Crime and Misconduct Commission

SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

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

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Inquiry into the legislative arrangements to outlaw serious and organised crime groups with particular reference to:

(a) **International legislative arrangements developed to outlaw serious and organised crime groups and association with those groups, and the effectiveness of these arrangements;**

(b) **The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership and association with those groups;**

(c) **Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership of and association with those groups and the effectiveness of these arrangements;**

(d) **The impact and consequences of legislative attempts to outlaw serious and organised crime groups and membership and association with these groups on:**

- **(i)** **society**
- **(ii)** **criminal groups and their networks**
- **(iii)** **law enforcement agencies**
- **(iv)** **the judicial/legal system.**

(e) **An assessment of how legislation which outlaws criminal groups and membership of and association with these groups might affect the functions and performance of the Australian Crime Commission.**

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Introduction

The Queensland Crime and Misconduct Commission (CMC) was created with the enactment of the *Crime and Misconduct Act (Qld) 2001*, effectively merging the functions and activities of the Queensland Crime Commission and the Criminal Justice Commission. In terms of serious and organised crime, the Act confers on the CMC the jurisdiction to investigate major crime which includes organised crime[1], paedophilia[2] serious crime[3] and terrorism[4]. The activities of the CMC are differentiated from the activities of the Queensland Police Service (QPS) by the investigation of major crimes that cannot appropriately or effectively be carried out by the QPS or other state-based agencies on their own. In responding to the invitation for submissions, our comments are restricted to those areas where the CMC has expertise by virtue of its jurisdiction and activities. In this context, the operational, intelligence and research activities of the CMC are concentrated on state legislative matters as opposed to those matters controlled by Commonwealth legislation[5]. The CMC's interest in organised crime focuses on well-recognised illicit markets exhibiting a division of labour and a degree of organised enterprise.

We have chosen not to comment specifically on some of the terms of reference. In particular, it is our view that the Australian Crime Commission (ACC) is best placed to provide comment on how legislation which outlaws criminal groups and membership of and association with these groups might affect its functions and performance.

We further note that a number of the issues raised in our submission to the Committee's 2007 inquiry into the future impact of serious and organised crime on Australian society are also relevant to the current inquiry.

RICO style legislation

As we noted in our submission dated 27 February 2007 to the earlier Parliamentary Joint Committee Inquiry, law enforcement can experience difficulties in targeting sophisticated criminal networks involved simultaneously in a range of illicit activities. This is largely because each prosecution generally concerns itself with specified offences. A successful prosecution of one, or even more members of a network, often has only a limited effect on the broader operations of the larger criminal group. Among other things, this has led to calls for the introduction of RICO style laws in Australia.

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1 Organised crime is defined in Schedule 2 of the Act to involve criminal activity undertaken with the purpose of gaining profit, power or influence, and involving offences punishable by not less than seven years' jail, two or more people, and planning and organisation or systematic and continuing activity

2 Paedophilia is defined in Schedule 2 of the Act as criminal activity involving sexual offences against children or child pornography

3 Serious crime is defined in Schedule 2 of the Act as unsolved criminal activity involving offences punishable by not less than 14 years' imprisonment (e.g. murder, arson).

4 Terrorism is defined in Schedule 2 of the Act as criminal activity that involves a terrorist act. Section 22A of the Act outlines the meaning of a terrorist act by reference to the outcomes and intention of the action. Section 22A(3) provides for exclusions to the definition.

5 Such as politically motivated violence, illegal immigration, social security fraud and tax evasion.

RICO in the United States

The Racketeer Influenced Corrupt Organisations Act (RICO) was passed by the United States Congress as part of the *Organized Crime Control Act 1970.* It allows law enforcement agencies (LEAs) to target the organising entity behind a crime, not merely the criminal activity itself. By concentrating on the conspiracy behind a crime, investigators are able to target organisers as well as their associates.

RICO legislation is designed to attack and destroy criminal enterprises rather than focus on individual criminal acts. RICO makes it a crime to use a pattern of racketeering activity[6] or income derived from such activity to conduct or acquire an interest in a criminal enterprise. The prosecution must prove that the defendant has an association with an 'enterprise'[7] and has engaged in a 'pattern'[8] of racketeering activity. The term 'racketeering activity' requires that a conspiracy exist or be committed involving two federal or state offences which constitute the underlying predicate offences within a period that does not exceed 10 years.

As well as targeting the more traditional organised crime groups such as the Mafia which have a formal structure, RICO has been effective in enabling US courts to remove corrupt officials from key political and law enforcement positions and impose external control over racketeering influenced organisations like businesses, union branches and even pension funds.

United Kingdom assessment of RICO

Since 2001 the United Kingdom has been reviewing and in some cases changing, laws aimed at defeating organised crime. The UK chose not to go down the path of introducing RICO style legislation because:

> To work, RICO still needs sufficient evidence to convict on the underlying 'predicate' offence before these can be set in the wider racketeering context. It does not, therefore, help against those targets who have evaded detection altogether. RICO appears to be more useful against traditional 'racketeering' organisations than the sort of large scale trafficking groups which are the main threat in the UK. The latter tend to be prosecuted in the US, as in the UK, for standard conspiracy and trafficking offences. (UK Government, 2004)

Additional reasons for the UK deciding not to adopt RICO were that it introduced new offences based on membership of an organised crime group without having to prove that an individual conspired or did something to further a conspiracy. This was tantamount to saying the person was a member of a proscribed organisation. In the opinion of some commentators, this ran counter to the tenor of English law:

> The White Paper rejects the introduction of RICO style legislation on the basis that RICO itself requires "sufficient evidence to convict on the underlying predicate offence". To substitute for evidence of a conspiracy, however, a case based on membership of an organised crime group without proof that such an individual actively conspired with others in that group or did an act in furtherance of a conspiracy is not to prove conspiracy but a different offence altogether, analogous to membership of a proscribed organisation…The Panel is concerned that the suggestion embodied in the White Paper to introduce a parallel offence for membership of one or other shadowy organised crime group is disproportionate to the

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[6] Racketeering activity is defined to be a violation of specified state and federal offences.

[7] An enterprise may be a highly structured long term entity or a relatively *ad hoc* group formed for a limited period to engage in short term criminal activity.

[8] A pattern of activity has been held by US courts to be two or more separate incidents of racketeering activity with a common scheme, plan or motive carried out with some regularity and continuity.

> mischief alleged and a departure too far from the accepted burden on the prosecution to show both the *actus reus* and the *mens rea o*f a crime. (Fraud Advisory Panel, 2004,pp.8-9)

United Kingdom assessments of organised crime and the legislation for dealing with it concluded that the country did not face the same difficulties of infiltration of legitimate institutions as did the US. Furthermore, RICO gave the FBI the right to use evidence gathered by telephone intercept (TI) in court. This went to the heart of being able to prove conspiracy between people who were issuing the orders, and those who followed them. In the UK such material is inadmissible as evidence; police use TI to gather intelligence on suspects, but that is all. Without TI evidence, RICO in the UK would be 'a tiger without any teeth', concluded the assessments.

In 2005 the UK government responded to the organised crime problem by introducing the *Serious and Organised Crime Act*, and the *Proceeds of Crime Act*. The aims were to "strengthen the ability of law enforcement agencies to fight organised crime." (Queen's Speech, 15 November 2006). The Act has the following features:

- establishing a new Serious Crime Prevention Order to prevent organised crime by individuals, or organisations, by imposing restrictions on them
- introducing new offences of encouraging or assisting a criminal act with intent, or encouraging or assisting a criminal act believing that an offence may be committed
- strengthening the recovery of criminal assets by extending powers of investigation and seizure to all accredited financial investigators.

An innovative feature was the Serious Crime Prevention Order; this aspect of the legislation received royal assent in October 2007. The purpose of the Order is to impose binding conditions to prevent individuals or organisations facilitating serious crime, backed by criminal penalties for breach. The courts can impose an Order if they believe on the balance of probabilities that the subject:

- acted in a way which facilitated or was likely to facilitate the commissioning of serious crime
- the terms of the order are necessary and proportionate to prevent such harms in future.

Comment

It has been argued that RICO style legislation would assist in dismantling organised crime networks because it permits the prosecutor to lead evidence which provides a comprehensive picture of the defendant's criminal activity and associations. This assumes that legislation would be drafted to allow a broader range of evidence to be heard about the charges.

Membership of serious and organised crime groups would still need to be proven in court and legal challenges will be expected. The usual rules of evidence would apply and the evidence would have to be admissible. However, as the UK assessment found, RICO still needs sufficient evidence to convict on the underlying 'predicate' offence before these can be set in the wider racketeering context.

Before RICO style legislation should be considered in Australia, considerable evaluation and a critical review of the US experience would need to be undertaken. For example, the US experience indicates that RICO prosecutions can be protracted and resource intensive. In some cases it has taken three to four years to secure a conviction using the RICO legislation. There are suggestions that RICO is now being used less frequently by US prosecutors. The reasons for this are unclear, but warrant further investigation.

In order to assess if RICO would be useful in Queensland, the following areas would need to be reviewed:

- matters not going before the courts because Queensland does not have this legislation
- Part 7 of the Queensland *Criminal Code* relating to conspiracy to commit a crime and being an accessory after the fact (ss.535 onwards)
- conspiracy to commit a crime (s.541) and an examination of the case law on conspiracy
- perceived difficulties relating to charging a large number of co-offenders.

Legislative arrangements to outlaw serious and organised crime groups

There are two key issues in the legislative arrangements being considered under the terms of reference. The first is efforts to proscribe serious and organised crime groups, including membership of those groups. The second is the consorting type activity for persons associating with outlawed groups or members of those groups.

It is noted that the South Australian Serious and Organised Crime (Control) Bill 2007 is currently before the South Australian Upper House. It is designed to disrupt the criminal activity of Outlaw Motorcycle Gangs (OMCGs), dismantle their organised crime networks and discourage others from trying to set up in South Australia. The Bill also targets persons who associate with proscribed groups.

Proscribing serious and organised crime groups

In its most recent annual assessment of organised crime in Australia, the ACC observed that the structure of serious and organised crime groups has changed over recent years:

> Organised crime groups have also tended to be highly structured and hierarchical but this has started to change recently as they adopt more flexible structures, operating in networks to progress joint 'business ventures'… Some networks are formed for short periods while others may last for years. (ACC 2007, p. 5)

Legislative efforts to outlaw serious and organised crime groups may or may not prove to be effective in relation to OMCGs, which are easily identifiable and formally structured. However, the changing nature of most organised criminal networks in Australia makes efforts to identify and outlaw other groups or networks more difficult.

Anti-consorting legislation

Anti-consorting laws appeal to some because they focus on interrupting criminal associations and breaking down the infrastructure that promotes illegal activities. It is argued that the introduction of well-designed consorting laws would allow LEAs to attack both the extended associations and core membership of organised crime groups. These are capacities that have traditionally eluded LEAs.

Anti-consorting legislation draws criticism in several respects. Persons may be sent to gaol not for what they do but for whom they know. There are also concerns that such legislation may breach fundamental democratic principles such as freedom of association. Sufficient unease has been expressed in the community instanced by parliamentary debate and expert

commentary on current legal issues[9] to indicate that protracted legal challenges should be expected.

Risks of misconduct in policing of anti-consorting style laws

It is noted that historically, the policing of anti-consorting style laws has been associated with significant police corruption. In Queensland the offence of consorting was introduced in 1931 and repealed in 2005. In 1962 the police Licensing Branch was given responsibility for policing all metropolitan prostitution, out-of-hours liquor trading, gaming and SP bookmaking. The oversight of so much crime by a clique of police engendered conditions in which corruption flourished. Police in the Licensing Branch consorted with people they were supposed to be investigating. The seediness of this arrangement was highlighted in the Fitzgerald Inquiry:

> Although not all who were posted there engaged in misconduct, members of the Licensing Branch toured Brisbane's night-life, socializing and drinking in the brothels, nightclubs, and gaming establishments which were supposedly so difficult to enter, noting and participating in the various activities which they observed, charging prostitutes and sometimes receptionists (usually with their co-operation) on a rotational basis, occasionally prosecuting prostitutes from escort agencies or their drivers and underlings engaged in unlicensed sales of liquor. Even less frequently they raided illegal gambling premises, when, once again, less important offenders, sometimes nominated and even paid to be the subject of charges, were usually proceeded against. More energetic treatment was reserved for those prostitutes and other offenders who were out of favour with individuals or groups within the Licensing Branch, and those who were not paying protection and whose competition was unwelcome to those who were. (Fitzgerald 1989, Ch 2.3.3 p.6)

Commissions of inquiry have highlighted similar misconduct issues in other Australian jurisdictions, such as in New South Wales.

Queensland legislative context

Queensland law enforcement agencies have access to several tools and powers which over the years have proven effective in dealing with serious and organised crime groups. The CMC is the only Queensland state agency to have powers for coercive hearings conferred on it. The CMC uses its coercive hearings in investigations into major crime undertaken pursuant to referrals to it from the Crime Reference Committee established under the Act.

Proceeds of crime legislation (and in particular, Queensland's civil confiscation regime introduced in 2002) has also proved to be a potent tool in disrupting organised crime by undermining the basis of, and incentive for, crime.

The CMC's witness protection program also assists in disrupting organised crime by supporting witnesses who provide evidence in relation to serious offences and whom through fear and intimidation, may not otherwise have given their testimony.

From a Queensland perspective, we believe that an enhancement of existing law enforcement powers, including the refinement of the existing proceeds of crime legislation and the introduction of telephone interception powers, are likely to be more effective in disrupting organised crime networks than legislation to outlaw serious and organised crime groups.

[9] For example, ABC Radio National 2008, *Law report*, 6 May.

Hearings power

The CMC is the only Queensland law enforcement agency with the power to conduct coercive hearings — that is, to require witnesses to attend closed hearings and answer questions even where the answers would normally tend to incriminate the witness.

The hearings power is a potent investigative tool because it greatly enhances the CMC's ability to break through the 'wall of silence' that frequently characterises major crime and corruption. The powers are useful in securing otherwise unobtainable testimony from witnesses in major crime investigations.

Other powers

The CMC has power to:

- require a person to produce records or other things relevant to a CMC investigation
- enter a public sector agency, inspect any record or other thing in those premises, and seize or take copies of any record or thing that is relevant to a CMC investigation
- summons a person to attend a hearing to give evidence and produce such records or things as are referred to in the summons
- apply to a magistrate or judge for a warrant to enter and search premises
- use surveillance devices.

Witness protection

The CMC has primary responsibility for the protection of witnesses for the state of Queensland through its Witness Protection Unit, which is staffed largely by sworn QPS officers attached to the CMC. These officers provide witnesses in the program with the necessary protection and security to ensure their safety, including during court appearances. Most referrals come from the QPS.

The Witness Protection Unit has responsibility relocation of protected witnesses and any necessary changes of identity. As well, the CMC ensures that protected witnesses receive any necessary professional assistance and guidance. This enables people who enter the witness protection program with drug or alcohol addictions or other mental or physical afflictions to address these issues. Many witnesses have been rehabilitated as a direct result of being included in our program.

Witness protection is seen worldwide as an increasingly valuable asset in the suppression and prosecution of organised crime. Organised crime flourishes in an environment where threats encourage silence, and the witness protection program supports witnesses through allowing them to safely provide crucial evidence in relation to serious offences; evidence that, due to fear and intimidation, may have otherwise gone unheard.

The role of witness protection in investigating organised crime is instanced by the success of a witness protection operation conducted by the CMC. In 2007 the CMC's Witness Protection Unit provided protection to 11 witnesses who gave evidence against many members of an OMCG. The first hand evidence of these witnesses resulted in the securing of convictions against eight members of an Outlaw Motorcycle Gang (OMCG) for offences including drug trafficking, drug supply, torture, deprivation of liberty, firearms and weapons offences. These convictions significantly disrupted the ongoing criminal activities of this particular group.

Proceeds of crime legislation

The CMC has responsibility for administering the civil confiscation scheme under the *Criminal Proceeds Confiscation Act 2002.* Under the Act, the CMC can restrain property even without a conviction, undermining the financial incentive of crime. This undermines the financial basis of, and incentive for, crime by identifying and targeting the proceeds of crime for confiscation.

Under the Act, property may be restrained if it belongs to, or is under the effective control of, someone who is suspected of having engaged in serious criminal activity in the past six years. Property suspected of having been derived from serious criminal activity can also be restrained even if the particular person suspected of having engaged in the activity cannot be identified. Restrained property is liable to be forfeited unless a person proves, on the balance of probabilities, that it was lawfully acquired.

The CMC aims to remove the financial incentive for crime by identifying and recovering assets gained through illegal activity. The agency undertakes proceeds of crime restraint and forfeiture action in relation to criminal activity that it and other LEAs investigate. Since the Criminal Proceeds Confiscation Act came into operation in January 2003, the CMC has restrained a total of $48.38 million in assets.

Because the confiscation of property without compensation is a derogation of fundamental property rights, the courts seem intent to construe the legislation strictly. In 2003 the Court of Appeal declared s.30 of the *Criminal Proceeds Confiscation Act 2002* invalid. Section 30 allowed the state to apply for a restraining order on property without telling the owner. The owner was barred from attending a judicial hearing in which application was made for the restraining order. In ruling on the cases of four people whose property was restrained, the Court of Appeal stated that s.30 was inconsistent with the essential character of the exercise of judicial power in an open Australian legal system. (*Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40).

The CMC has proposed several amendments to the Act, ranging in importance from those issues likely to have a major impact on effectiveness to minor amendments involving correction of apparent drafting errors. The more significant issues relate to:

- inherent inefficiencies in the fragmented model encompassing both the civil and conviction based confiscation schemes;
- expansion of the legislation to encompass an ability to restrain property to satisfy potential victim of crime compensation orders and restitution orders;
- utility of a trust fund model to fund the confiscation function;
- examinations under the Act, including the use that may be made of information obtained in an examination;
- onus of proof in matters involving apparent unexplained wealth;
- potential expansion of the range of offences to which the Act applies; and
- money laundering offence provisions.

Telephone interception powers

The CMC and the QPS have been jointly arguing for the introduction of Queensland-based TI powers for the past decade. The continued absence of TI powers severely impedes the capacity of Queensland LEAs to detect, investigate and dismantle organised crime activity in this state. TI powers, which are available to federal agencies and in all other state

jurisdictions, have enabled LEAs elsewhere to secure arrests in circumstances where traditional law enforcement techniques alone would have been insufficient.

Both the CMC and the QPS can currently access information resulting from TI, and TI itself, by entering into joint operations with agencies which have these powers, principally the ACC and Australian Federal Police (AFP), and less frequently, interstate agencies. In practice, access is not so easily obtained. The AFP and ACC have their own national intelligence and investigative priorities which consume significant portions of their resources. Requests for access to TI by way of a joint operation made by Queensland agencies must compete for resources against these national priorities. Queensland TI legislation would allow local access to TI product in accordance with state based priorities and ease some of the external demand for resources in terms of the federal agencies.

Conclusions

We commend the Committee for examining legislative options to disrupt and dismantle serious and organised crime groups and associations with these groups. While there have been calls for RICO style legislation in Australia for several years, there has been little rigorous examination of the possible efficiency and effectiveness of such laws in the Australian context. The CMC supports a detailed examination of different legislative options for disrupting and dismantling organised crime. However, we also note that overseas experience, the interpretation of Australian proceeds of crime legislation by the courts, and the changing nature of organised crime groups in Australia point to issues requiring further consideration.

Legislation proscribing specific groups may prove to be useful in disrupting the activities of OMCGs. However, its application to the more fluid, loosely associated, entrepreneurial and sophisticated organised crime networks which have emerged in Australia is likely to be more problematic. Legislation proscribing associations between certain individuals is likely to be subject to extensive legal challenge and will need a significant resource commitment by LEAs to enforce. The US experience also indicates that RICO prosecutions tend to be protracted and resource intensive. It may be the case that a more efficient and effective return on investment for law enforcement and the judicial system can be achieved using other legislative arrangements and investigative strategies.

For Queensland, the legislative priority for law enforcement remains the refinement of proceeds of crime laws and the introduction of telephone intercept powers. The continued absence of telephone intercept powers severely impedes the capacity of Queensland law enforcement to detect, investigate and dismantle organised crime activity in this state.

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