under the *Organised Crime Law 1997* are designed for organisations seeking to engage in specific offences and thus gain benefits, while art 288 *Penal Code* applies to groups engaged in or seeking to engage in any type of crime.

Part 4: The Need for Organised Crime Laws in Australia

Organised crime poses significant challenges to the criminal justice system. The criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. The structure and modi operandi of criminal associations, however, do not fit well into the usual concept of criminal liability. Moreover, it is difficult to hold directors and financiers of organised crime responsible if they have no physical involvement in the execution of the organisation's criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of accessorial liability.

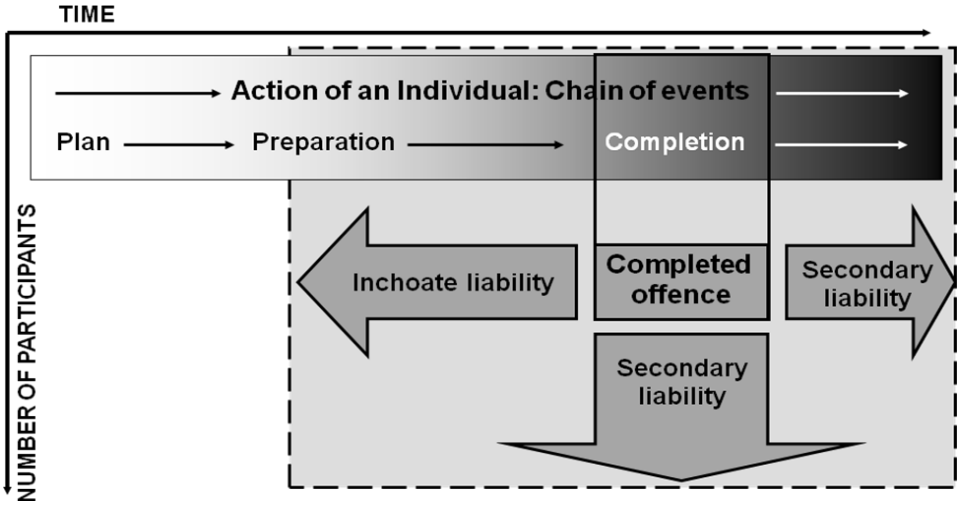
The following Sections explore the scope of contemporary criminal law and discuss the need — if any — to extend criminal liability further in order to prevent and suppress organised crime more effectively.

4.1 Existing Extensions of Criminal Liability

For criminal liability to arise it is necessary that an accused committed an offence. In very basic terms this requires proof that the accused completed all the elements of the offence he or she is charged with. Absence of one or more elements of an offence does, however, not automatically void criminal responsibility. Liability is not limited to completed offences. In some circumstances criminal liability may also arise if an offence remains incomplete, if a person makes a contribution to an offence without being its main executor, or if a person perpetuates a situation created by an offence already committed. So-called inchoate liability and secondary liability extend criminal responsibility beyond the paradigm of individual commission of completed offences. David Brown et al observe:

> This extension occurs along two dimensions: a time dimension and a group dimension. Along the time dimension, the offences of attempt and incitement criminalise conduct occurring before the offence that the accused planned to commit. Along the group dimension, the law of complicity provides for the criminalisation of conduct engaged in by more than one person. The law of conspiracy extends liability along the group dimension by criminalising agreements by two or more people to commit a crime (or other unlawful act).[375]

Figure 21 Extensions of criminal liability[376]



[375] David Brown et al, *Criminal Laws* (4th edn, 2006) 1076; cf Peter Gillies, *Criminal Law* (4th edn, 1997); Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 399–400.

[376] Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) ??.

These extensions of criminal liability are not without difficulties and controversies. In particular, it is debatable why, if no harm occurs in inchoate offences, punishment is justified. In relation to secondary liability it is also questionable just how remotely a person can be connected to a criminal offence and still be liable for his/her connection to it.[377]

In essence, extensions to criminal liability serve to prevent and deter crime and to punish the 'guilty mind'. First, attaching liability to preparatory crimes such as attempt, conspiracy, and incitement and to persons who support and contribute to the preparation and planning reduces the risk that the offences will be completed. Inchoate offences and secondary liability is for the most part aimed at criminalising conduct engaged in by persons possessing the intention to accomplish substantive criminal harm and their conduct has the potential to culminate in or contribute to that harm. Second, extending criminal liability enables law enforcement to intervene earlier without having to wait until harm is done. Inchoate offences and secondary liability afford law enforcement agencies a basis for early intervention and restraint and allows them to arrest a person before he or she can go on and complete the crime. Punishment for inchoate offences and secondary liability may also deter others from doing the same. Third, it is argued that criminal law should focus on culpability rather than outcome.[378] In relation to inchoate offences it is held that the person who tries to commit a crime but fails is not very different from a person who tries and succeeds. Peter Gillies also argues that criminalising attempts "satisfies the community instinct to see justice is done to the person who has gone very close to committing substantive harm".[379]

4.2 Inchoate liability

Attempt and other inchoate offences such as incitement and conspiracy[380] criminalise preparatory crimes. Generally, liability for preparatory crimes arises when a completed offence cannot be established because a physical circumstance or consequence specified in the definition of the offence is absent. The accused, however, believed the circumstance to be present and intended the consequences. In summary, the offence of attempt combines the mental element of intention with a loosely defined physical element (usually referred to as 'proximity').[381] Generally, no harm or damage will have occurred in relation to an attempt. Although the accused did not actually commit the completed offence, the fact that he or she tried to do so is regarded as warranting punishment.

The commission of a crime can be regarded as a series of events that lead to its completion. Between the formation of the criminal plan and the commission of the complete offence that is the object of this plan numerous acts may in a particular case be committed. Liability for attempts generally requires that the accused took some initial steps towards the completion of the offence. This requirement seeks to separate actual attempts from mere wishful thinking. 'Proximity' is the term used to mark the point along this continuum to which an accused must progress until he or she can be regarded as having attempted the substantive offence. Only conduct that is "sufficiently proximate" and not "merely preparatory" is considered punishable: *Britten v Alpogut* [1987] VR 929 at 939 per Murphy J. The difficulty in establishing the precise point at which liability for attempts arises stems from the fact that the term 'proximity' does not specify a distinct act of tangible harm that marks the beginning of attempt. Instead, liability for attempt and also for incitement are concerned with potential (rather than actual) harm.[382]

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377 See further Section 2.3.3 below.

378 HLA Hart, "The House of Lords on Attempting the Impossible", in C Tapper (ed), *Crime, Proof and Punishment; Essays in Memory of Sir Rupert Cross* (1981).

379 Peter Gillies, *Criminal Law* (4th edn, 1997) 670. See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008).

380 Conspiracy is discussed separately below.

381 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008) with further references.

382 See further, Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008); Simon Bronitt & Berandette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 404–408; Peter Gillies, *Criminal Law* (4th edn, 1997) 673–679.

The distinction between preparation and proximity is important as criminal responsibility must be confined to conduct that really endangers the community or another person. A person engaging in mere planning or preparation may be doing no more than wishful thinking. It is only when the accused's activities begin to approach the completion of an offence that the law treats the accused as guilty of an attempt: *R v Smith* [1975] AC 476.

In relation to organised crime, the proximity requirement means that persons who are only planning and perhaps directing a criminal offence cannot be held liable for an attempt. Furthermore, the law of attempt and incitement requires that the accused's intention is directed at a specifiable criminal offence; it does not suffice if a person only engages in planning and preparation of criminal offences generally. Directing a criminal organisation in the absence of identifiable criminal activities does not create liability for an inchoate offence.

The threshold for inchoate liability is raised even further in those jurisdictions that require prove of an overt act which manifests the intention to a commit a specific offence.[383] Senior members of criminal organisations, however, will rarely if ever engage in overt physical acts which are left for low-ranking member to carry out.

4.3 Secondary Liability

Secondary liability provides for the criminalisation of conduct engaged in by more than one person. It refers to an extension of responsibility to criminalise participants who commit offences jointly or who contribute to the commission of a criminal offence: so-called accessories. Secondary liability arises for persons who are parties to the principal offence but who themselves are not criminally responsible as principal offenders.[384] The rationale for extending liability beyond the principal offender(s) is "that a person who promotes or assists in the commission of a crime is just as blameworthy as the person who actually commits the crime".[385]

Secondary liability may arise for conduct that occurred before or during the commission of the principal offence: so-called accessorial liability (accessories). Secondary liability may also arise for conduct that occurs after the principal offence, by so-called accessories after the fact. Secondary liability may only arise in connection with a principal offence; it is derivative, thus there can be no criminal responsibility for an accessory in the absence of a principal offence.[386]

To establish accessorial liability it must generally be shown that the accused (physically) enabled, aided, counselled, or procured another person to commit an offence. The prosecution must show that the accused "is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission": *R v Russell* [1933] VR 59 at 67 per Cussen ACJ.[387] In relation to criminal organisations, these requirements are broad enough to capture many of the 'soldiers' that carry out the criminal activities of the organisation, but it is more difficult — and often impossible — to establish liability for those are more to distant from the principal offence, including those persons who direct and mastermind the criminal network but who have no physical involvement in the execution of specific offences.[388]

Accessorial liability further requires proof that the accused (1) knew all of the essential facts which made the principal offence a crime, and (2) intentionally enabled, aided, counselled, or procured

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383 See, for example, s 4(1) *Criminal Code* (Qld).

384 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 341–344; David Lanham et al, *Criminal Laws in Australia* (2006) 480–482.

385 Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 426.

386 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed 2008).

387 Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2004) 349–358; David Lanham et al, *Criminal Laws in Australia* (2006) 492–499.

388 Cf Louis Waller & CR Williams, *Criminal Law* (10th ed, 2005) para 10.67.

the conduct of the principal offender: *Giorgianni v R* (1985) 156 CLR 473 at 487–488 per Gibbs CJ. These mental elements ensure that persons who unwittingly support or participate in the principal offence are not criminally responsible as accessories. The elements also ensure that an accessory can only be held responsible for principal offences that he or she contemplated and not for conduct by the principal offender that are outside the scope of the accused's contemplation.[389] These requirements create some difficulties for offences in which criminal organisations are involved. In the case of larger syndicates some people may make contributions to the group generally, and may well be aware that the group regularly engages in criminal activities, but they have no specific knowledge about individual offences. A person may, for instance, deliberately provide a criminal organisation with firearms, other equipment or money, but may not be aware of any specific offences this material will be used for. Participants of this kind do not meet the threshold of the mental elements required for accessorial liability.

In establishing accessorial liability there is no requirement to show that the accessory acted in agreement with the principal or that the principal acknowledged the support or contribution by the accessory in any way. Accessorial liability may arise even if the principal offender is completely unaware of the accessory's conduct. Thus accessorial liability is established, for the most part, on the basis of the physical collaboration of multiple persons and, unlike conspiracy, not on their 'mental' cooperation.[390]

4.4 Conspiracy

In many jurisdictions, especially common law countries, the doctrine of conspiracy is currently the most suitable — and often the only available — tool to create liability for people involved in criminal organisations,[391] especially those "who plan and organise crimes but take no part in their actual commissions".[392] Put simple, conspiracy criminalises agreements between two or more persons to commit an unlawful act where there is an intention to commit that unlawful act.[393]

As with other inchoate offences, conspiracy extends criminal liability beyond the completion of a crime (see Figure 21 above). Conspiracy extends liability 'backwards' beyond attempts by criminalising the planning (or 'agreement') stage of a criminal offence; "conspiracy is a more 'preliminary' crime than is attempt";[394] it exists even without preparation of the contemplated offence.[395] As such, conspiracy serves the purpose of preventing crime and it allows law enforcement agencies to intervene (and enables charges to be laid) long before the actual attempt or commission of an offence.[396] Conspiracy has a further dimension in that it allows for the criminalisation of multiple persons involved in a criminal enterprise. Conspiracy attaches liability to agreements to commit crime. This enables the prosecution of persons who organise and plan crime, rather than execute it.[397]

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389 RG Kenny, *An Introduction to Criminal Law in Queensland and Western Australia* (6th edn, 2004) paras 9.12–9.13. Cf Simon Bronitt & McSherry, *Principles of Criminal Law* (2nd edn, 2005) 358–364; David Lanham et al, *Criminal Laws in Australia* (2006) 499–509.

390 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008).

391 Cf Clay M Powell, "Conspiracy Prosecutions" (1970) *Criminal Law Quarterly* 34 at 42.

392 Louis Waller & CR Williams, *Criminal Law* (10th ed, 2005) para 10.66.

393 Section 465 *Criminal Code* (Canada), s 310 *Crimes Act* 1961 (NZ); s 11.5(1) *Criminal Code* (Cth); s 48(1) *Criminal Code* (ACT); s 282 *Criminal Code* (NT); ss 541, 542 *Criminal Code* (Qld); s 321(1), (2) *Crimes Act* 1958 (Vic); ss 558, 560 *Criminal Code* (WA), and at common law.

394 David Watt & Michelle Fuerst, *2008 Tremeear's Criminal Code* (2007) 422. "Thus, the law of conspiracy pushes inchoate liability back towards what would usually be regarded as a mere preparatory act in the law of attempt." Eric Colvin et al, *Criminal Law in Queensland and Western Australia* (4th edn, 2005) para 19.22.

395 *R v Trudel* (1984) 12 CCC (3d) 342.

396 Peter Gillies, *The Law of Criminal Conspiracy* (2nd ed, 1990) 4-13. Cf *DPP v Nock* (1978) 67 Cr App R 116 at 126-127.

397 Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008).

In essence, liability for conspiracy arises when two or more persons enter into an agreement to commit an unlawful act[398] with the intention to commit that unlawful act.[399] Unlike attempt, there is no requirement to demonstrate that the accused came close ('proximate') to the completion of the substantive offence.[400]

At the heart of liability for conspiracy is the agreement to commit a criminal offence or effect an unlawful purpose.[401] The agreement must be made between at least two people, or, in other words, between the accused and another person. An agreement with oneself is not possible.[402] While the agreement cannot exist without communication between the conspirators, there is no requirement that the parties to the agreement know each other. All that is required is that each conspirator is committed to the agreed objective. There is no requirement regarding the level of involvement of a conspirator in the agreement. The agreement may envisage that all conspirators equally take some action towards the agreed goal, but a conspirator may also be part of the agreement without carrying out any conduct towards the common objective.[403]

The agreement between the conspirators imports an intention that the unlawful act or purpose of the agreement be done.[404] "To prove the existence of a conspiracy, it must be shown that the alleged conspirators were acting in pursuance of a criminal purpose held in common between them".[405]

Jurisdictions are divided over the requirement to prove some overt physical manifestation to take place after the agreement. This requirement seeks to ensure that the conspirators actually put their plans into action and eliminates liability for agreements that may be no more than bare intent or wishful thinking.[406] Most US jurisdictions and also Australian federal criminal law, and the Australian Capital Territory require that at least one of the parties to the agreement commit an overt act pursuant to the agreement, ss 11.5(2)(c) *Criminal Code* (Cth), 48(2)(c) *Criminal Code* (ACT). At common law,[407] in Canada,[408] New Zealand,[409] Queensland, Victoria,[410] and Western Australia,[411] however, this 'overt act' is not a formal requirement of conspiracy. Consequently, liability for conspiracy may also arise without any physical manifestation of the agreement between the conspirators. In practice, some overt act usually has occurred before conspiracy is charged.[412]

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398 *R v O'Connell* [1912] QWN 36; *Day and Simon v R* (1995) 81 A Crim R 60; *R v Gudgeon* (1995) 133 ALR 379 at 389.

399 Australia: *R v Rogerson* (1992) 174 CLR 268; *R v Thompson* (1965) 50 Cr App R 1; *Giorgianni v R* (1985) 156 CLR 473 at 506; *DPP v Nock* [1978] 2 All ER 654 at 558. Canada: *Chapman* (1972) 20 C.R.N.S. 141 at 142; *R v O'Brien* (1954) 110 C.C.C. 1 at 3, 6, 9; *Mulcahy* (1868) L.R. 3 H.L. 306.

400 Glanville Williams, *Criminal Law: the general part* (2nd ed, 1961) 710.

401 "When two agree to carry [the agreement] into effect, the very plot is an act in itself": *Mulcahy v R* (1868) L.R. 3 H.L. 306 at 317 per Willes J, also cited in *R v O'Brien* (1954) 110 C.C.C. 1 at 9 per Estey J.

402 *R v O'Brien* (1954) 110 C.C.C. 1; *Peters v R* (1998) 192 CLR 49. Cf s 11.5(2) *Criminal Code* (Cth).

403 Cf Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd edn, 2005) 416–424; David Brown et al, *Criminal Laws* (4th edn, 2006) 1092–1103; Eric Colvin et al, *Criminal Law in Queensland and Western Australia* (4th edn, 2005) para 19.22; David Lanham et al, *Criminal Laws in Australia* (2006) 469–470, 471–475.

404 *R v Rogerson* (1992) 174 CLR 268; *R v O'Brien* (1954) 110 C.C.C. 1

405 MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th edn, 2006) s 541.20; cf *Gerakiteys v R* (1984) 153 CLR 317

406 Donald Stuart, *Canadian Criminal Law* (5th ed, 2007) 705.

407 "It is not necessary in order to complete the offence that any one thing should be done beyond the agreement": *R v Aspinall* (1876) 2 QBD 48 at 58 per Brett JA.

408 See *Belyea v R* (1932) 57 CCC 318; *Cameron* (1935) 64 C.C.C. 224 at 230; *Harris* [1947] O.R. 461 at 466; *Deal* (1956) 114 C.C.C. 325 at 331. "[I]t is immaterial that there was no effort towards achieving the common purpose once agreement is proved." Donald Stuart, *Canadian Criminal Law* (5th ed, 2007) 688-689.

409 *R v Gemmell* [1985] 2 NZLR 740 at 743. Cf *R v Johnston* (1986) 2 CRNZ 289; *R v Sanders* [1984] 1 NZLR 636.

410 Section 321(1), (2) *Crimes Act* 1958 (Vic).

411 *Poulters' Case* (1611) 77 ER 813. Eric Colvin et al, *Criminal Law in Queensland and Western Australia* (4th edn, 2005) para 19.22.

412 "The overt acts taken to carry out the agreement are merely evidence going to prove the agreement": *R*

It "may be difficult for the prosecution to prove what occurred in a private meeting between conspirators"[413] and "the authorities generally do not learn of the conspiracy until it has been transacted, wholly or partly."[414] Justices McPherson and Thomas remarked in *R v Gudgeon* (1995) 133 ALR 379 that:

> The essence of the offence of conspiracy lies in the 'agreement of minds' and performance of the agreement is not a requisite of the offence. Evidence of acts following the agreement may be the only available proof that the agreement was made, but it is the agreement and not the evidence that constitutes the offence.[415]

One of the practical advantages of conspiracy is that it allows merging the prosecution of several charges against multiple persons,[416] thus recognising the connection between different individuals and different crimes. Conspiracy offers an avenue to target the masterplan (ie the agreement) rather than the isolated substantive offences.[417] "The conspiracy prosecution", remarks Clay Powell, "has the great advantage of combining all the isolated acts to put together the full picture."[418] The difficulty in this combining of offences and offenders is the unavoidable complexity of conspiracy prosecutions and trials. Douglas Meagher noted: "Where the number charged exceeds five or six, the trial tends to become unmanageable".[419]

In practice, conspiracy charges frequently involve criminal rings involved in drug trafficking, supply, and sale.[420] The charges are generally used against persons who are involved in the planning and organisation of the crimes and in most cases there was also evidence of the accused having possession of or immediate access to the illicit drugs. While the essence and rationale of conspiracy captures many features of organised crime, proving the elements can be difficult for certain people involved in criminal organisations.[421] First, conspiracy cannot be used as a charge against persons that are not part of the agreement. This excludes from liability low ranking members of criminal organisations that are not privy to the agreement and are not involved in the planning of criminal activities.[422] Mere knowledge or recklessness of the agreement does not suffice to establish liability for conspiracy.[423] Second, in those jurisdictions that require proof of an overt act it becomes difficult, if not impossible, to target high ranking members of criminal organisations that mastermind and finance the criminal activities, but that are not involved in executing their plans and thus do not engage in any overt acts.

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v Douglas (1991) 63 CCC (3d) 29; *Kouftis v R* [1941] SCR 481 at 488.

413 Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 390. Cf *R v Gassyt* (1998) 127 CCC (3d) 546; AP Simester & WJ Brookbanks, *Principles of Criminal Law* (2nd ed, 2002) 265.

414 Peter Gillies, "Secondary Offences and Conspiracy" (1991) 15 *Criminal Law Journal* 157 at 161.

415 MJ Shanahan et al, *Carter's Criminal Law of Queensland* (16th edn, 2006) s 541.20.

416 Cf Peter Gillies, "Secondary Offences and Conspiracy" (1991) 15 *Criminal Law Journal* 157 at 162.

417 Cf *R v Shepherd* (1988) 37 A Crim R 303 at 309-310.

418 Clay M Powell, "Conspiracy Prosecutions" (1970) *Criminal Law Quarterly* 34 at 43.

419 Douglas Meagher, *Organised Crime* (1983) 65; cf Barbara Hocking, *The Law of Criminal Conspiracy* (1998) 377.

420 See, for example, *R v Sorby* [1986] VR 753; *R v Shepherd* (1988) 37 A Crim R 202; *R v Gudgeon* (1995) 133 ALR 379; *R v Pericic* [2000] QCA 431; *R v X and Y* (2001) 130 A Crim R 153; *Mauceri v R* [2007] NSWCCA 262.

421 Cf Sabrina Adamoli et al, *Organised Crime around the World* (1998) 132.

422 Cf Douglas Meagher, *Organised Crime* (1983) 64.

423 *R v Alexander* (2005) 206 CCC (3d) 233; *R v Roche* (2004) 192 CCC (3d) 557.

Part 5: Australian Legislative Arrangements to Target Organised Crime

5.1 Introduction

With the exception of New South Wales, no state or territory in Australia currently has any specific offences in relation to organised crime and there are also no such offences under federal criminal law. South Australia and Western Australia have so-called anti-fortification laws which were introduced specifically to 'crack down' on the criminal activities of outlaw motorcycle gangs (OMCGs). These laws, however, are seen by many as a failure[424] and are currently under review by the High Court of Australia.[425] A proposal to introduce an offence for participating in an organised criminal group into Queensland's *Criminal Code* failed in October 2007. South Australia recently proposed a suite of measures, including criminal offences, to criminalise biker gangs.

In Australia, the introduction of organised crime laws creates peculiar jurisdictional difficulties. For the most part, in Australia, the six States New South Wales (NSW), Queensland (Qld), South Australia (SA), Tasmania (Tas), Victoria (Vic), and Western Australia (WA) have powers to legislate criminal law. Powers to enact criminal laws have also been delegated to the Australian Capital Territory (ACT) (s 22 *Australian Capital Territory (Self-Government) Act 1988* (Cth)) and the Northern Territory (s 6 *Northern Territory (Self-Government) Act 1978* (Cth)).[426]

The federal Commonwealth Parliament has limited legislative powers. Minor exceptions aside, these powers relate only to the subject matters enumerated in s 51 of the *Australian Constitution.* Crime is not a subject matter of legislative power enumerated by s 51; hence, the Commonwealth Parliament has no general legislative power to make laws on crime. The Commonwealth Government, however, has the power to make criminal law in those areas that are assigned to the Federal Parliament. These include the subject matters enumerated by s 51 *Constitution* and the 'incidental power' as provided for in s 51(xxxix) *Constitution,* for example customs, trade, external affairs, fisheries, quarantine et cetera.[427] The Commonwealth's external affairs power authorises the Federal Government to enter into international treaties. Australia has signed the *Convention against Transnational Organised Crime* but it is not certain whether the implementation of the Convention obligations rests with the Commonwealth or the States and Territories. In the past, especially in *Commonwealth v Tasmania* (1983) 46 CLR 625, the High Court applied a very broad reading of the Commonwealth's external affairs powers, suggesting that the Federal Parliament can legislate on any criminal law issue arising out of international treaties signed by the Federal Government.[428] To date, federal criminal law, however, contains no specific offences relating to participation in criminal organisations and there appear to be no immediate plans to introduce an offence of this nature into the *Criminal Code* (Cth).

In late 2006, New South Wales became the first State in Australia to introduce specific offences aimed at criminalising the participation in a criminal organisation. The new provisions under the *Crimes Act* 1900 (NSW) mirror similar offences in Canada and New Zealand and reflect some elements of the definition of 'organised crime group' in the *Palermo Convention*. It is anticipated that other jurisdictions in Australia will implement legislation similar to that in New South Wales. In Queensland, a Bill to criminalise membership in an organised criminal group was introduced in May 2007 but was defeated in Parliament in October 2007.[429] South Australia proposed sweeping

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424 [Editorial], "The war on bikies is failing", (22 June 2007) *The Advertiser* (Adelaide) 16; personal communication with South Australia Police and Western Australia Police, June 2007.

425 See Section ? below.

426 See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) with further references.

427 See further Andreas Schloenhardt, *Queensland Criminal Law* (3rd ed, 2008) with further references.

428 See further David Brown et al, *Criminal Laws* (4th ed, 2006) 956.

429 *Criminal Code (Organised Criminal Groups) Amendment Bill* 2007.

new measures, including offences, against criminal associations in November 2007 which are fundamentally different compared to those in operation elsewhere.[430]

5.2. New South Wales

In September 2006, New South Wales (NSW) became the first — and so far the only — jurisdiction in Australia to have specific offences against criminal organisations. The *Crimes Legislation Amendment (Gangs) Act 2006*[431] introduced several new offences in relation to "participation in criminal groups" into the *Crimes Act 1900* (NSW) and also increased law enforcement powers in relation to criminal organisations in a new Part 16A of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The next Sections explore the circumstances that led to the introduction of these provisions, followed by an analysis of the definition of criminal group and the participation offence.

5.2.1 Background

Legislation to criminalise participation in a criminal organisation and related activity was first introduced in the Legislative Assembly on 30 June 2006. The introduction of the *Crimes Legislation Amendment (Gangs) Bill* was seen as response to increased organised crime activity in New South Wales in order to protect "the citizens of New South Wales […] against gang violence, thuggery and organised criminal activity",[432] "increase that feeling of safety within our community",[433] and to "prevent Sydney from turning into Chicago or Los Angeles."[434] In his second reading speech, Parliamentary Secretary Tony Steward remarked:

> New South Wales cities are not plagued by violent street gangs such as those found in the United States of America. However, criminal organisations do exist. At the highest level, there are well-developed and hierarchical criminal networks such as the Russian mafia and other ethnically based organised crime groups and outlaw motorcycle gangs, known colloquially as bikies. Those organisations terrorise individuals and businesses, run sophisticated drug and firearm operations, cover their tracks through veiled money laundering operations and make innocent bystanders and businesses their victims.[435]

He noted further that:

> In recent years, there have also emerged significant crime gangs based on common ethnicity. They include Vietnamese and Chinese gangs with a strong involvement in the drug trade, Pacific Islander groups who are specialised in armed robberies, and criminals of Middle Eastern origin who engage in firearms crime, drug trafficking and car rebirthing. […] Many gangs have nothing to do with ethnicity. They are formed rather on the basis of common interest, for example motorbikes, geographical proximity, or, sadly, contacts made in the prison system.[436]

The introduction of this Bill was not triggered by any single, high profile case or incident and no empirical evidence has been submitted to support the statements that organised crime is increasing significantly in New South Wales. There are, however, other reports documenting the history and levels of organised crime in New South Wales which — like most other Australian

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430 *Serious and Organised Crime Bill 2007* (SA).

431 No 61 of 2006.

432 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

433 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

434 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Maroubra), 1535.

435 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142; NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Eric Roozendaal), 1733. See also NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Kevin Greene, Georges River), 1524.

436 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

jurisdictions — is home to many established criminal organisations, including OMCGs that are particularly prevalent in the trade of amphetamine, methamphetamine, and MDMA (ecstasy) and the associated nightclub and security industry.[437] The legislative material contains no references to the *Convention against Transnational Organised Crime*.

In introducing this new legislation against criminal organisations, the Government sought to

> recognise that crimes committed by gangs, whether they be crimes of violence, revenge attacks, systematic property damage, organised motor vehicle theft, protection rackets, armed robberies or the drug and gun trade, are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals acting alone.[438]

Of particular concern in New South Wales has been a perceived rise in the activities of Middle Eastern criminal syndicates in Sydney, which, according to Opposition member Mr Chris Hatcher, "will have an impact on society unlike anything we have ever seen".[439] He noted that Middle Eastern organised crime has existed in NSW since the mid-1990s and stated that his Party

> has called upon the Government to take action against 200 identified thugs. Those are the 200 whom police have on record at the very least as being ongoing and full-time organisers and principals in criminal activity in western and south-western Sydney.[440]

Earlier attempts by the NSW Opposition to legislate against criminal organisations failed, including a recent proposal to make leadership of a criminal group an aggravating offence under the *Crimes (Sentencing Procedure) Act 1999* (NSW).[441]

It should be noted that the measures against organised crime are not the only feature of the *Crimes Legislation Amendment (Gangs) Act 2006* (NSW). The Act simultaneously introduced new provisions relating to public order which were a response to xenophobic riots that occurred in Cronulla in southeastern Sydney on December 11, 2005. The magnitude of this incident and subsequent revenge attacks, and the coverage these riots obtained in the international media, forced the NSW Government to amend existing public order offences (sometimes referred to as 'mob offences'),[442] increase penalties for offences against law enforcement officers,[443] and enhance related enforcement powers.[444] While these provisions feature prominently in the debates of the *Crimes Legislation Amendment (Gangs) Bill*¸ they are otherwise unrelated to the provisions relating to organised crime.

The *Crimes Legislation Amendment (Gangs) Act* was assented to on September 28, 2006. Prosecutions and case law on the new provisions are only slowly forthcoming and the medium and long-term effects of the legislation have yet to be seen. Critics remains sceptical about the need

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437 See further DGE Caldocott et al, "Clandestine drug laboratories in Australian and the potential for harm" (2005) 29(2) *Australian and New Zealand Journal of Public Health*, 155 at 158; Australian Crime Commission. *Submission to the Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into AOSD* (13 Mar 2006) 8; G Wardlaw. "Supply reduction (law enforcement) strategies pertaining the illicit use of psychostimulants", in D Burrows et al. (eds), *Illicit psychostimulant use in Australia* (1993) 96.

438 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142; cf NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Kevin Greene, Georges River), 1523.

439 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

440 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

441 *Crimes (Sentencing Procedure) (Gang Leaders) Bill* 2005; cf NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Chris Hartcher, Gosford), 1517.

442 See new ss 60(1A), (2A), (3a), 60A(1), 195(2), 196(2), 197(2), 199(2), 200(2) *Crimes Act 1900* (NSW.

443 See ss 60B, 60C *Crimes Act 1900* (NSW).

444 See new s 87MA *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

for this legislation arguing that it is simply another attempt "to grab headlines and win votes [rather] than to address crime rates and community safety."[445]

5.2.2 Definition of "criminal group"

At the heart of the New South Wales amendment stands the definition of the term "criminal group" in s 93IJ(1) *Crimes Act 1900* which is in many parts identical to the definition of "organised criminal group" in New Zealand. In New South Wales, criminal groups are defined as groups of three or more people who have as one of their objectives to obtain material benefits from serious indictable offences (s 93IJ(1)(a) and (b)) or to commit serious violence offences (s 93IJ(1)(c) and (d)). In simple terms, criminal groups in New South Wales include two types of associations of three or more people: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence. The Second Reading speech of the Bill confirms that the legislation "attacks the foundations of two very different types of gangs. It deals with both organised criminal groups and impromptu groups of violent individuals or mobs."[446]

Figure 22 "Criminal group", s 93IJ(1) *Crimes Act 1900* (NSW)

Terminology Elements	**Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 98IJ(2)): o Some of them are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o Its membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from serious indictable offences (a) in New South Wales or (b) equivalent elsewhere; or • Serious violence offences(s 93IJ(1)) (c) in New South Wales or (d) equivalent elsewhere.

Structure

The minimum number of people required for a criminal group in New South Wales is three — the same as in most other jurisdictions. Unlike the *Palermo* Convention, in NSW there is no further requirement of any formal structure (such as membership or a division of labour) between these people. It is assumed that there is some association between the people in the criminal group but it is not required that the group existed for any length of time, thus spontaneous association of people can also be criminal groups. Section 93IJ(2) confirms that:

> A group is capable of being a criminal group […] whether or not:
>
> (a) any of them are subordinates or employees of others, or
>
> (b) only some of the people involved in the group are planning, organising or carrying out any particular activity, or
>
> (c) its membership changes from time to time.

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445 NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon), 1756. See also the comments in Dennis Miralis, "Law & Order 2007-style" (Mar 2007) *NSW Law Society Journal* 54 at 54, 56.

446 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1142.

Objectives of the criminal group

The core feature of the criminal group definition in New South Wales is the requirement that the criminal group shares a common objective. As in New Zealand and Canada, there is no requirement of any actual joint activity by the group members — the shared objective is the central feature of this definition and the shared objective need not be sole objective of this group, s 93IJ(1). The objectives of criminal groups in New South Wales have been adopted from New Zealand, capturing two types of associations: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence.

The first possible objective of a criminal group is "obtaining material benefit from conduct that constitutes a serious indictable offence" in New South Wales (para (a)) or an equivalent offence outside NSW (para (b)). "Serious indictable offence" is defined in s 4 *Crimes Act 1900* (NSW) as "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more." There is no limitation in s 93IJ(1)(a) and (b) as to the nature of the offence; it can be any kind whatsoever. But the requirement that the groups seeks to "obtain material benefit" from that offence suggests this would generally involve serious offences against property, property offences involving violence, as well as drug offences, homicide, and a small number of other crimes.

The second possible objective of criminal groups is "committing serious violence offences" in New South Wales (para (a)) or equivalent offences outside NSW (para (b)). "Serious violence offence" is a new term defined in s 93IJ(1) as offences punishable by imprisonment of ten years or more that involve either (a) the loss (or risk of loss) of life, (b) serious injury (or risk of serious injury), (c) serious property damage thereby endangering the safety of a person, or (d) perverting the course of justice in relation to a serious violence offence. This second type of criminal group encompasses people who associate in order to commit grave offences against the person, such as homicide, rape, or inflictions of grievous bodily harm. While this second objective is reflective of some crimes committed in New South Wales in recent years, in particular gang-rapes,[447] it marks a sharp departure from general concepts of organised crime. In particular, the second objective does not require any purpose relating to financial or other benefit. It encompasses situations that may be purely emotional or spontaneous and it does not feature the characteristics of an ongoing criminal enterprise for material gain.

The criminal objective element shares some resemblance to the requirement of "agreement" in the doctrine of conspiracy.[448] To that end, the NSW Legislation Review Committee noted that the concept of a criminal group in s 93IJ(1) "is akin to a permanent or at least long-term conspiracy, which lasts for as long as three or more people maintain an association in pursuit of at least one of the criminal objectives listed in s 93IJ(1)."[449] In contrast to conspiracies, however, there is no requirement of any specific agreement among the three or more people to commit particular (identifiable) crimes.[450] The absence of a requirement to establish any specific activity planned by the group is also noticeable in the mental elements of the new offences (see below).

In summary, only one part of the definition of 'criminal group' deals with organised crime while another part deals with groups seeking to engage in serious violence. It is debatable whether the concept of criminal groups adequately captures the characteristics of organised crime. Concerns may arise over the breadth of the NSW definition although the legislator has assured that "the threshold used to define an organised criminal group is quite high".[451] The term "organised" is, however, not used anywhere in the legislation. It has been stated that, for example, "three kids spraying graffiti on a billboard could not be classified as an organised criminal group, but a 10-

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447 Cf *R v Bilaf Skaf* [2005] NSWCCA 297.

448 See Section ?? above.

449 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 19.

450 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 19.

451 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144.

person car rebirthing operation would be," [452] but the legislation offers little guidance to draw this distinction.

The strong emphasis on the objectives of the criminal group rather than on its structure and its activities creates some uncertainty about the scope of application. It is left to the courts to limit the application of this definition and ensure that there are no infringements on the freedom of association and other civil liberties. The current legislation does not contain these safeguards.

5.2.3 Participation in criminal groups

Section 93IK *Crimes Act 1900* (NSW) contains four new offences relating to participation in a criminal group. Under subsection (1) it is an offence to knowingly participate in a criminal group. This offence is the basic participation offence; the other offences are aggravations involving some violence. Subsection (2) criminalises assaults relating to criminal group activity and subsection (3) contains a similar offence in relation to property damage. Under subsection (4) it is an offence to assault law enforcement officers whilst intending to participate in a criminal group. The four offences are discussed separately below.

New section 93IK(1) criminalises (basic) participation in a criminal group. The physical element of this offence requires proof that accused "participated" in a group of people that meets the definition of "criminal group" under s 93IJ(1) (see above). The offence has two mental (or fault) elements: (a) the accused's knowledge that the group is a criminal group; and (b) knowledge or at least recklessness that the accused's participation in that group may contribute to the occurrence of any criminal activity, see Figure 23 below.[453] Offences under s 93IK(1) are punishable by up to five years imprisonment.

Figure 23 Elements of s 93IK(1) *Crimes Act 1900* (NSW)

S 98IK(1)	Elements of the offence
Physical elements	• participating in • a criminal group (s 93IJ(1)).
Mental elements	• knowledge/recklessness as to whether the participation in that group contributes to the occurrence of any criminal activity, s 93IK(1)(b); • knowledge that it is a criminal group, s 93IK(1)(a).
Penalty	Maximum 5 years imprisonment

Physical Elements

The single physical element of the offence under s 93IK(1) is proof of participation in a criminal group as defined in s 93IJ(1). The term 'participation' is not further defined in the *Crimes Act 1900* (NSW) and its exact meaning is unclear. [454] The term is usually used in the context of complicity and accessorial liability — which are governed by common law in New South Wales — to describe any aiding, enabling, counselling, or procuring of a criminal offence. From the wording of s 93IK(1) it is not clear whether the participation must actually have the consequence of contributing to the occurrence of any criminal activity, or whether any participation suffices, including acts unrelated or only remotely related to "any crime, whether complete or incomplete, at any time in the future".[455]

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452 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144.

453 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 15.

454 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525. See also the discussion of the term in Section ?? above.

455 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 16, 30-32.

Membership is not a separate element of the new offence and the legislator confirmed that the legislation "does not make membership of a criminal organisation an offence per se, nor does it make every transaction with a criminal organisation an offence. A person can be a member of the gang and not a criminal participant."[456] In the eyes of the legislator, participation is more than simple membership, but the distinction between participation and membership is not an easy one to make and the mental elements for this offence further blur this division. It has been noted elsewhere, that "[i]f a person need not be a member to be liable, then the group of possible offenders is broader than that of gang members alone."[457]

The new offence has also been criticised, especially in opposition circles, for not adequately targeting the organisers and financiers of organised criminal activity. The offence under s 93IK criminalises any participation in a criminal group and, unlike similar provisions in Canada, does not differentiate between different levels of involvement or between the roles people occupy within a criminal organisation. In particular there are no references, no aggravating elements, and no higher penalties provided for gang leaders.[458] This is seen by some as major weakness of the new offence:

> It is time that leadership of a gang, by virtue of that leadership without anything else, puts the activities of the person involved as leader in the worst category of that crime. Gangs form around leaders; a key condition precedent to a gang forming is that there is a leader. Gangs comprise leaders and followers, and most members are followers. There may be one or two leaders, but nothing in this legislation tackles leaders.[459]
>
> In the corporate world a hierarchy exists between chairmen, directors, company secretaries and other office bearers, and the same exists within the criminal realm. Some recognition should be give to these distinctions.[460]

The omission of leadership from the concept of criminal group and the participation offence was deliberate. As stated earlier, the legislator designed the new offences to target a diverse spectrum of criminal groups and participants, not just those organisations with clear internal hierarchies. From the legislative material it appears that the legislator sought to criminalise a great range of people who are directly and indirectly associated with criminal groups:

> That offence targets a range of activities and people who work with criminal organisations, and obviously some of them will be members. They will wear the colours and have the tattoos. Others will wear tailored suits and appear to be the pinnacle of respectability. The offence targets those hiding in the background of a criminal enterprise and those who facilitate organised criminal activity. They may be accountants, bookkeepers, executives, or even lawyers who fudge records, launder money, construct sham corporate structures and hide assets. It also targets the front men.
>
> These are the so-called cleanskins, people with no criminal record who give criminals a legal front behind which to commit their crimes and minimise the risk of detection by law enforcement. They may be licensed hoteliers, real estate agents, smash repairers, pharmacists or public officials, who, in various ways, aid and abet ongoing criminal activity. And, of course, the bill targets the heavies—the people who actively commit ongoing criminal acts: the drug runners, the gun traffickers, the car rebirthers, the armed robbers and the standover men.[461]

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456 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144; cf NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 26.

457 Timothy Mullins, "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1996-99) 8 *Auckland University Law Review* 832 at 837.

458 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525; NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla) 1529.

459 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Andrew Tink, Epping), 1525.

460 NSW, Legislative Council, *Hansard* (19 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (The Hon Gordon Moyes), 1753.

461 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1144.

But the possible application of the participation offence is much wider than that. It has been noted that a criminal group can equally be constituted by "a number of youths with no particular leader — with a lot of alcohol induced bravado […] going around pulling out sprinklers and street signs and causing nuisance."[462] There is, however, a fundamental difference between this type of juvenile delinquency and multinational drug cartels. The legislation does not in any way recognise this important distinction.

Mental elements

Section 93IK(1)(a) *Crimes Act 1900* (NSW) requires that an accused has knowledge pf the criminal nature of the group. This means that the person must positively know of the three or more people involved in that group and must also know that the group is pursuing one of the stated objectives. There is no separate requirement that the accused himself or herself pursues these objectives independently and there is no element requiring that he or she intended to provide assistance or encouragement to others.[463]

Further, a person must be at least reckless — ie must be at least aware of the possibility — that his or her participation in the group could or might contribute to the occurrence of any criminal activity, s 93IK(1)(b). Recklessness is an alternative to knowledge, thus it is not necessary that an accused is virtually certain that his or participation will actually make such a contribution. Proof of foresight that there might or could be a contribution will suffice.[464] It is not necessary to show that this mental element relates to the commission of a specific criminal activity; the statute states that foresight of "any criminal activity" will suffice.[465]

It has been argued that the inclusion of recklessness as an alternative mental element to knowledge in s 93IK(b) assists in the deterrence of criminal activity by criminal groups. "The message, particularly to young people," stated Mr Michael Daley MP, "is: When in doubt stay away. It places a responsibility for their own actions. […] It will no longer be a defence to claim ignorance."[466] On the other hand, the mental elements for the offence under s 93IK(1) have been criticised for being too broad and lacking clarity.[467] Including recklessness as a mental element is seen as displacing "the common law threshold of a knowledge of essential matters as a basis of liability."[468] Dennis Miralis remarked that:

> Under this Act there is no requirement that the accused must have intended to provide assistance or encouragement to a criminal group. Additional it isn't necessary for the prosecution to prove that the accused knowingly or recklessly contributed to the commission of a specific crime. These are fundamental departures from the requirement in criminal law that an accused is guilty only if they had a guilty mind and intended to commit an offence.[469]

Concerns have been expressed that the new offence can potentially target people who are only rudimentarily associated with criminal groups if they are reckless that their participation might contribute to criminal activity,[470] such as "businesspeople who are trying to make a living being out

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462 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mrs Dawn Fardell, Dubbo) 1534.

463 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

464 *La Fontaine v R* (1976) 136 CLR 62; *R v Crabbe* (1985) 156 CLR 464; *Boughey v R* (1986) 161 CLR 10 at 21.

465 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 21.

466 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Michael Daley, Moroubra) 1537.

467 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 33.

468 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Paul Pearce, Coogee) 1533.

469 Dennis Miralis, "Law & Order 2007-style" (Mar 2007) *NSW Law Society Journal* 54 at 55.

470 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) paras 33-34.

in harm's way and falling victim to the Government in relation to gangs."[471] During the parliamentary debates Ms Lee Rhiannon raised the questions:

> Does this mean that someone who catches a lift with friends who have committed a crime will be caught by the provision? Can that person be sent to gaol for a car ride? […] How does someone know whether he or she is associating with a gang, which is not allowed, or a group, which is allowed. It seems inevitable that innocent people will be caught in the wide net of this legislation.[472]

In summary, it is not fully possible "to predict, with reasonable confidence and on the basis of reasonably accessible legal materials, the circumstances in which a power will be used so as to interfere with one's rights."[473]

5.2.4 Aggravations

The new provisions relating to participation in a criminal group also include three aggravated offences in subsections 93IK (2), (3), and (4), punishable by 10 and 14 years imprisonment. The offences modify the requirements under the participation offence in subsection (1) by alter the physical elements, including assaulting another person (subs (2)), destroying or damaging property (3), and assaulting a law enforcement officer (4).

These new offences are aggravations to existing offences in the *Crimes Act 1900* (NSW) and at common law, such as assault, property damage, and assaults of law enforcement officers. The aggravating feature of the new offences is the additional mental element requiring an intention of participating in a criminal activity of a criminal group by that action. The stated purpose of these aggravations is to recognise

> that crimes committed by gangs, whether they be crimes of violence, revenge attacks, systematic property damage […] are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals alone.[474]

Assault with intent to participate in a criminal group

The first of the aggravations involves assaults of another person with intention to participate in a criminal group, s 93IK(2). The single physical element of this offence is the assault of another person. The term assault is understood in the same way as elsewhere in the *Crimes Act 1900* (NSW) and at common law: "An assault is any act which […] causes another person to apprehend immediate and unlawful personal violence […] and the actual intended use of unlawful force to another person without his [or her] consent": *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439 at 444 per James LJ.[475] Participation is not a separate physical element of this offence; in contrast to s 93IK(1), it must be established that by the assault the person intended "to participate in the criminal activity of a criminal group". In other words, it needs to be shown that the assault was accompanied by an intention to participate; actual participation is not required and there is also no requirement that the criminal group approves or is aware of the assault.

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471 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Malcolm Kerr, Cronulla) 1532.

472 NSW, Legislative Assembly, *Hansard* (6 Sep 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Ms Lee Rhiannon) 1757.

473 NSW Parliament, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 (5 Sep 2006) para 35.

474 NSW, Legislative Assembly, *Hansard* (30 Aug 2006), Crimes Legislation Amendment (Gangs) Bill, Second Reading (Mr Tony Stewart, Bankstown), 1143.

475 Cf Simon Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2005) 503–504; Bernadette McSherry & Bronwyn Naylor, *Australian Criminal Laws* (2004) 158.

Property damage with intent to participate in a criminal group

The second aggravation in s 93IK(3) relates to actual or threatened damage or destruction of property.[476] It requires proof that the person damaged or destroyed another person's property or threatened to do so. The physical acts need to be accompanied by an intention to participate in criminal activities of a criminal group. The structure of physical and mental elements is identical to subsection (2) and, as with the other aggravations, it suffices to show that the intention relates to "any" criminal activity. It is not necessary to demonstrate that the intention (or the actions) is aimed at a specific criminal enterprise, but the intention must relate to criminal activities, not to other, legitimate conduct of the group.

Assaulting a law enforcement officer with intent to participate in a criminal group

The third and final aggravation in s 93IK(4) mirrors the offence in subsection (2) with an additional physical element relating to the status of the person assaulted. Subsection (4) criminalises assaults of law enforcement officers whilst they are executing their duties intending by that action to participate in any criminal activity of a criminal group. The meaning of law enforcement officers and their relevant duties are set out in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The offence also extends to assaults of officers who are off-duty in the situations specified in s 93IK(5). These situations relate to instances in which the assault is deliberately targeting law enforcement officers.

One of the difficulties associated with the aggravating offences in s 93IK(2)-(4) is again the uncertainty over the meaning of the term 'participation'. It is also not fully clear what evidence would be required to link the assault or property damage with the intention to participate in a criminal group. It appears that the assault or property damage may be completely unrelated to the criminal activities of a criminal group so long as the accused believes or wants these acts to be participatory in some way. Questions may also be raised about the selection of aggravations. In order to criminalise organised crime more effectively, it may be beneficial to combine the mental element of 'intending to participate in a criminal group' with offences that are closely associated with criminal organisations such as drug trafficking, firearms trafficking, or organised motor vehicle theft.

5.3 Queensland

On May 24, 2007, a Bill was introduced into the Queensland Parliament by the State Opposition "to break up organised crime groups and equip law enforcement agencies with the power to arrest these groups."[477] Supporters of the Bill argued that "Brisbane has more crime gangs than Chicago"[478] and that the proposed legislation will "help this state ensure that it does not become an attractive haven for organised crime."[479]

The *Criminal Code (Organised Criminal Groups) Amendment Bill 2007* (Qld) proposed the introduction of s 545A into the *Criminal Code* (Qld) to make it an offence to participate as a member in an organised criminal group. The proposed legislation has been designed to extend the spectrum of criminal liability "beyond parties to offences and break down the group mentality of these organised crime elements."[480] The legislative material also makes brief reference of the *Convention against Transnational Organised Crime*.[481]

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476 Cf s 195 *Crimes Act 1900* (NSW).

477 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1. Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

478 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4012 (Mr Langbroek).

479 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4011 (Dr B Flegg).

480 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 1.

481 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4015 (Mr M McArdle).

The Queensland proposal follows the model adopted in New Zealand and New South Wales by combining a definition of "organised criminal group" with a new offence for participation in such a group.

5.3.1 Organised criminal group

The definition of "organised criminal group" in proposed s 545A(2) is identical to the definition of "organised criminal group" in New Zealand, though there is no acknowledgement of this connection anywhere in the legislative material. "Organised criminal groups" are defined as groups of three or more people who have as one of their objectives to obtain material benefits from offences punishable by at least 4 years imprisonment[482] (s 545A(2)(a) and (b)) or to commit serious violent offences (s 545A(2)(c) and (d)). "Serious violent offence" is defined in s 545A(2) using the same criteria as the equivalent provision in New South Wales. There is no further requirement of any structure, formal association, or any existence of the group for any length of time, and there are no elements relating to the actual activities the group engages in.

Figure 24 "Organised criminal group", proposed s 545A(2) *Criminal Code* (Qld)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s 545A(2)(e)-(g)): o Some of the persons are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o The group's membership changes from time to time.
Activities	• [no element]
Objectives	Either: • Obtaining material benefit from offences punishable by at least 4 years imprisonment (a) in Queensland or (b) equivalent elsewhere; or • Commission of serious violent offences (s 545A(2)) punishable by ten years imprisonment (c) in Queensland or (d) equivalent elsewhere.

Unlike the equivalent definition in New South Wales, the Queensland proposal does include the word "organised". This inclusion may be purely rhetorical but it may also lead to think that random clusters of people without any association between them cannot be regarded as organised criminal groups. However, to constitute an "organised criminal group" it does not matter whether or not membership changes over time, whether different people may be engaged in the planning and execution of the criminal activities, and whether there is a hierarchical structure between persons in the group, s 545A(2)(e)-(g).

As in those jurisdictions with similar legislation, common concerns relate to the breadth of its application and the difficulties of establishing the existence of an organised criminal group. It has been argued that in practice the objectives of the group "would be virtually impossible to prove as crime gangs do not usually have a charter of aims and objectives that includes participation in criminal activity."[483] Concerns were also expressed that the definition

> may in fact target persons who are not themselves engaging in any criminal activity and have no association whatsoever with what members of the public would consider an organised criminal group.

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482 "The reasoning behind the reference to the 4 year offence is to capture the stealing type offences": *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 4.

483 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013 (Mr Lawlor).

> Social groups and culturally relevant organisations could be targeted, resulting in prosecution of people based on race, ethnicity or membership of a social group.[484]

5.3.2 Participation in an organised criminal group

The proposed offence of participating in an organised criminal group is similar in structure to the offences in New Zealand and New South Wales though the Queensland proposal contains some subtle yet significant differences. Under s 545A(1) of the proposal:

> A person who participates as a member of a group knowing—
>
> (1) that it is an organised criminal group; and
>
> (2) that the person's participation contributes to the occurrence of any criminal activity of the group;
>
> commits a crime.
>
> Maximum penalty — 5 years imprisonment.

Figure 25 Elements of proposed s 545A(1) *Criminal Code* (Qld)

S 545A(1)	Elements of the offence
Physical elements	• participating • as a member (s 545A(2) of a group
Procedural matters	Examples for people identifying themselves as members, s 545A(2).
Mental elements	• knowing that the participation contributes to the occurrence of any criminal activity of the group; • knowing that the group is and organised criminal group (s 545A(2)).
Penalty	5 years imprisonment

The threshold for liability under the proposed offence appears to be higher than in New Zealand and New South Wales. In particular, the Queensland proposal is limited to participation "as a member". Membership is an integral part and a physical element of this proposed offence and includes by definition associate members, prospective members, and those who identify themselves as members, for example by wearing or carrying the group's insignia, cloths et cetera, s 545A(2). Accidental associations with criminal groups thus fall outside the application of this offence. Membership itself, however, is not an offence:

> The Bill does not propose to make membership of a gang a criminal offence. Quite simply, the Bill is all about checks and balances. It is not about identifying who is a card-carrying member of a gang and proving beyond reasonable doubt that the offender is a gang member. Rather, the Bill is about identifying organised and ongoing criminal activity in the name of a gang and punishing people accordingly.[485]

In practice, establishing membership will be difficult as it involves an inquiry into the persons actually constituting the group. In many cases, it will be difficult to, either, identify three or more persons and establish that they form a criminal group, or to find witnesses to give evidence against other members. To facilitate proof of this element, the proposal under s 545A(2) includes examples of certain indicia to help establish that an accused is associated with a criminal organisation.[486] These include:

- Wearing clothing, patches insignia or symbols relevant to the group;
- Having a tattoo or brand that is an identifying mark, picture or word relevant to the group;

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484 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

485 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4016 (Mr Messenger).

486 Cf Mark K Levitz & Robert Prior, "Criminal Organization Legislation: Canada's Response" (2003) 61(3) *The Advocate* 375 at 378.

- Making statements about membership of or belonging to the group;
- Having a known association with members of the group.

These examples are not conclusive evidence but are designed to assist the prosecution in establishing whether a person identifies himself/herself as a member, especially in the absence of confessions or other witnesses. There have been some concerns about the use of insignia as evidence for membership with one critic asking:

> So what would happen to a young man who joins a bikie gang [and wears a tattoo of the criminal gang] but, as he gets older, loses interest in the gang? Unless he removes the tattoo surgically, he would always be walking, talking proof that he was a criminal and, according to this Bill, would be subject to five years jail.[487]

The use of evidence such as insignia, tattoos, and other marks and logos confirms that the legislation is suitable for use against criminal organisations with a clear visual presence and identity, but is not helpful to target organisations that operate less visibly and keep their membership covert. It was noted by the Attorney-General that

> [t]he Bill will not assist in the investigation of organised criminals who operate in secret with a high degree of technological sophistication. In fact, there is a real risk that such a law would be counterproductive by driving gangs and similar organisations further underground.[488]

From the text of the proposal and the parliamentary debates, it remains unclear whether the proposed offence requires a nexus between the participation and any actual criminal activity. The wording of the Bill suggests that there is no additional requirement that the person engages in any criminal activity; participation as a member are the sole physical elements. It is the stated objective of this proposal to make

> group members liable for the criminal activities of others. Group members do not need to participate in the actual crime committed or know that the offence would occur. It is enough to be a member of the gang and have others committing the crime.[489]

Furthermore:

> The presence of the defendant, as a group member while another member/s commits an offence renders them guilty. This is seen as passive participation and still contributes to the occurrence of criminal activity.[490]

This, however, would confirm concerns that mere membership in an organised criminal group is indeed a crime.[491] On the other hand, it has been argued that the key requirement of the offence is "that the participation must contribute to the occurrence of any criminal activity. Participation alone is not an offence […]."[492] Sensible interpretation of the legislation suggests that there should be no liability if no criminal activity by the group occurs, but there is no requirement that the accused's participation makes any actual contribution to that activity.

The mental elements of the proposed offence require (a) that the person knows that the group in which he or she participates is an organised criminal group (ie he/she knows the objectives of the group) and (b) also knows that the participation contributes to the occurrence of any criminal activity of that group. Accidental participation and — in contrast to New South Wales — recklessness will not result in criminal liability under the Queensland proposal.

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487 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013 (Mr Lawlor).

488 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

489 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

490 *Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld), Explanatory Notes, 2.

491 Kerry Shine, Attorney-General and Minister for Justice (Qld) (pers comm., 5 Feb 2008, on file with author).

492 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4017 (Mr Messenger).

5.3.3 Further remarks

In summary, proposed s 545A *Criminal Code* (Qld) is more carefully drafted and more narrowly construed than the provisions in New South Wales. In comparison to the *Palermo Convention*, the Queensland proposal is broader in that the definition of organised criminal group also applies to groups engaging in serious violent offences and does not require any formal structure of the group.

It has been argued that the main purpose of the Bill is deterrence and prevention:

> I believe that a five-year sentence for associating with organised crime will be a deterrent to a lot of people. Facing being locked away for five years for breaking the law in such a way is something that young people certainly would not want to be confronted with. […]
>
> [W]e introduce these laws in our state so that we can keep more people out of jails and send a message to the drug barons and the law breakers that their activities will not be condoned here. People who had thought of associating with organised crime will think, 'I don't want to be a party to that.' […]
>
> At the end of the day this legislation is about prevention, so that young people are not subjected to prison terms. […] This is about protecting our young people from the organised crime element.[493]

It is very doubtful that the proposed provisions could achieve these goals. Higher penalties are rarely, if ever, an effective deterrent and there is no empirical evidence that the participation offence stops people from becoming involved with criminal organisations. Given the broad application of the provisions there is a real danger that the provision creates criminal liability for large numbers of people that would go unpunished otherwise and it seems unlikely that the proposed laws "can keep more people out of jail" — in contrast, it seems more likely that, if enforced rigorously, the new laws would result in more people going to gaol.

The Queensland Bill failed to pass the second reading in Parliament on October 31, 2007. "The government opposes this Bill", stated Attorney-General and Minister for Justice Kerry Shine,

> as it is ill conceived, unnecessary and aims to extend the basic principles of criminal liability to guilt by association. The fundamental right of freedom of association is potentially eroded by this bill because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group. No specific act or omission by the accused is necessary and no specific criminal act or activity need be contemplated by the accused for the offence to be committed. […]
>
> A one-size-fits-all response is therefore not the answer to this complex problem. In any event, such an approach is unlikely to be effective in targeting organised criminal groups which may operate under the cover of legitimate business enterprises and with a high degree of sophistication.[494]

There are currently no further proposals by the State Government in Queensland to add new offences against criminal organisation to the *Criminal Code*. The Opposition expressed that it may re-introduce the failed Bill in 2008.[495]

5.4 South Australia

In South Australia, new laws against organised crime were first proposed by Premier Mike Rann and the Director of Public Prosecutions in South Australia in June 2007.[496] On November 20, 2007 the Premier outlined the new provisions before Parliament and introduced the *Serious and Organised Crime Bill 2007* (SA) — an instrument specifically designed to suppress the activities of

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493 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4013-4014 (Mr Johnson).

494 Queensland, Legislative Assembly, *Hansard* (31 Oct 2007) 4010 (Hon KG Shine (Attorney-General and Minster for Justice).

495 Personal communication with Mr Mark McArdle, Shadow Attorney-General, Shadow Minister Justice, Brisbane (Qld), 26 Nov 2007.

496 Brendan Nicholson, "Rann seeks national crackdown on bikie gangs" (20 June 2007) *The Australian* 6; Pia Akerman, "Rann to cut crime by bouncing bikies from pubs and clubs" (22 June 2007) *The Australian* 9.

outlaw motorcycle gangs. If enacted, this legislation will introduce radical measures to outlaw criminal organisations and prohibit any deliberate association with them and their members.

The stated purpose of the legislation are, s 4(1):

(a) to disrupt and restrict the activities of—

(i) organisations involved in serious crime; and

(ii) the members and associates of such organisations; and

(b) to protect member of the public from violence associated with such criminal organisations.

The central part of the proposal is the Attorney-General's power to "declare a criminal bikie gang an outlaw organisation" on the basis of police intelligence and hold "gang members who engage in acts of violence that threaten and intimidate the public" liable for serious offences.[497]

The proposed legislation in South Australia, which is modelled in part after Hong Kong's *Societies Ordinance 1997*, marks a significant departure from the spirit and concept of organised crime under the *Palermo Convention*. The definition and criminalisation of organised crime groups also differs considerably from the concepts used in New South Wales, New Zealand, and Canada. The following Sections explore the key features of the *Serious and Organised Crime Bill 2007* (SA).

5.4.1 Declared organisations

The proposed South Australian laws do not define the term criminal group. Instead, the Bill proposes to empower the Attorney-General to declare organisations if he/she "is satisfied that—

a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and

b) the organisation represents a risk to public safety and order (proposed s 10(1) *Serious and Organised Crime (Control) Bill 2007* (SA)).

The declaration is made on the application of the Commissioner of Police (s 8), and the application must be gazetted, allowing members of the public to make submissions within 28 days of the publication (s 9).

The criteria and methods used by the Attorney-General to determine whether or not to declare an organisation are not a model of clarity and are a complex mix of evidential indicia and administrative discretion. Figure 26 seeks to visualise the key points required to declare an organisation.

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497 South Australia, House of Assembly, *Daily Hansard* (20 Nov 2007) (Hon MD Rann, Premier). Cf s 8 *Societies Ordinance 1997* (Hong Kong).

Figure 26 "Declared organisations", proposed s 10 *Serious and Organised Crime (Control) Bill 2007* (SA)

Terminology Elements	**Declared organisations**
Structure	• association of members (s 3) of the organisation (s 3)
Activities	• organisation represents a risk to public safety or order
Objectives Determination of purpose, s 10(4)	• organising, planning, facilitating, supporting or engaging in serious criminal activity. AG may be satisfied of the purpose of the association regardless of whether or not (a) all the members or only some members associate for the purpose; (b) members associate for the purpose of organising, planning, facilitating, supporting or engaging in the same serious criminal activities or different ones; and (c) members also associate for other purposes.
Information to be considered when making declaration, s 10(3).	

In simplified terms, the Attorney-General's decision to declare an organisation (and thus criminalise any association with members of the group, s 35) is based on three criteria set out in proposed s 10(1) *Serious and Organised Crime (Control) Bill 2007* (SA): (1) the association of members of the organisation, (2) the risk posed by that group to public safety and order, and (3) the purpose of the people associated in that group. Subsection 10(3) sets out some indicia that may assist the Attorney-General in making the declaration.

Association of members of the organisation, s 10(1)(a)

The first criterion relates to the structure of the organisation by requiring an association of members of the organisation. The definition of organisation in proposed s 3 makes clear that it is not required that the organisation is incorporated, structured, is based in South Australia, or involves residents of South Australia. This enables the Attorney-General to declare organisations with no physical presence and no members in that State. The definition in s 3 renders the term 'organisation' synonymous with the term 'group' and also includes incorporated bodies (ie legitimate organisations).

Under the Bill, it is necessary that the organisation has members. Unlike similar legislation elsewhere, there is no minimum number of members or associates. According to proposed s 3, members also include:

(a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and

(b) in any case—

(i) an associate member or prospective member (however described) of the organisation; and

(ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and

(iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation.

This definition of membership is of such breadth to be almost meaningless. Membership does not relate to any formal association with the organisation, it also includes people who believe to be members, take steps to be members, or who are treated as members. The definition does in fact not explain what 'real' membership is. In the context of this Bill, the term is void of any real meaning and, in summary any person with any actual, perceived, or desired association with a group is by virtue of s 3 automatically a member.

The Bill does not further define how the word 'associate' is to be understood. Using the common interpretation of the term, it is assumed that the 'members of the organisation' meet, come

together, connect or otherwise communicate for one of the purposes stated in proposed s 10(1)(a).[498]

Risk to public safety and order, s 10(1)(b)

The second criterion to declare an organisation relates to the risk that the organisation poses to public safety and order. The Bill contains no further guidance about the meaning and interpretation of these terms and the level of risk required. It is also not clear whether the risk has to be actual or perceived, who determines the risk, and what methods and criteria are used in this decision.

Proposed s 10(3) lists some indicia such as serious criminal activity and criminal convictions that assist the Attorney-General in deciding whether or not to declare an organisation. These indicia include, for instance, known links between the organisation and serious criminal activity, criminal convictions of associates, current and former members, and the existence of interstate and overseas branches of the organisation that pursue similar purposes. The points listed in subsection (3) are not conclusive evidence and the connection between these indicia and any "risk to public safety and order" is not always obvious.

The declaration of organisations is specifically designed to outlaw biker gangs and prohibit any association with them. The list of indicia in s 10(3) makes specific references to "interstate and overseas chapters" of the organisation, one of the key characteristic of OMCGs. The provision is, however, wide enough to capture a great range of organisations, especially those that have a history of engaging in serious offences,[499] and those that involve persons with a criminal history (including gangs formed in prisons).[500]

Purpose of declared organisations, s 10(1)(a)

Lastly, to declare an organisation the Attorney-General needs to be satisfied that the purpose of the association is the "organising, planning, facilitating, supporting or engaging in serious criminal activity". The purpose of the association must be directed at serious criminal activity (ie the commission of serious offences, including indictable offences and specified summary offences, s 3). It is not necessary that all members of the group associate for that purpose, s 10(4). The objective of the association does not need to relate to criminal activities that generate any benefits for the organisation. In other words, the proposed legislation is not specifically designed to ban only those organisation that engage in criminal activities for purpose of profit.

5.4.2 Control orders

As stated in s 4, the measures under the *Serious and Organised Crime (Control) Bill 2007* (SA) are designed to disrupt and restrict criminal organisations and also the members and associates of these groups. Accordingly, in addition to the declaration of organisations, the Bill also proposes to place current and former members of declared organisations under a control order (s 14(1), (2)) and to criminalise any association with them (s 35(1)(b)). A control order may be sought by the Commissioner of Police and can be issued the Magistrates Court against a person that

- is a member of a declared organised under s 10, s 14(1); or
- has been a member and continues to associate with members of a declared organisation, s 14(2)(a)1st alt; or
- engages or has engaged in serious criminal activity (s 3) and regularly associates with members of a declared organisation, s 14(2)(a)2nd alt; or
- engages or has engaged in serious criminal activity and regularly associates with persons who, too, engage or have engaged in serious criminal activity, s 14(2)(b).

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498 Cf s 35(11)(a) *Serious and Organised Crime (Control) Bill 2007* (SA).
499 Cf s 10(3)(a) and (c) *Serious and Organised Crime (Control) Bill 2007* (SA).
500 Cf s 10(b) *Serious and Organised Crime (Control) Bill 2007* (SA).

Proposed s 14 is designed to prohibit the person who is the subject of the control order to communicate with other known offenders, to visit certain premises (such as clubhouses of biker gangs), to associate with members of criminal organisations, and to posses weapons or other dangerous articles, s 14(5). Moreover, s 35 creates criminal liability for persons who associate with someone placed under a control order.

5.4.3 Criminal association offences

Proposed s 35 *Serious and Organised Crime (Control) Bill 2007* (SA) creates a new offence entitled "criminal associations". In essence, the section creates criminal liability for persons who frequently associate with members of declared organisations or who associate with known criminals or other persons posing a risk to public safety and order, see Figure # below. The proposed legislation exempts certain associations, such as those between close family members, lawful businesses, and those of educational or therapeutical nature from criminal liability, s 35(6).

Figure 27 Elements of proposed s 35(1), (2) *Serious and Organised Crime (Control) Bill 2007* (SA)

S 35(1), (2)	**Elements of the offence**

Physical elements	• associating with another person;
	• at least six times over a 12-months period;
	• the other person is either
	  o a member (s 3) of a declared organisation (s 10); or
	  o the subject of a control order (s 14).

Procedural matters	Certain associations to be disregarded, s 35(6).

Mental elements	• knowledge or recklessness that the other person was (s 35(2)):
	  o a member (s 3) of a declared organisation (s 10); or
	  o the subject of a control order (s 14).

Penalty	5 years imprisonment

Section 35(1)(a) makes it an offence, punishable by imprisonment of five years, to associate on no less than 6 occasions over a 12 months period with members of declared organisations. Associating "includes communicating […] by letter, telephone or facsimile or by email or other electronic means", s 35(11)(a). Membership is further defined in s 3 of the Bill to include prospective members, persons who identify themselves as belonging to the group, and persons treated by the group as belonging to it. It is further required that the accused knew that the other person was a member or was reckless as to that fact, s 35(2)(a).

The Bill also proposes to criminalise persons who associate (6 times or more over 12 months) with certain known criminal offenders, including those that are the subject of a control order (ss 35(1)(b), 14) or that have a criminal conviction for a prescribed offence (s 35(3)). For liability under these offences, it is required that the accused knew the person was subject of a control order (s 35(2)(b)) or was at least reckless about the other persons previous convictions (s 35(4)).

Unlike the organised crime provisions in Canada, New Zealand, and New South Wales, the proposed offence in South Australia is not directed at participation in criminal organisations or involvement in their criminal activities. The central focus of the offences in proposed s 35 is on associations with certain people. The Bill does not conceal that it seeks to prohibit communication and other forms of associations with certain organisations and their members. The only exemptions apply to certain family or professional associations and to associations that occur less frequently than the required six occasions during a period of 12 months. Persons who unwittingly associate would also not be liable (s 35(2), (4)), while persons with some awareness that the other person could or might be a member of a declared organisation or the subject of a control order would meet the threshold required to establish recklessness.

In addition to the criminal association offences, the Bill proposes the introduction of two new offences into the *Criminal Law Consolidation Act 1935* (SA) for making threats or reprisals against public officers and persons involved in criminal investigations or judicial proceedings.[501]

5.4.4 Observations

Even a conservative analysis of the measures under the *Serious and Organised Crime (Control) Bill 2007* (SA) demonstrates that the proposed legislation goes well beyond criminalising participation in organised crime groups. The scope of application of this Bill is much wider and, despite statements to the contrary, is not limited to outlaw motorcycle gangs. There are no clear boundaries that limit the provisions under this Bill to organised crime; it has the potential — and possibly the purpose — to ban any organisation that, in the eyes of the Attorney-General, is perceived as a "risk to public safety and order".

Further reflection on the proposed declaration of criminal organisations in South Australia reveals remarkable similarities to laws relating to terrorist organisations. Division 102 of Australia's *Criminal Code* (Cth) sets out detailed procedures to list terrorist organisations and creates a range of criminal offences relating to membership in and other associations with these organisations. The effect of the South Australian proposal is similar to the federal terrorism laws in that it, first, establishes a mechanism to prohibit certain organisations and, second, criminalises associations with these organisations. Unlike federal laws, the South Australian Bill is of much wider application as it allows the prohibition of any organisation seeking to engage in serious criminal activity. The federal procedures for declaring terrorist organisation, however, have much greater safeguards built into them (such as parliamentary approval etc) while the South Australian Bill vests the power to declare organisations in a single person. The proposed legislation raises serious concerns about this concentration of power and the loose criteria used in making declarations.

The offence created under proposed s 35 *Serious and Organised Crime (Control) Bill 2007* (SA) is not concerned with participation, membership, or other contributions to criminal organisations. Its emphasis is on associations between persons. Proposed s 35 gives rise to grave concerns about infringements of the freedom of association. It has been argued that even academics conducting interviews with members of biker gangs may be liable under the new offences.[502] The breadth of application and vagueness of the terminology used create a real danger that the legislation may be excessive and is widely open to abuse against a suite of groups, associations, and individuals that may be seen as undesirable by senior government officials.

5.5 Anti-fortification laws

The remaining States and Territories in Australia currently have no specific offences relating to organised crime and there are, at present, no proposals to introduce such offences.[503] The Northern Territory discussed the introduction of organised crime type legislation some years ago, but this never led to any Bills. The Territory is currently exploring anti-gang legislation to deal with the public perception of a resurgence of aboriginal youth gangs in Darwin.[504] Some States, such as Victoria and Western Australia, and also the *Australian Crime Commission Act 2002* (Cth) give special powers to relevant law enforcement agencies for organised crime investigations,[505] but these powers are not accompanied by special liability provisions or special offences.

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501 Proposed ss 248, 250 *Criminal Law Consolidation Act 1935* (SA).

502 Arthur Veno, "Bikies suffer as politics of fear takes hold in SA" (26 Feb 2008) *The Advertiser* (Adelaide) 20.

503 Personal communication with Policy Directorate, Department of Attorney General (WA), 16 Oct 2007 (on file with author).

504 Personal communication with Drug and Organised Crime Division, Northern Territory Police Force, 14 + 24 Jan 2008 (on file with author).

505 *Major Crime (Investigative Powers) Act 2004* (Vic); Part 4 *Corruption and Crime Commission Act 2003*

South Australia, Western Australia, and New South Wales have so-called anti-fortification laws to assist police in investigations relating to criminal organisations, especially outlaw motorcycle gangs (OMCGs). These measures are specifically designed to prevent OMCGs to equip their club houses and other meeting places with security devices in order to prevent or obstruct police investigations. South Australia and Western Australia introduced these laws in 2003. The *Statutes Amendment (Anti-Fortification) Act 2003* (SA)[506] and the *Corruption and Crime Commission Amendment and Repeal Act 2003* (WA)[507] authorise law enforcement agencies to remove fortification devices in order to access premises for investigative purposes. New South Wales introduced similar anti-fortification provisions with the *Crimes Legislation Amendment (Gangs) Act 2006*.[508] These laws do not create any special offences in relation to organised crime.

Fortification is defined as "any security measure that involves a structure or device forming part of, or attached to premises that is intended or designed to prevent police access to the premises" or that could have that effect, s 74BA *Summary Offences Act 1953* (SA), cf s 67(1) *Corruption and Crime Commission Act 2003* (WA), s 210A *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). In New South Wales and South Australia, the legislation allows the Commissioner of Police to seek a court order to remove fortifications: ss 210B, 210C *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); s 74BB *Summary Offences Act 1953* (SA). In Western Australia, the Commissioner of Police can issue fortification warnings and removal notices without having to seek prior court approval: ss 70, 72 *Corruption and Crime Commission Act 2003* (WA). It is an offence to hinder the lawful removal of fortifications: s 210E (NSW), s 74BJ (SA), s 77 (WA).

The anti-fortification laws have had limited, if any, measurable effect on the activities of OMCGs. Questions have also been raised about the potential violation of constitutional principles by these laws, in particular the independence of the court in making fortification removal orders. In *Osenkowski v Magistrates Court of South Australia* (2006) SASR 456 Mr Osenkowski challenged the validity of a fortification removal order made against him arguing that the process of making the order set out in s 74BB *Summary Offences Act 1953* (SA) is "incompatible with the integrity, independence and impartiality required of a Court." In short, Osenkowski submitted

> that the legislation so constraints the Magistrates Court when exercising its power to make a fortification removal order, and so constraints this Court on appeal, that the appeal to this Court simply confers an 'aura of respectability' on a decision made by the Magistrates Court in the course of proceedings that are inconsistent with or incompatible with the exercise of judicial power.[509]

The Supreme Court of South Australia, however, dismissed the appeal.

A similar question has arisen in a case currently under consideration by the High Court of Australia. The Gypsy Jokers Motorcylce Club Inc — a gang frequently associated with drug offences and other organised crime activities — is challenging a fortification removal order made against them by the Police Commissioner of Western Australia. The Gypsy Jokers argue that there the legislation creates a collusion between the police (as part of the executive) and the court, thus violating the separation of powers and the independence of the judiciary.[510] Hearings of this case were held in September 2007 and it is anticipated that a decision will be made by the High Court in early 2008.

(WA).

506 No 46 of 2003.

507 No 78 of 2003.

508 No 61 of 2006.

509 *Osenkowski v Magistrates Court of South Australia* (2006) SASR 456 at 457 per Doyle CJ.

510 Cf *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* [2007] WASCA 49.