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Committee Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Department of the Senate, Parliament House

By email: acc.committee@aph.gov.au

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Dear Senate Committee

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

Please accept this late submission to your inquiry into legislative arrangement to outlaw serious and organised crime groups. This submission focuses on the international legal frameworks (and related constitutional issues) governing transnational organised crime which are relevant to Australia's legislative efforts directed at organised crime, in particular the 2000 United Nations Convention against Transnational Organised Crime ('TOCC') (to which Australia is a party).

The Current Legislative Approach

Australian currently has no comprehensive federal or uniform national legislative response to transnational organized crime. To the extent that organised crime is simply a mode of facilitating the commission of ordinary criminal offences, there is arguably no lacuna in the law, since any offences committed can already be prosecuted by recourse to the ordinary criminal law. However, there is added value in specifically classifying and targeting *transnational* organised crime per se through additional legislative measures, since

When offenders, victims, instruments and products of crime are located in or pass through several jurisdictions, the traditional law enforcement approach, focused at the local level, is inevitably frustrated.¹

At the Commonwealth level there are a various disparate laws which either target one specific element of organised crime or, though not specifically concerned with organised crime, were introduced for the purpose of combating it. See, for example:

¹ UN Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime* (2004), xviii.

- *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth);
- *Measures to Combat Serious and Organised Crime Act 2001* (Cth);
- *Proceeds of Crime Act 2002* (Cth);
- Division 73 of the *Criminal Code* (extraterritorial people smuggling);
- Terrorism-related offences in the *Criminal Code*, to the extent that terrorist offences overlap with organised crime (particularly in relation to offences connected with terrorist organisations).

There is also a definition of ‘serious and organised crime’ in Part I, s 4(1) of the *Australian Crime Commission Act 2002*, which provides an operational definition for the ACC but does not establish new criminal liabilities. It refers to an offence:

- (a) that involves 2 or more offenders and substantial planning and organisation; and
- (b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
- (c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences or a like kind; and
- (d) that is a serious offence within the *Proceeds of Crime Act 2002*, an offence of a kind prescribed by the regulations or an offence that involves [a proscribed serious indictable offence]....

A similar investigative definition exists in Queensland under the *Crime and Misconduct Act 2001* (Qld), schedule 2.²

In addition, there are relevant State laws. NSW is the only State to have enacted specific organised crime offences, introduced in late 2006 to the *Crimes Act 1900* (NSW) by the *Crimes Legislation Amendment (Gangs) Act 2006*. A ‘criminal group’ is defined as three or more people who have as their objectives either to obtain material benefits from serious indictable offences (s 93IJ(1)(a) and (b)) or to commit serious violent offences (s 93IJ(1)(c) and (d)). The law also creates new offences such as ‘participation’ in a criminal group (s 93T(1)), and was introduced in the context of concerns about spontaneous group violence following the Cronulla riots in Sydney.

The NSW law goes considerably beyond international standards relating to organised crime, since it does not require that the group is ‘structured’, exists over a period of time, or is directed towards material or financial benefit (all of which are essential conditions under the TOCC definition). The legislation is better understood as domestic ‘gang’ legislation rather than appropriately dealing with serious organised crime, although its overly-broad scope also captures the latter conduct. The law thus provides little guidance on distinguishing, for example, a gang of youths engaging in drunken property damage from a multinational arms smuggling syndicate.

Setting the threshold definition for criminal group-based offences so low, and framing overly-broad participation offences (including on the basis of recklessness) raises concerns about the inappropriate criminalization of conduct which is too remote from the commission of serious organised criminal harm, and raises related concerns about the adequate protection of individual liberties and freedom of association.

² The Act defines ‘organised crime’ as criminal activity that involves:

- (a) indictable offences punishable on conviction by a term of imprisonment not less than 7 years; and
- (b) 2 or more persons; and
- (c) substantial planning and organisation or systematic and continuing activity; and
- (d) a purpose to obtain profit, gain, power or influence.

In South Australia, the *Serious and Organised Crime Bill 2007* (SA) was recently introduced with the specific purpose of suppressing criminal motorcycle gangs. It gives unprecedented powers to the Attorney-General to declare a 'bikie' gang an outlaw organisation on the basis of police intelligence, and enables the prosecution of gang members who engage in acts of violence. The legislation does not define the term 'criminal group' but under a 10(1) would allow the Attorney-General to ban organisations if satisfied that:

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

Again, the law would go well beyond international standards in that no minimum number of members is specified, the group need not be structured, a material or financial benefit is not essential, and the definition of a 'member' is overly broad, raising concerns about the impact on individual liberties in circumstances where the conduct criminalised is too remote from the commission of organised crime. The threshold of a mere 'risk' to public safety and order is vague and ill-defined, as are the concepts of membership and association. The law raises considerable concerns given the potential also to impose control orders on members or former members (s 14) and to criminalise those who regularly associate with them (s 35). The NSW and South Australian laws are not good models for replication at the federal level, at least so far as implementation of the TOCC is concerned.

Finally, there are also State 'anti-fortification' laws which do not introduce specific offences in relation to organised crime, but aim to stop criminal motorcycle gangs equipping their club houses with anti-police security devices: *Statutes Amendment (Anti-Fortification) Act 2003* (SA), the *Corruption and Crime Commission Amendment and Repeal Act 2003* (WA) and the *Crimes Legislation Amendment (Gangs) Act 2006*. The scope of those laws is, however, obviously limited (and are currently being reviewed by the High Court on a challenge to their constitutional validity by the Gypsy Jokers Motorcycle Club Inc).

2000 United Nations Convention against Transnational Organised Crime

The *United Nations Convention against Transnational Organised Crime* (TOCC), which entered into force in September 2003, reflects a recent international consensus on the measures necessary to respond to transnational organised crime. Australia ratified the TOCC on 27 May 2004 and is bound by its obligations. The Convention sets out a universally accepted definition of organised crime and provides comprehensive guidance to States on the appropriate policy and legislative processes necessary to eliminate organised crime. Its three Protocols on People Trafficking, People Smuggling and Firearms also provide relevant international standards.

The TOCC aims to unify national approaches to organised crime to eliminate 'safe havens' for transnational criminal groups and to ensure more effective preventative strategies at the international level. It is important that Australian legislative arrangements to outlaw serious and organised crime groups are consistent with obligations under the TOCC.

The Commonwealth Parliament clearly enjoys legislative power under the external affairs power in the Commonwealth Constitution to incorporate an international treaty into domestic law,³ notwithstanding the otherwise limited scope of federal criminal legislative power.

³ *Commonwealth v Tasmania* (1983) 46 CLR 625

Under article 5(1) of the TOCC, Australia must establish the specified offences under the treaty as criminal offences in domestic law. However, it must be emphasised that the TOCC is limited to *transnational* organised crime offences (s 3(2)):

... an offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.

The Convention does not, therefore, require States to criminalise domestic organised crime (including biker gangs and the like), since special measures of international criminal cooperation are only considered justified in respect of the most serious forms of organised crime which spread across national jurisdictions.

Given this limitation, the TOCC does not provide a basis for federal legislative power over *domestic* organised crime groups pursuant to the external affairs power in the Constitution.

The TOCC can be divided into four parts: criminalisation, international cooperation, technical cooperation, and implementation. Concerning the obligation to criminalise new offences, TOCC introduces four new offences: participation in an organised criminal group (art 5), money laundering (art 6), corruption (art 8) and obstruction of justice (art 23). Article 2(a) 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.

To meet this definition, both the structure and the objectives of the group are relevant, whilst whether the group has actually committed crimes is irrelevant. Article 2(c) expressly excludes groups without formally defined member roles, continuity of membership or a developed structure, and the ‘period of time’ requirement excludes ad hoc ‘randomly-formed associations’ for the immediate commission of an offence without previous conspiracy. The group must aim either to commit a TOCC offence (articles 5, 6, 8, 23) or to commit a ‘serious crime’, which is defined in article 2(b) solely by a maximum penalty standard.

The TOCC definition is flexible in scope, allowing it to respond to both the current structural range of organised criminal groups and future evolutions. However, the TOCC’s compromise approach, necessary to unify national approaches, has arguably rendered the definitions too diffuse.⁴ At the same time, the definition has also been criticised as under-inclusive in its focus on formal, developed organisations without provisions relevant to youth groups or one-off criminal enterprises, and its focus on the organisations rather than their activities.⁵

National implementation of the definition must, however, ensure prospective certainty in the articulation of criminal liabilities, not least so as to satisfy the principles of legality and non-retrospectivity under human rights law and the general criminal law.

⁴ A Orlova & J Moore, “‘Umbrellas’ or ‘Building Blocks’?: Defining International Terrorism and Transnational Organised Crime in International Law” (2005) 27(2) *Houston Journal of International Law* 267 at 304.

⁵ Andreas Schloenhardt, “Mafias and Motorbikes: New Organised Crime Offences in Australia” (2008) 19(3) *Current Issues in Criminal Justice* (University of Sydney).

The determination of what constitutes a ‘serious’ offence solely based on penalties is perhaps the main weakness of the definition, given its exclusion of any consideration of actual harm caused or the type of conduct. Individual parties retain discretion to decide which offences shall fall within the scope of TOCC, increasing the likelihood of inter-state discrepancies.⁶ Any Australian implementing legislation would need to give carefully consider which offences are sufficiently serious in this context.

The limitation of purpose to the obtaining of a ‘material benefit’ appears to exclude non-economically motivated crimes, for example environmentally motivated offences or offences concerning political violence (including terrorism), although there was some disagreement during the drafting of the TOCC about whether terrorism would fall within its scope. The better view is that offences relating to terrorist financing and terrorist organisations are better dealt with elsewhere through more specific international treaty arrangements and relevant Security Council resolutions, and the various Australian anti-terrorism laws addressing such conduct, and thus fall outside the ambit of profit-oriented international organised crime.

So far as the modes of criminal liability are concerned, article 5(1) of the TOCC prohibits both ‘conspiracy’ and ‘active participation’ in organised crime groups, offences which may be criminalised either alternatively or cumulatively by state parties. The distinction was made to ensure ease of implementation for both common law (conspiracy) and civil law (participation) jurisdictions.

The active participation offence significantly expands criminal liability for organised crime. Whilst there is no liability for participation that does not contribute to the criminal activities or aims of the group, or for non-intentional participation, the provision is still broad in scope. Whilst for conspiracy the accused must be part of some agreement with the group to commit crime, active participation merely requires deliberate contributions to the organisation, including acts intended to help achieve a criminal end without being criminal in themselves, or forming part of the person’s ongoing role in or membership of the group. Criminal responsibility can thus attach to participants only remotely connected to individual offences in reliance on events occurring well before the preparation or planning stage of specific crimes.⁷ While preventive intervention by the criminal law at such an early stage may be warranted in respect of acute crimes such as terrorism, the rationale is not as compelling for organised crime, and should be avoided in any Australian implementing legislation.

Please be in touch if you require any further information.

Yours sincerely

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⁶ David Freedman, “The New Law of Criminal Organizations in Canada” (2007) 85(2) *Canadian Bar Review* 171 at 196.

⁷ Article 5(2) provides that the ‘purpose’ requirement of both conspiracy and actual participation offences may be inferred from objective factual circumstances, lowering the threshold of the burden of proof placed on the prosecution.