Law Council
OF AUSTRALIA

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

Parliamentary Joint Committee on the Australian Crime Commission

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Introduction

On 17 March 2008, the Parliamentary Joint Committee on the Australian Crime Commission ("the Committee") initiated an inquiry into the legislative arrangements to outlaw serious and organised crime groups ("the Inquiry").

The Terms of Reference for the Inquiry are broad, covering:

a. *international legislative arrangements developed to outlaw serious and organised crime groups and association to 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 of 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 of and association with these groups on:*

    i. *society*

    ii. *criminal groups and their networks*

    iii. *law enforcement agencies; and*

    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 ACC.*

The Law Council is grateful for the opportunity to participate in this Inquiry.

The Law Council's submission does not endeavour to address the full scope of the Inquiry's terms of reference.

Instead the Law Council's submission addresses the following three issues:

1. The existing provisions in the Commonwealth *Criminal Code* which extend criminal liability and which render association, participation and membership offences unnecessary;

2. The lessons learnt from Division 102 of the *Criminal Code*, which deals with the proscription of terrorist organisations and sets out related 'terrorist organisation offences'; and

3. Experiences with attempting to outlaw criminal groups in various State jurisdictions.

The Law Council's submission concludes that legislation to outlaw specific groups known to undertake criminal activities, and to criminalise membership of and association with those groups is both unnecessary and undesirable.

Legislation outlawing serious and organised crime groups is unnecessary

There is already sufficient provision for extended liability under the Criminal Code

The primary purpose of introducing legislation which outlaws serious and organised crime groups and criminalises association with those groups is to provide a mechanism for extending the net of criminal liability beyond those who it can be proven are *directly* involved in the planning and execution of *specific* criminal offences, to capture a wider range of players who are thought to facilitate and/or benefit from organised crime.

It is often argued that an extension of criminal liability of this kind is required to enable law enforcement agencies to better interrupt general patterns of criminal activity and to bring to account those who play an indirect, but nonetheless important enabling role in the commission of serious offences

In short, the rationale is that interacting with, or participating in the activities of a group that '*everyone knows is up to no good*'' ought to be sufficient basis on its own for criminal sanction.

The view is that police should not be left frustrated and unable to act when they possess evidence demonstrating associations and connections between '*known criminals*' but have no way of sheeting home responsibility for any particular planned or executed offence.

There is nothing new about these types of sentiments. It has always been the challenge of criminal law to define the limits of culpability in such a way that police are empowered to act both:

- to proactively prevent crimes from occurring; and
- to bring to account *all* those who knowingly instigated, facilitated or participated in the commission or planned commission of an offence.

However, it has also always been the challenge of criminal law not to define the limits of culpability in such a way that:

- a person may be subject to sanction for an offence which he or she perhaps contemplated but would never have actually executed; or
- a person may be subject to sanction because certain intentions or conduct were attributed to him or her by virtue only of his or her associations or proximity to the offence or offender.

Over time, principles of criminal liability have been developed which attempt to meet these two competing challenges. These are reflected in Part 2.4 of the Commonwealth *Criminal Code,* which is headed "extension of criminal responsibility" and which contains the following provisions:

11.1 Attempt

A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

11.2 Complicity and common purpose

A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

11.3 Innocent agency

A person who:

- has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
- procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

11.4 Incitement

A person who urges the commission of an offence is guilty of the offence of incitement.

11.5 Conspiracy

A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Part 2.4 explains in further details the scope and limitations of each of these provisions. For example:

- For a person to be guilty of attempt, the person's conduct must be more than "merely preparatory" to the commission of the offence. It is only when the person's activity begins to approach the completion of the offence that the conduct will be considered an "attempt.

- For a person to be found guilty of aiding, abetting, counselling or procuring an offence it must be shown that:

    - his or her conduct did *in fact* aid, abet, counsel or procure the commission of the offence by another other person; and

    - the other person did in fact commit the offence; [1] and

[1] However, it is not necessary that the person who committed the offence has not been prosecuted or has not been found guilty.

- he or she *intended* that his or her conduct would aid, abet, counsel or procure the commission of an offence *of the type* the other person committed; or have been *reckless* about the commission of the offence that the other person in fact committed.

These requirements ensure that those who unwittingly support or participate in the principal offence cannot be held to account as accessories. As an additional safeguard, a person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person terminated his or her involvement and took all reasonable steps to prevent the commission of the offence.

- For a person to be found guilty of conspiring to commit an offence, it must be shown that:

  - he or she entered into an agreement with one or more other persons; and

  - he or she and at least one other party to the agreement intended that an offence would be committed pursuant to the agreement; and

  - he or she or at least one other party to the agreement committed an overt act pursuant to the agreement.

  As with the aiding and abetting, a person cannot be found guilty of conspiracy to commit an offence if they withdrew from the agreement and took all reasonable steps to prevent the commission of the offence *before* the commission of an overt act pursuant to the agreement took place.

In his comprehensive submission to this Inquiry, Dr Schloenhardt argues that these extended liability provision in *Criminal Code* may still not be sufficient to capture all aspects of organised criminal activity. He argues that the requirement that the accused's intention be directed at the commission of a *specific criminal offence* excludes from the scope of the *Criminal Code* provisions the conduct of persons who are engaged in planning and preparing for criminal offences *in general*.[2] This would include those who direct and mastermind the activities of the organised criminal group but who have no physical involvement in, or specific knowledge of, the execution of specific offences. Dr Schloenhardt explains:

> *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.*[3]

With respect to the offence of conspiracy in particular, Dr Schloenhardt argues:

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[2] Dr Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the legislative arrangements to outlaw serious and organised crime groups, (2008) p. 76-77.

[3] Dr Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the legislative arrangements to outlaw serious and organised crime groups, (2008) p. 76-77.

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. 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. Mere knowledge or recklessness of the agreement does not suffice to establish liability for conspiracy. 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 criminal activities, but that are not involved in executing their plans and thus do not engage in any overt acts.

The Law Council accepts that criminal organisations may include persons who are involved in the direction of the organisation but who are careful to distant themselves from any direct involvement in the execution of specific offences.

However, there are a number of things which ought to be noted in this context:

- To establish accessorial liability it is only necessary to prove that the defendant intended that his or her conduct would aid, abet, counsel or procure the commission of any offence of *the type* the other person committed;

- The conspiracy offence only requires that *one of the parties* to the agreement has committed an overt act pursuant to the agreement;

- Under the *Criminal Code* and other Commonwealth and State laws, there are already substantive offence provisions which directly criminalise conduct such as the possession, transfer or receipt of property or funds which are either the proceeds of an offence or are likely to be used as an instrument of an offence.

  For example, under Part 10.2, Division 400 of the *Criminal Code* it is an offence to do any of the following:

  - Deal with money or other property in circumstances where either

    i. the money or property is, and the person believes it to be, proceeds of crime; or

    ii. the person intends that the money or property will become an instrument of crime.

  - Deal with money or other property in circumstances where either:

    i. the money or property is proceeds of crime; or

    ii. there is a risk that the money or property will become an instrument of crime; and

    the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

  - Deal with money or other property in circumstances where either

i. the money or property is proceeds of crime; or

ii. there is a risk that the money or property will become an instrument of crime; and

the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

The definitions of 'proceeds of crime' and 'instrument of crime' are both very broad:

"instrument of crime" is defined as follows: money or other property is an instrument of crime if it is used in the commission of, or used to facilitate the commission of, an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

"proceeds of crime" is defined as follows: money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

A person is regarded as "dealing with money or property" if he or she does any of the following:

- receives, possesses, conceals or disposes of money or other property;
- imports money or other property into, or exports money or other property from, Australia; or
- engages in a banking transaction relating to money or other property.

When offence provisions such as these are combined with the conspiracy provision, the result is that it even becomes possible to successfully prosecute a person for conspiring to handle or transfer money where there is a risk that the money may be used to facilitate an offence and the person is reckless or negligent as to that risk.[4]

Offence provisions of the type listed above, particularly when coupled with the civil forfeiture provisions set out in the *Proceeds of Crime Act 2002* (Cth), provide law enforcement agencies with ample scope for targeting the activities of those who finance, facilitate and/or profit from serious and organised crime.

The Law Council does not deny that it remains an onerous and difficult task to gather sufficient evidence to prove, beyond reasonable doubt, the complicity of all players, particularly high ranking players, in organised criminal activity. Significant time, energy and resources are no doubt expended by those engaged in organised criminal activity in attempting to mask and conceal their involvement. No doubt too, the methods employed to achieve that end are complex and sophisticated and designed to distance certain players from the commission of any particular offence.

[4] *A.Ansari v R; H. Ansari v R* [2007] NSWCCA 204

Nonetheless, the difficulties that law enforcement agencies may face in attempting to prove, beyond reasonable doubt, that certain individuals have committed a particular offence, does not mean that the offence provisions themselves are inadequate. There is a difference between:

- a situation where law enforcement agencies have evidence that certain persons are engaged in conduct which is reprehensible or harmful to the community, but they are unable to act because that conduct is not prohibited by law; and

- a situation where law enforcement agencies have reason (perhaps good reason) to suspect that a person is engaged in conduct which is clearly prohibited by law, but they are unable to act because they cannot gather sufficient admissible evidence to substantiate their suspicion.

In the first situation there may be a strong argument in favour of law reform. In the second situation, calls for law reform should be treated with great caution.

That is because, in the case of the second situation, calls for law reform boil down to the following:

> *"We know that certain people are up to no good but we can't prove it. Therefore, we need to broaden the law, so that otherwise innocent behaviour, (such as participation in an identified group), can in and of itself provide a basis for criminal sanction."*

The Law Council believes that the existing principles of extended criminal liability set out in the Part 2.4 of the *Criminal Code* correctly demarcate the limits of criminal culpability. It is true that those provisions may place an onus on law enforcement agencies to establish a nexus between a particular individual and the commission or planned commission of a specific offence, but that is entirely appropriate, whatever challenges it may present to investigators and prosecutors.

In recent years, in the name of tackling serious and organised crime, law enforcement agencies have been provided with significantly enhanced investigative powers[5] and new offences and civil proceedings have been created[6] to allow law enforcement agencies to target the money trail.

It is of concern that despite the reported success of these measures, many of which are quite draconian and were opposed by the Law Council, there is a suggestion that there is still a need for further fundamental law reform, to alter the very principles of criminal responsibility.

If every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised.

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[5] See for example *Measures to Combat Serious and Organised Crime Act 2001 (Cth*), *Australian Crime Commission Act 2002* (Cth), *Telecommunications (interception and Access) Act 1979* (Cth).

[6] Div 400 of the *Criminal Code* (Cth) and the *Proceeds of Crime Act 2002* (Cth); *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth).

The current Criminal Code provision already meet Australia's obligations under the Convention Against Transnational Crime

Australia ratified the *Convention Against Transnational Crime* (CATC) on 27 May 2004. Australia was active in the negotiation of the treaty and was among the first Western countries to ratify.

The CATC has two primary objects:

- to encourage countries that do not have provisions against organised crime to adopt comprehensive countermeasures; and

- 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.

Amongst other things, the CATC sets out four model criminal offence provisions which State parties must ensure are reflected in their domestic law: participation in an organised criminal group, money laundering, corruption and obstruction of justice.

In respect of this Inquiry, the most relevant of these model offences are the participation in organised criminal activity offences set out in Article 5.

The Law Council believes that the *Criminal Code* provisions which allow for extended criminal responsibility already ensure that the types of conduct covered by the model offence provisions in Article 5 are subject to criminal sanction.

Article 5 of the CATC requires that:

> *Each 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 organized criminal group;*
> >
> > *(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:*
> >
> > *a. Criminal activities of the organized criminal group;*
> >
> > *b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;*

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.[7]

Under the CATC, each State party is given the option of adopting ***either or both*** of the offences (which must be committed intentionally) set out in (a)(i) and (ii) above. The conspiracy offence (set out in (a)(i)) has generally been seen as more suitable for adoption in common law jurisdictions, while the participation offence (set out in (a)(ii)) has generally been seen as better suited to civil law countries.

The model conspiracy offence in Article 5(1)(a)(i), contains similar features to the existing conspiracy offence in section 11.5 of the *Criminal Code.* The elements of the CATC conspiracy offence can be summarised as follows:

- the entering into an agreement by two or more persons to commit a serious crime;
- for the purpose of obtaining financial or other material benefits; and
- (where required by domestic law),[8] the performance of an act by one of the participants in furtherance of the agreement or involving an organised criminal group.

Similarly, the conspiracy offence contained in section 11.2 of the *Criminal Code* requires:

- the entering into an agreement by two or more other persons;
- with the intention (on the part of the defendant and one other party to the agreement) that an offence would be committed pursuant to the agreement; and
- the performance of an act by at least one party to the agreement in furtherance of the agreement.

Thus, the conduct that the CATC conspiracy offence seeks to prohibit – namely the making of an agreement to commit a serious crime for the purpose of obtaining financial or other material benefits – is already captured by the existing Australian conspiracy offence. In fact, the scope of the existing Australian conspiracy offence is likely to be broader than that proposed by the CATC in so far as it extends to the majority of offences in the *Criminal Code* and is not limited to those offences committed for the purpose of obtaining financial or other material benefits.

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[7] 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.*

The definition does not require proof of any actual criminal activities carried out by the organised crime group.

[8] Article 5(3) of the CATC provides that "State Parties whose domestic law requires an act in furtherance of the agreement for purpose of the offence established in accordance with paragraph 1(a)(i) of this article shall so inform the Secretary General of the United Nations at the time of their signature or deposit of their instrument of ratification, acceptance or approval of or access to this Convention."

This conclusion is supported by Dr Schloenhardt's observations that the offence in Article 5(a)(i):

> *essentially advocates for the universal adoption of the conspiracy offence specifically in relation to conspiracies aimed at offences that may generate material benefits for the accused.*[9]

The alternative participation offence in Article 5(1)(a)(ii) clearly contains elements that differ from the existing conspiracy offence in section 11.5 of the *Criminal Code*. However, as the CATC makes clear, State Parties need only implement one of the Article 5(1)(a) offences to comply with their obligations. In fact, the purpose of the two alternative offences is to accommodate for the variations in civil and common law jurisdictions.

The additional conduct required to be criminalised by all State parties under Article 5 relates to: "organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group."

Again this offence provision appears to be substantially similar to that contained in section 11.2 of the *Criminal Code,* which makes it an offence to aid, abet, counsel or procure the commission of an offence by another person.

It is true that the CATC offences *presume* the existence of a statutory definition of "organised criminal group", whereas the existing provisions of the *Criminal Code* make no reference to and therefore do not define the term "organised criminal group" However, the absence of such a definition does not equate to a derogation from Australia's obligations under the CATC. The fact that the Australian provisions are framed without specific reference to "an organised criminal group" means that they are broader and more generic in nature. However, they nonetheless capture the same conduct.

Lessons learnt from Division 102 of the Criminal Code

In considering whether it is necessary and prudent to outlaw specific groups known to undertake criminal activity, and to criminalise membership of and association with those groups, it is useful to review the effectiveness of comparable Commonwealth legislation dealing with terrorist organisations.

Division 102 of the *Criminal Code,* which was introduced by the *Security Legislation Amendment (Terrorism) Act 2002,* contains a number of what are generally described as 'terrorist organisation offences'.

These offences relate to the conduct of a person who is in some way connected or associated with a 'terrorist organisation'. Under the Division it is an offence to:

- direct the activities of a terrorist organisation (102.2)
- be a member of a terrorist organisation (102.3)

[9] Dr Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the legislative arrangements to outlaw serious and organised crime groups, (2008) at p. 15.

- recruit a person to join or participate in the activities of a terrorist organisation (102.4)

- receive from or provided training to a terrorist organisation (102.5)

- receive funds from or make funds available to a terrorist organisation (102.6)

- provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (102.7)

- on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (102.8)

At the time Division 102 was introduced into the *Criminal Code*, and each time it has been subsequently expanded and refined by amendment, it has attracted considerable criticism, including from the Law Council.[10]

Some of the key arguments advanced in opposition to the introduction of Division 102 can be summarized as follows:

- The terrorist organisation offences cast the net of criminal liability too widely by criminalising a person's associations, as opposed to their individual conduct.

- It was unnecessary to expand the scope of criminal liability in this way because existing principles of accessorial liability already provide for an expansion of criminal responsibility in circumstances of attempt, aiding and abetting, common purpose, incitement and conspiracy.[11] These established principles draw a

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[10] See Report of the Senate Legal and Constitutional Affairs Inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, Recommendation 4 and pages 45 – 59. Accessed at: http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/terrorism/report/report.pdf.

See also the Law Council submission to this inquiry, available at http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf

Criticism of the further expansion Division 102 can be found in the Report of the Senate Legal and Constitutional Affairs Inquiry into the provisions of the *Anti-Terrorism Bill 2004,* on pages 35 – 38 which summarize a number submissions critical of the provisions. Accessed At:

http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terrorism04/report/report.pdf

See also: Tthe Report of the Security Legislation Review Committee (the Sheller Review), June 15 2006, Chapters 7 to 10. Accessed at:

http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~SLRC+Report-+Version+for+15+June+2006%5B1%5D.pdf/$file/SLRC+Report-+Version+for+15+June+2006%5B1%5D.pdf

The Parliamentary Joint Committee on Intelligence and Security's Review of Security and Counter Terrorism Legislation, December 2006, pp67 – 84. Accessed at:

Accessed at: http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm

Report of the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the proscription of terrorist organisations under the Australian Criminal Code, September 2007.

Accessed at: http://www.aph.gov.au/house/committee/pjcis/proscription/report.htm

[11] Available at http://www.lawcouncil.asn.au/get/submissions/2110877939.pdf

more appropriate line between direct and intentional engagement in criminal activity and peripheral association.

- In shifting the focus of criminal liability from a person's conduct to their associations, the terrorist organisation offences unduly burden freedom of association and expression and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial, religious or community connections, may be exposed to the risk of criminal sanction.

- The problems inherent in the terrorist organisation offences are exacerbated by the fact that their precise reach is unknown and unknowable. This is because the definition of a terrorist organisation incorporates any organisation, whether it is listed by regulation or not, which satisfies the broad and imprecise criteria set out in sub-section 102.1(a).

In the context of the current Inquiry it is worth exploring some of these concerns with Division 102 of the *Criminal Code* in more detail.

The Law Council believes that the lessons to be learnt from Division 102, strongly recommend against adopting similar measures to outlaw "criminal organisations" or "criminal groups".

Broad, imprecise definitions are difficult to avoid and inevitably lead to wide Executive discretion as to which groups or organisations ought to be proscribed.

A "**terrorist organisation**" is relevantly defined in section 102.1(1) of the *Criminal Code* as:

> *(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or*
>
> *(b) an organisation that is specified by the regulations for the purposes of this paragraph*

According to section 102.1(2), before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition above, the Attorney General must be satisfied on reasonable grounds that the organisation to be listed:

> *(a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or*
>
> *(b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).*

An organisation 'advocates' the doing of a terrorist act if:

> *(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*

(b) the organisation directly or indirectly provides instructions on the doing of a terrorist act; or

(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act.

Neither the *Criminal Code* nor the Regulations contain any further or more detailed criteria to guide and circumscribe the exercise of the Attorney General's proscription powers. For example, it is no longer a legislative requirement, as it was prior to the *Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth),* that in order for an organisation to be proscribed under the Regulations, it must first have been designated as a terrorist organisation by United Nations Security Council.

On the basis of the broad definition contained in s 102.1(2), a considerable number of organisations across the globe are therefore potentially eligible for proscription under the Regulations. Nonetheless, only 19 organisations have been listed to date.[12] The rationale behind how and why those organisations in particular have been chosen and the order in which their proscription has been pursued is difficult to discern. Likewise information is not publicly available about other organisations which have been considered for proscription, but ultimately not listed, or about organisations which are currently under consideration for listing.

In the context of past parliamentary committee reviews, ASIO has provided the Parliamentary Joint Committee on Intelligence and Security (PJCIS) with the criteria it purportedly uses in selecting and assessing entities for proscription under the *Criminal Code*. That criteria includes the following factors:

(a) engagement in terrorism;

(b) ideology and links to other terrorist groups/networks;

(c) links to Australia;

(d) threat to Australian interests;

(e) proscription by the UN or like-minded countries; and

(f) engagement in peace/mediation processes.[13]

However, ASIO has also explained to the PJCIS that these criteria represent a guide only and that it is not necessary that all elements of the criteria be satisfied before a decision is taken to list an organisation. For that reason, where the criteria have been departed from in the past, ASIO and the Attorney-General's Department have not considered it necessary to advance evidence of special overriding circumstances which

[12] For an up-to-date list of listed terrorist organisations see the Australian Government's National Security website at http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument.

[13] Parliamentary Joint Committee on Intelligence and Security, 'Review of the listing of the Kurdistan Workers' Party (PKK)', Canberra, April 2006,1 p. 11.

justified the listing of the organisation, notwithstanding the fact that the criteria were not met.[14]

The result is that while both the Attorney General's Department and ASIO have acknowledged that it is neither possible nor desirable to list every organisation in existence which meets the broad definition of a 'terrorist organisation' under the *Criminal Code*, neither agency has been willing to promulgate binding criteria for singling out particular organisations for listing under the *Code*.

The absence of transparent criteria has inevitably made it difficult to allay public fears that the proscription power might be utilised for politically convenient ends rather than to address law enforcement imperatives.

The experience at the state level, discussed below, suggests that defining a "criminal group" or "criminal organisation" for the purposes of criminalising activity undertaken in relation to that group or organisation, is likely to prove just as difficult as defining a terrorist organisation.

This is because it is simply not possible to definitively describe the characteristics of a group that gives rise to its "terrorist" or "criminal" nature, without recourse to language that is inherently imprecise.

The result is that the discretion conferred on the authority tasked with determining which groups fall within the proscribed category is inevitably very broad.

The Law Council believes that conferring a broad discretion of this kind is not acceptable in circumstances where the consequences of outlawing a group are to limit freedom of association and expression and to expose people to serious criminal sanctions.

According to Australia's obligations under the *International Covenant on Civil and Political Rights*, limitations on the rights to freedom of association (article 22) and freedom of expression (article 19) are only permissible where they are prescribed by law and are necessary and proportionate to the achievement of a legitimate and identified aim.

In a submission to the PJCIS on the proscription of terrorist organisations under the *Criminal Code*, the Human Rights and Equal Opportunity Commission explained in more detailed what it means for a limitation on a right to be provided for by law or prescribed by law:

> *The [United National Human Rights Committee] has stated that the expression 'provided by law' in the context of article 19(3) [right to freedom of expression] and 'prescribed by law' in the context of article 22(2) [right to freedom of association] requires that the law which sets out the limiting measure must be clearly set out, and not so vague as to permit too much discretion and unpredictability in its implementation.*
>
> *The Human Rights Committee has stated that laws which authorise the restriction of rights 'should use precise criteria and may not confer an unfettered discretion on those charged with their execution'. A provision which gives the executive an unfettered discretion may not constitute a restriction*

[14] Minority Report of Parliamentary Joint Committee on Intelligence and Security, above n 13. at p. 36.

prescribed by law and may result in an arbitrary interference with ICCPR rights.[15]

The Law Council believes that the current provisions providing for the proscription of terrorist organisations in Division 102 do not comply with the requirements of precision and certainty. The Law Council fears that any provisions designed to outlaw criminal groups or organisations are likely to fall into the trap.

It is unclear when the actions or statements of people associated with the group should be attributed to the group for the purposes of characterisation.

In the absence of a constitution, corporate plan or some other statement of an organisation's goals and mandate, the attribution of defining characteristics to a group or organisation of people inevitably requires assumptions to be made, based on the statements or activities of certain individuals within the group, about the existence of a commonly shared motive or purpose.

For example, one of the grounds on which the Attorney-General may list an organisation as a terrorist organisation is if the organisation *advocates* the doing of a terrorist act.[16]

Section 102.1(1A) of the *Criminal Code* which defines what advocacy means in this context, but does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole.

The result is that, under the *Criminal Code*, a person who is a member of an organisation could be prosecuted for a criminal offence if another member of that group 'praises' a terrorist act, even when the person who praised the terrorist act is not the leader of the group, or when the statement is not accepted by other members as representing the views of the group.[17]

As the Law Council has often pointed out, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

With a few exceptions, so called criminal groups or organisations are likely to be relatively fluid, amorphous associations, without a clearly stated purpose or finite membership list. Attempting to attribute to such a collection of individuals a shared motive and purpose, will inevitably require that the knowledge or intent of one or some members of the group is imputed to all others. The result is likely to be the legitimation of a process of guilt by association.

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[15] HREOC submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Power to Proscribe Terrorist Organisations, February 2007, paragraph 23 – 24.

[16] *Criminal Code Act 1995* (Cth), s 102.1(2).

[17] Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at [8.10].

Offences based on a person's interaction and association afford police too much latitude to intrude upon people's privacy and liberty, without due cause

As noted above, the purpose of outlawing certain groups or organisations is to expose to criminal sanction the members of those organisations, or the individuals who support, fund or associate with those organisations.

In the context of the terrorist organisation offences, the Federal Government has often been quick to point out that before a person could be found guilty of the majority of offences under Division 102 of the Criminal Code, the prosecution would have to prove beyond reasonable doubt that the accused person either knew or was reckless as to whether the relevant organisation that he or she had somehow interacted with was a terrorist organisation. Therefore, according to the Government, no sanction can follow from innocent interaction and association.

However, as the Law Council has argued in previous submissions,[18] the danger with the terrorist organisation offences, many of which have never and may never lead to a successful prosecution, is not just that they potentially expose a person to criminal sanction, but that they are available to serve as a hook for the exercise of a wide range of law enforcement and intelligence gathering powers.

For example, without more, innocent interaction and association with a suspected member of a suspected terrorist organisation may not result in conviction and punishment, but it may generate sufficient interest on the part of police to lead to a search warrant, a telephone interception warrant, other surveillance measures and even arrest and detention.

In short, the Law Council's concern is that because the terrorist organisation offences do not focus on individual conduct, those offences potentially afford police very wide latitude to intrude upon people's privacy and liberty, based purely on who they know and interact with. The intent element of the terrorist organization offences may operate to limit the risk that entirely innocent interaction will be subject to criminal sanction. However, the intent element of the offences is easily overlooked by police when deciding whether to arrest, question, search and detain.

The Law Council believes that these concerns, about the increased latitude for the exercise of police powers, would also arise if offence provisions were introduced to criminalise the conduct of a person who is in some way connected or associated with a prohibited criminal group.

A number of the terrorist organisation offence provisions are inherently flawed because they rely on concepts such "membership" and "association".

The Law Council believes that the terrorist organisation offences outlined below highlight some of the particular risks and uncertainties which arise when laws are introduced which criminalise a person's associations and interactions, rather than their conduct.

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[18] See Law Council's Submission to the Parliamentary Joint Committee Inquiry into the Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (submitted 16 April 2002) available at http://www.lawcouncil.asn.au/submissions.html.

- ***"Membership" is a very imprecise concept in the context of many organisations and therefore an inappropriate basis for an offence.***

Section 102.3 of the *Criminal Code* makes membership of a terrorist organisation an offence carrying a penalty of ten years imprisonment. In order to prove this offence, the prosecution must establish beyond reasonable doubt that the person *knew* that the organisation was a terrorist organisation.

Membership of an organisation is defined in section 102.1 as including:

- a person who is an informal member of an organisation; and
- a person who has taken steps to become a member of the organisation; and
- in the case of an organisation that is a body corporate, a director or an officer of the body corporate.

The membership offence does not apply if the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.

The Law Council has a number of concerns with this membership offence.

First, criminalising membership of a group assumes the existence of a formal membership process whereby it can be clearly determined, at any particular point in time, whether or not a specific person is a member of that group or organisation. Such formal membership structures may not exist in terrorist or criminal groups. As a result, the potential class of persons that fall within the definition of "membership" is indeterminately wide.

The scope of persons falling within the "membership" category is further extended by the broad definition of membership in the *Criminal Code*, which includes 'informal members' and any person who has taken 'steps to become a member'. These terms potentially capture any person tangentially connected with the organisation.

The difficulty in determining with precision who is a member of a group and when membership begins or ends, has significant implications for those persons seeking to rely on the defence to the membership offence set out in sub-paragraph 102.2(2). That sub-paragraph provides a defence where:

> *the person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation*

Discharging this burden is likely to prove very difficult in circumstances where there is no formal resignation process and no membership or subscription fees which can be cancelled. "Ceasing to be a member" may equate to little more than subtlety withdrawing and absenting oneself from the group's activities – without announcement or fanfare of any sort.

This concern has been voiced by the House of Lords which found that a similar legal burden placed on a defendant in criminal proceedings was contrary to the presumption

of innocence.[19] The House of Lords' concerns were in turn shared by the Security Legislative Review Committee which commented as follows:

> *the decision of the House of Lords is sufficient to raise a doubt about the proportionality of overriding the presumption of innocence by imposing upon a person, charged with the offence of membership of a terrorist organisation, carrying a maximum penalty of ten years imprisonment, the legal burden of proving, if he or she is to be exonerated, on the balance of probabilities, that he or she took all reasonable steps to cease to be member as soon as practicable after he or she knew that the organisation was a terrorist organisation. The difficulty the defendant might have in proving this might result in the conviction of an innocent person and the incarceration of that person unjustly.*[20]

- ***"Association" offences have the potential to ensnare a wide range of innocent and peripheral players***

The association offence in section 102.8 of the *Criminal Code* magnifies the objectionable features of the membership offence described above.

Under this provision, it is an offence to, on two or more occasions, associate with a member of a listed terrorist organisation or a person who promotes or directs the activities of a listed terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. [21]

This offence attracts a penalty of 3 years imprisonment.

Limited exemptions exist for certain types of association, such as those with close family members or legal counsel, and are contained in subsection 102.8(4). Subsection 102.8(6) also provides that the offence provision in section 102.8 does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

At the time section 102.8 was introduced into the *Criminal Code*, the Government considered the association offence to be necessary to address what is said to be the:

> *fundamental unacceptability of terrorist organisations of themselves by making associating with such organisations in a manner which assists the continued existence or expansion of the organisation illegal.*[22]

When reviewing the association offence in section 102.8 the Security Legislation Review Committee concluded:

> *The breadth of the offence, its lack of detail and certainty, along with the narrowness of its exemptions, has led the SLRC to conclude that considerable*

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[19] *Sheldrake v Director of Public Prosecutions, Attorney-General's Reference (No 4 of 2002)* [2005] 1 AC 264.

[20] Security Legislation Review Committee, *Report of the Security Legislation Review Committee,* (2006), para 10.20.

[21] *Criminal Code (Cth)* section 102.8(2).

[22] See Explanatory Memorandum to the *Anti-Terrorism Bill (No 2) 2004*.

difficulties surround its practical application. Some of these difficulties include the offences' potential capture of a wide-range of legitimate activities, such as some social and religious festivals and gatherings and the provision of legal advice and legal representation. Further, the section is likely to result in significant prosecutorial complications. [23]

The Law Council shares the view of the Security Legislative Review Committee. The Law Council believes the association offence is neither a necessary or proportionate means of preventing terrorist activity in Australia. Given the elements of the association offence are so difficult to define and the scope of the offence so broad, it applies indiscriminately to large sections of the community without any clear justification.

The existence of the exemptions in sub-sections 102.8(4) and 102.8(6) do little to allay these concerns.

For example, the 'assurance' offered by 102.8(6), namely that the offence does not does not apply to the extent (if any) that it would infringe the constitutional doctrine of freedom of political communication, offers little practical guidance as to the limits of the offence. The sub-section appears to suggest that the offence provision could be applied in a manner which breaches the implied freedom and that the actual ambit of the offence can only be determined by challenging its constitutionality. [24]

- ***"Funding" offences may capture legal practitioners***

Under section 102.6 of the *Criminal Code* it is an offence to get funds to, from, or for a terrorist organisation. There are two separate offences under section 102.6. The first is based on the person *knowing* that the organisation which he or she intentionally receives funds from, or makes funds available to, is a terrorist organisation. The penalty for this offence is 25 years imprisonment. The second offence is based on recklessness as to whether the organisation is a terrorist organisation. The penalty for this offence is 15 years imprisonment.

Under subsection 102.6(3) a person will not be guilty of a section 102.6 offence if he or she receives funds from the organisation solely for the purpose of providing:

(a) legal representation for a person in proceedings relating to this Division; or

(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

The defendant bears a legal burden in relation to these exceptions.

This means that if a legal practitioner is charged with receiving funds from a terrorist organisation, he or she must establish on the balance of probabilities that the funds were received for the purpose of the providing legal assistance in relation to proceedings under Division 102 or in relation to some other form of regulatory compliance.

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[23] Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.75].

[24] Security Legislative Review Committee, *Report of the Security Legislation Review Committee* (2006) at para [10.66].

Communications between a legal adviser and their client made for the purpose of obtaining or giving legal advice are generally subject to client legal privilege. This makes it very difficult, if not impossible, for the legal practitioner to prove that the services, for which he or she received funding from a terrorist organisation, fall within the 102.6(3) exception. In order to exonerate him or herself from a section 106.2 offence, the legal practitioner must gain their client's consent to waive professional privilege so that evidence can be adduced about the nature of the legal assistance rendered. Where privilege is not waived, the documents subject to professional privilege cannot be produced even if they will establish the innocence of the legal adviser charged with a crime. If a legal adviser cannot prove that the services they provided to a terrorist organisation fall within the legal representation exception, they face up to 25 years imprisonment.

The Law Council, like the Security Legislation Review Committee, considers these provisions, and in particular the exception in subsection 102.6, to be unreasonably restrictive.[25]

An Executive controlled proscription process leads to a denial of natural justice

In addition to the concerns expressed above, the current process of proscribing terrorist organisations set out in Division 102 does not afford affected parties the opportunity to be heard prior to an organisation being listed or to effectively challenge the listing of an organisation after the fact,without exposing themselves to prosecution.

If an organisation is proscribed by regulation as a terrorist organisation there is no opportunity for the members of the community who might be affected by the listing to make a case against the listing before it comes into effect.

There are avenues for review *after* an organisation has been listed, both before the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Federal Court. However, the Law Council regards such *post facto* review as inadequate, not least of all because people who seek to challenge a listing after it has come into effect may expose themselves to prosecution if, during the course of their application for review, they disclose membership of or support for the relevant organisation.

Despite the assurances given about the safeguards incorporated in the current listing process they remain manifestly inadequate. For example:

- ***Review by the Parliamentary Joint Committee on Intelligence and Security***

The Attorney-General's Department has emphasised that the current listing process is subject to strict Parliamentary oversight because Parliament has the power to disallow a regulation that lists an organisation as a terrorist organisation.

In this respect, the role of the PJCIS in reviewing the listing of organisations is critical.

[25] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 120.

Section 102.1A of the *Criminal Code* stipulates that the PJCIS *may* review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House. The PJCIS has noted that "since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter."[26] Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based.

The Parliament is likely to rely upon the judgement of the PJCIS in deciding whether to disallow the proscribing regulation; particularly where classified material is involved.[27]

The primary problem with PJCIS review is that it is not mandatory and it takes place after a decision to proscribe an organisation has been made and come into effect.

Further, while the PJCIS has been diligent in reviewing listings, robust in it's questioning of relevant government officers, and critical of some aspects of current listing process, it has not succeeded in forcing the Executive:

(a) to commit to a fixed set of criteria for selecting organisations for listing; and

(b) to address its reasons for listing to those criteria.

The PJCIS has indicated that it requires pre-identified criteria to use as a basis for testing a listing and it has adopted for that purpose the criteria provided by ASIO. However, as was revealed in the review of the listing of the Kurdistan Workers Party (PKK), the Executive regards the ASIO criteria only as a rough, non-binding guide. Therefore it is difficult for the PJCIS to employ a consistent and rigorous framework for review.

Moreover, the reality of party politics in Australia dictates that there is often insufficient distinction between the Executive and the Parliament to suggest the latter can be relied upon to provide independent supervision of the former.

- ***Consultation with States and Territories***

Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws, has provided only doubtful additional accountability. For example, in the case of the PKK listing, although the matter was under consideration for over a year, State and Territory leaders were advised of the proposed listing just six days before the relevant regulation was made and were only provided with the three and half page unclassified statement of reasons in support of the listing.

It is difficult to accept that consultation of this type acts as a genuine safeguard. Further, there is no basis for the assumption that representatives of the Executive at the State and Territory level are concerned with policing the misuse or unnecessary use of executive power at the federal level, except to the extent that it involves a Commonwealth incursion into State matters.

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[26] Parliamentary Joint Committee on ASIO ASIS and DSD, 'Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act* 2004', Tabled 16 June 2004.

[27] Because such material will not be available to Parliament generally.

- ***Judicial Review***

While there is the opportunity for judicial review of a decision to proscribe an organisation, it extends only to the legality of the decision and not its merits. Further, as noted above, judicial review is only available after the decision has come into effect.

- ***Expert Advice***

The Attorney-General's Department has submitted that a further "safeguard" of sorts in the current executive listing process is that decision makers have access to and act upon expert advice from senior officials, such as the Director-General of ASIO and the Chief General Counsel, and others with extensive knowledge of the security environment. According to the Attorney-General's Department:

> *"The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries cannot be understated."*[28]

The Law Council believes that such submissions misunderstand the critical reason why a judicial process is preferred to an executive process. A judicial process offers greater safeguards because it would involve a transparent decision making process presided over by an independent decision-maker.

Before making an application to the court the Attorney-General would still need to gather and be guided by expert opinions from the same members of the Executive he currently consults. And in considering the Attorney-General's application, the court would have access to same range of information from the same range of sources as the Attorney-General.

The difference with a judicial process is that the manner in which that information is presented and tested would be more transparent and the ultimate evaluation of that information would rest with the court and not with the Attorney-General. Furthermore, a judicial process might allow for information from other sources, including from those potentially affected by a proposed listing, to also be placed before the ultimate decision maker. While the "expertise of members of the Executive" may be considerable, it should not automatically be assumed that they are necessarily possessed of all the relevant information.

At any rate, as the Attorney-General is not bound to follow the advice of the other members of the Executive, the fact that their advice is currently voluntarily sought as part of the listing process does not represent a safeguard in the true sense of the word.

In view of the above shortcomings with the current listing process the Security Legislation Review Committee recommended either that:

- the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court;

or

[28] Australian Government submission Parliamentary Joint Committee on ASIO ASIS and DSD, 'Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act* 2004', p.17.

- the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General but with the following changes:

    - there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition; and

    - An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

The Law Council prefers the first of the alternate recommendations above.

As discussed further below, the Law Council does not regard legislation to outlaw serious and organised crime groups and to criminalise association to those groups as necessary.

However, if such legislation was to be introduced, the experience under Division 102 of the Criminal Code demonstrates that a judicial listing process is to be preferred over an executive process.

The unlawful association provisions in the *Crimes Act* have proven unnecessary

Even before Division 102 was introduced into the *Criminal Code,* the Commonwealth *Crimes Act* already contained provisions allowing for the outlawing of specific groups of individuals. Under subsection 30A(1) of the *Crimes Act*, the following groups are declared to be *unlawful associations:*

(a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages:

1. the overthrow of the Constitution of the Commonwealth by revolution or sabotage; or

2. the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government; or

3. the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States; or

or which is, or purports to be, affiliated with any organisation which advocates or encourages any of the doctrines or practices specified above; or

(b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention.

Without limiting the effect of subsection 30A(1), subsection 30A(2) provides that any body of persons, incorporated or unincorporated, which is, in pursuance of section 30AA, declared by the Federal Court of Australia to be an unlawful association, shall be deemed to be an unlawful association for the purposes of this Act.

Under section 30AA the Attorney-General may apply to the Federal Court for an order calling upon any body of persons, incorporated or unincorporated, to show cause why it should not be declared an unlawful association. The application must be based on the grounds that the body of persons is one which falls within the categories of section 30A(1). If no cause is shown, subsection 30AA(7) authorises the Federal Court to make an order declaring that the association is an "unlawful association".

Where an organisation is declared to be an unlawful association, a number of criminal offences apply, including:[29]

- failure to provide information relating to an unlawful association upon the request of the Attorney-General (s30AB);
- being an officer, member or representatives of an unlawful association (s30B);
- giving contributions of money or goods to, or soliciting donations for, an unlawful association (s30D);
- printing, publishing or sending material by an unlawful association (ss30E-FA); or
- allowing meetings of an unlawful association to be held on property owned or controlled by a person (s30FC).

These unlawful association provisions have been reviewed and criticised on the basis that they are no longer a relevant or necessary part of federal criminal law. This assertion is supported by the fact that only one person has ever been convicted in Australia of an offence under the unlawful association provisions of the *Crimes Act* – and that conviction was overturned on appeal.[30]

In 1991, the Gibbs Committee recommended the repeal of Part IIA of the *Crimes Act* given its very limited use since its introduction in 1926.[31] The Gibbs Committee formed the view that: [32]

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[29] See sections 30B-30FCC of the *Crimes Act* , maximum penalties range from imprisonment for six months to imprisonment for one year.

[30] *R v Hush; Ex parte Devanny* (1992) 48 CLR 487.

[31] Gibbs, R Watson and A Menzies in their *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) [38.2]-[38.9].

[32] Gibbs, R Watson and A Menzies in their *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) [38.2]-[38.9].

> *… the activities at which these provisions are aimed can best be dealt with by existing laws creating such offences as murder, assault, abduction, damage to property and conspiracy and that there is no need for these provision*.

In 2006, the Australian Law Reform Commission also concluded that the unlawful association provisions in the *Crimes Act* were no longer necessary and ought to be repealed.[33]

Presumably, when the relevant provisions of the *Crimes Act* were introduced, there was perceived to be a pressing need for legislation allowing certain groups to be outlawed and those associated with them to be prosecuted.

This perception appears to have been misplaced.

The redundancy of these provisions acts as a reminder that sometimes legislation is enacted simply as a means of creating the appearance that action is being taken to combat a specific threat or problem, rather than as means of in fact addressing the problem.

Using legislation as a rhetorical device in this way ought to be avoided at all cost. Rights to freedom of association and expression should never be infringed upon unless a genuine, rather than speculative, case of necessity has been made out.

Experiences at the State level

A number of Australian jurisdictions have considered, and in some cases enacted, criminal provisions that outlaw "criminal groups" or "criminal organisations" and create related offences.

Legislation was adopted to this effect in 2006 in New South Wales and was recently passed by South Australian Parliament. Similar legislation was proposed in Queensland but was not enacted.

The measures discussed below contain features that run counter to established criminal law principles, infringe human rights and suffer from similar problems to the terrorist organisation offence provisions described above. As a result the Law Council is firmly of the view that these provisions should not be replicated at the federal level.

The New South Wales Experience

In September 2006, the New South Wales Parliament enacted the *Crimes Legalisation Amendment (Gangs) Act 2006*, making it the first state to enact specific offences directed at criminal activities by proscribed "criminal groups". The Act also introduced new aggravated offences in relation to assault or damage during a public disorder and new police powers to disperse groups and to enter and search premises.

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[33] Unlike terrorist organisation, an unlawful organisation does not need to act in advancement of a particular cause or with the intention to coerce or influence by intimidation a government, country or section of the community. See ALRC report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006).

The *Crimes Legalisation Amendment (Gangs) Act 2006* was directed at outlawing serious and organised crime and the offence provisions it introduced are centred on the definition of "criminal group".[34]

Under the Act, a "criminal group" is a group of three or more people who have as one of their common objectives to:

- obtain material benefits from serious indictable offences; or
- commit serious violent offences

In some ways, this notion of criminal group is similar to the offence of conspiracy: there is a need to establish a common objective that is similar to the need to show an agreement. However, in contrast to the conspiracy, there is no requirement among the three or more people to agree to commit particular, identifiable crimes.

Under the Act, a group can be criminal group whether or not any of the members are subordinate or employees of others, only some of the people involved are planning, organising or carrying out any particular activity or its membership changes from time to time. There are no further structural or organisational requirements in the definition of "criminal group", such as membership, period of existence or division of labour. This leaves open the possibility that a "criminal group" could encompass a spontaneous association of three or more people. As Dr Schloenhardt explains:

> *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-person car rebirthing operation would be" but the legislation offers little guidance to draw 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.*[35]

The NSW provisions contain four new offences relating to participating in a criminal group. Under section 96 it is an offence for a person to:

- participate in a criminal group, knowing that it is a criminal group and knowing or being reckless as to whether his or her participation in that group contributes to the occurrence of any criminal activity (penalty 5 years imprisonment);
- assault another person, intending by that action to participate in any criminal activity of a criminal group (penalty 10 years imprisonment);
- destroy or damage property belonging to another person, or threaten to destroy or damage property belonging to another person, intending by that action to participate in any criminal activity of a criminal group (penalty 10 years imprisonment);

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[34] This definition is now contained in s93S of the *Crimes Act 1900.*

[35] Dr Schloenhardt, Submission to Parliamentary Joint Committee on the Australian Crime Commission Inquiry into the legislative arrangements to outlaw serious and organised crime groups, (2008) at p. 85.

- assault a law enforcement officer while in the execution of the officer's duty, intending by that action to participate in any criminal activity of a criminal group.

When considering the offence provisions in *Crimes Legalisation Amendment (Gangs) Bill 2006* the NSW Parliament Legislation Review Committee noted that the provisions represented a significant departure from traditional criminal law principles of extended liability:

> *The Bill's concept of a criminal group 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). However, s93IK(1) is broader than the traditional crime of conspiracy, in that it is the general criminal objectives of the group which provide the basis for criminal liability rather than any specific agreements to commit particular crimes.* [36]

The Committee also noted that the Bill does not define "participation" in a criminal group or make it clear whether a person must *intend* to pursue the objectives of the criminal group in order to be defined as a participant:

> *The Bill seems to contemplate that a person could be convicted of the proposed offence under s 93IK(1) on the basis of conduct which is relatively peripheral to the commission of a minor summary offence by others, where the accused merely foresees that it is possible that his or her conduct will contribute to the occurrence of such a crime at some time in the future.*
>
> *…*
>
> *The principle of legal certainty requires that is should be 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. The principle forms an important part of rights jurisprudence under the European Convention on Human Rights [EHCR]. In applying the ECHR, the European Court of Human rights has held:*
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> > *A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. [Sunday Times v United Kingdom* (1979) 2 EHRR 245 [49]]
>
> *The Court's jurisprudence shows that the more severe the sanction or important the right is, the more important it is that the law should be unambiguous and precise; and that the division between acceptable flexibility and unacceptable vagueness depends on the content of the law, the field it is designed to cover and the number and status of those to whom it is addressed.* [37]

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[36] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 p. 9.

[37] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest*, No 10 of 2006 p. 11-12

The Law Society of New South Wales shared these concerns and further objected to the enactment of the *Crimes Legislation Amendment (Gangs) Act 2006* on the basis that no objective evidence was offered to support the purported need for the new offences, and no reason was given to justify subverting important rule of law principles:

> *When introducing this legislation to the NSW Parliament, Mr Tony Stewart MP made the following comments: "We have ramped up the penalties for gang crimes, we have given police tough new powers, we have introduced Australia's first criminal organisation offences and we have given police and their families the protection they deserve. Crime gangs are on notice. Whether you are a violent mob or an ongoing criminal enterprise, the police are coming after you".*
>
> *…*
>
> *Like many of the reading speeches on law and order, Mr Stewart's speech contained dramatic assertions that were intended to create fear in the community about "rampant lawlessness". It included a reference to "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 specialists in armed robberies, and criminals of Middle Eastern origin who engage in firearm crime, drug trafficking and car rebirthing".*
>
> *No objective evidence was offered in support of any of these claims and, disturbingly, ethnicity was referred to as a cause of criminality, reflecting the prejudice often heard on talkback radio. The fact that these views were expressed in Parliament reinforces the significant influence the media have on politicians in the debate on law and order.*
>
> *The Legislation Review Committee published its report in Legislation Review Digest no.10 of 2006. It was concerned that the meaning of "participate in a criminal group" is unclear and may result in criminal liability for participation in a group, where a person does not intend to advance the criminal objectives of the group as set out in the Act. This means that a motor mechanic who merely repairs a bike gang's motorcycles may be potentially convicted without having any intention of assisting the criminal group. This is because the Act significantly departs from the traditional criminal law rules relating to accessory.*
>
> *Under this Act there is no requirement that the accused must have intended to provide assistance or encouragement to a criminal group. Additionally, 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.*
>
> *The Legislation Review Committee was concerned that this "lack of clarity" may allow a person to be convicted of the offences of being involved in a gang, which carries a maximum penalty of five years imprisonment, on the basis of conduct that is "relatively peripheral to the commission of a minor summary offence by others, where the accused merely foresees that it is possible (i.e. being reckless) that his conduct will contribute to the occurrence of crime in the future". The committee concluded that this lack of clarity was in breach of the rule of law principle of "legal certainty".*
>
> *…*

Despite the significant nature of the concerns raised by the committee, the Act was passed. The political desire to be seen to be 'tough on gangs' appears to have outweighed considerations of civil liberties and well-established principles of the rule of law.[38]

The South Australian Experience

The South Australian Government introduced the *Serious and Organised Crime (Control) Act 2008* into Parliament last year with the objective of disrupting and restricting the activities of organisations involved in serious crime and protecting members of the public from violence associated with such criminal organisations.

The South Australian laws, passed in June 2008, do not define the term 'criminal group'. Instead, the *Serious and Organised Crime (Control) Act 2008* (SA) empowers the Attorney-General, on application of the Commissioner of Police,[39] to declare an organisation as a "criminal organisation" if satisfied that:

- members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- the organisation represents a risk to public safety and order .

Under the South Australian Act, the Attorney-General can make a declaration that an organisation is a "criminal organisation" without stating the grounds for or providing any explanation for that declaration. There is no right to appeal or judicial review following the making of a declaration.

Once a declaration is made, serious criminal liability flows for people who are members of, or associate with members of, the organisation. For example, under section 35 of the Act it is an offence to associate, on not less than six occasions during a period of 12 months, with a person who is a member of a declared organisation, or the subject of a control order. The penalty for this offence is five years imprisonment.

It is also an offence for a person with a criminal conviction of a kind prescribed by regulation to associate more than six times in 12 months with a person who also has a prescribed criminal conviction, provided the person knew that the another person had the relevant criminal conviction, or was reckless as to that fact.

The South Australian Act goes much further than criminalising participation in organised criminal group and, despite what has been publicly reported, goes beyond outlawing motorcycle gangs. It introduces a system of control orders similar to the control order regime contained in Division 104 of the *Criminal Code*.[40]

Under the South Australian Act, a control order may be sought by the Commissioner of Police and issued by the Magistrates Court. Like the federal control order regime, interim control orders can be made in the absence of the defendant. Under the South

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[38] Dennis Miralis, 'Law & Order 2007-Style' in (2007) 3 *Law Society of New South Wales Journal* 54.

[39] A notice of the application must be published in the Gazette and in a newspaper circulating throughout South Australia, inviting members of the public to make submissions to the Attorney-General in relation to the application within 28 days of the notice.

[40] See Part 3 of the *Serious and Organised Crime (Control) Act 2008* (SA).

Australian Act, a control order can be made against a person who has been a member of a declared criminal organisation, a person who engages or has engaged in serious criminal activity, a person who regularly associates with members of a declared organisation, or a person who engages in serious criminal activity and regularly associates with others who engage in serious criminal activity.[41] A control order made under the South Australian Act may prohibit the person from associating or communicating with specified persons, entering or being in the vicinity of certain premises or possessing specified articles.

The South Australian Act also permits a 'senior police officer' to make a 'public safety order' prohibiting a specified person or class of person from entering or being on specified premises, attending a specified event or entering or being within a specified area.[42] A public safety order can be made without judicial oversight, however certain variations and certain orders must be authorised by the Court.

The wide ranging provisions of the South Australian Act and their severely restrictive impact on the enjoyment of fundamental human rights have attracted much criticism and expressions of concern. As the Law Society of South Australia and the South Australian Bar Association observed in a Joint Statement on the *Serious and Organised Crime (Control) Bill 2007*:

> *[T]his legislation goes too far. It undermines the presumption of innocence, restricts or removes the right of silence, lacks proper procedural fairness, and removes access to the courts to challenge possible biased, unfounded, or unreasonable decisions of the Attorney-General or Commissioner of Police.*
>
> *The Attorney can make a declaration against any 'organisation' where he is personally satisfied that some of its members whether here, interstate or overseas engage in serious crime without stating the grounds or providing any explanation for that declaration. There is no right of appeal or judicial review available against the making of the declaration. A magistrate may make control and public safety orders which may eventually impact on the liberty of individuals. The bill provides those orders are to be made on the basis of 'facts' established on the balance of probabilities rather than the criminal onus of proof beyond reasonable doubt. The individual affected by such an order may never know the case against him or her where it is based on what the Commissioner claims is 'criminal intelligence.' There is then no ability to challenge the truth or reliability of what may be unfounded and malicious allegations.*
>
> *…*
>
> *A person may be deemed guilty by association where they have any 'contact' or 'meeting' (which includes any contact by email, telephone or other electronic means) with a designated person even though that contact may be entirely innocent. Once the contact is proven the onus of proving innocence is upon the person charged. The offence carries up to five years imprisonment.*
>
> *The passage of the anti-terrorism package of legislation in 2005 and 2006 resulted in laws which undermined fair trials and due process. This Bill represents an extension of those laws intended to combat terrorism, and which*

[41] See s14(2) of the *Serious and Organised Crime (Control) Act 2008* (SA).

[42] See Part 4 of the *Serious and Organised Crime (Control) Act 2008* (SA).

at the time were argued to be essential in dealing with that emergency, to other areas of traditional law enforcement.

Whilst as a society we claim adherence to intentional human rights instruments and conventions such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights our Parliament is about to pass a law which undermines the rule of law and in particular rights to procedural fairness and a fair trail on criminal charges which carry a penalty of imprisonment of up to five years.

Our society rightly prides itself on the fairness of its justice system and the acknowledgement of personal freedom from executive control. The legislation undermines basic and fundamental civil and political rights of all groups and individuals. We should not allow oppressive and repressive laws to become the norm. The dangers posed by this legislation are too great. It should be withdrawn in its entirety.

The Queensland Experience

In 2007 the State Opposition introduced the *Criminal Code (Organised Criminal Groups) Amendment Bill 2007* into Queensland Parliament. The Bill proposed to introduce a new section 545A into the Queensland *Criminal Code*, making it an offence to participate as a member of an organised criminal group. The purpose of the Bill was to extend criminal liability "beyond parties to offences and break down the group mentality of these organised crime elements".

Under the Queensland Bill, "organised criminal group" was defined to mean:

> *a group of 3 or more persons who have as their objective or 1 of their objectives—*
>
> *(a) obtaining material benefit from the commission of an offence for which an offender is liable to imprisonment for a term of 4 years or more; or*
>
> *(b) obtaining material benefit from conduct outside Queensland that, if it occurred in Queensland, would constitute the commission of an offence for which an offender is liable to imprisonment for a term of 4 years or more; or*
>
> *(c) the commission of a serious violent offence; or*
>
> *(d) conduct outside Queensland that, if it occurred in Queensland, would constitute the commission of a serious violent offence;*
>
> *whether or not—*
>
> *(e) some of the persons are subordinates or employees of other persons; or*
>
> *(f) only some of the persons participating in the group at a particular time are involved in the planning, arrangement or execution at that time of a particular action, activity or transaction; or*
>
> *(g) the group's membership changes from time to time.*

There is no further requirement of any structure, formal membership procedure or the existence of the group for any specified period of time and no element of the offence relates to the actual activities the group engages in. However, unlike the NSW definition, the Queensland definition includes the term "organised". This term may

denote a more established or formalised group structure, however no such requirements are listed in the definition.

Concerns about the bill focussed on the breadth of the definition of "organised criminal group" and the difficulties likely to be faced in establishing the existence of such as a group. For example, it was argued that under the proposed definition, the "objectives of the group" would be almost impossible to prove, given criminal gangs rarely have a charter of aims or purposes that include participation in criminal activity.

The Queensland Bill also included a participation offence. Proposed section 545A(1) sought to make it an offence to participate as a member of a group, knowing that the group is an organised criminal group, in circumstances where that participation contributes to the occurrence of any criminal activity of the group. The penalty for this offence is five years imprisonment.

This proposed offence would have required the person to be a *member* of the criminal organisation. This includes associated members, prospective members, and those who identify themselves as members (although membership of an organised criminal group is not of itself an offence). This definition is broad enough to include persons who identify themselves as members such as by wearing clothing bearing the groups insignia or logo.

The proposed offence was criticised on the grounds that it lacked a clear nexus between the participation and the actual criminal activity. For example, there is no additional requirement that the person engages in any criminal activity. The physical elements of the offence are satisfied once it has been established that the person participated as a member in the group.

The Queensland Bill was not enacted into legislation. It failed to receive the support of the Government and failed to pass the second reading in Parliament on 31 October 2007. Attorney-General and Minister for Justice Kerry Shine stated that the Bill was:

> *ill conceived, unnecessary, and aims to extend the basic principles of criminal liable 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.*[43]

To date there have been no further proposals to introduce new criminal organisation offences into Queensland law.

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[43] Queensland, Legislative Assembly, *Hansard* (31 October 2007) 4010 Hon KG Shine, Attorney-General and Minister for Justice.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.