SUBMISSION

AUSTRALIAN CRIME COMMISSION

SUBMISSION TO:

The Parliamentary Joint Committee on the Australian Crime Commission

INQUIRY INTO:

The legislative arrangements to outlaw serious and organised crime groups

ACC
AUSTRALIAN CRIME COMMISSION

Executive Summary

In its previous report on the future impacts of serious and organised crime the Parliamentary Joint Committee on the Australian Crime Commission (ACC) highlighted that serious and organised crime covers a diverse range of criminal activities including the trafficking of people, identity theft, the importation, manufacture and distribution of illicit drugs, money laundering, bribery, and financial fraud. Organised crime groups are very adaptable and have the capacity to access external expertise, undertake corruption and exploit domestic and international opportunities. By the nature of their activities and propensity to use or threaten violence, they constitute a direct threat to the safety and well being of the community as well as a range of more indirect impacts. Unchecked, they have the potential to undermine confidence in key government and private sector institutions, with potentially wider consequences.

The threat from organised crime demands the pursuit of constant innovation in law enforcement capabilities and adaptation to the changing threat environment. The ACC is developing advanced capability to generate, prioritise and proactively monitor groups and individuals that represent the highest threat to the Australian community and economy and to attack criminal enterprise structures that are highly successful at generating wealth. Of particular concern is the extent that offshore connections can manipulate, influence and assist the flight of capital from the Australian economy.

The ACC is watching with interest the effectiveness of the South Australian legislation. Organised crime is flexible and adaptable and legislation of this nature is likely to have an effect on organised crime but the impact of legislation may be reduced over time as these groups adapt their practices to overcome legislative impediments. There is also a risk that legislation based on identification of specific groups may result in a displacement effect that makes members of these groups more difficult for law enforcement to monitor or target.

Legislation alone may not effectively deal with the ongoing threat posed by serious and organised crime. It is only one aspect of the law enforcement approach to organised crime groups. It is vital to also retain a focus on ongoing development of responses to the actual crimes, and to ensure that any legislative response is consistent with structures, focuses and responsibilities of law enforcement agencies. Intelligence collection, information sharing and development of knowledge is fundamental to combating serious and organised crime.

It is important to recognise that law enforcement agencies are actively responding to organised crime developments and threats through collaborative action, such as that facilitated by the ACC Board. Taskforce operations that capitalise on specialist skills and data sources across a range of agencies such as the Australian Customs Service, Australian Securities and Investment Commission, Crimtrac, AUSTRAC, the Australian Taxation Office and State and Federal Police to combat serious and organised crime continue to be effective in providing the flexibility and expertise to respond to changing criminal threats.

In developing new initiatives and benchmarking activities against a number of international counterparts, the ACC has reviewed legislative regimens operating in international jurisdictions, in particular models operating in the United Kingdom (UK), United States of America (US) and Canada. The ACC's assessment is that measures implemented in the UK to support the work of the Serious Organised Crime Agency (SOCA) represent the most applicable model for consideration in the Australian context. Directed at organised crime groups that represent the highest threat to its community, the measures available in the UK are designed to reduce the harm caused by the most serious manifestations of organised crime, however legislation of this type would require further examination.

Introduction

The ACC's submission to the Parliamentary Joint Committee (PJC) on the Australian Crime Commission Inquiry into the future impact of serious and organised crime identified that adaptation, diversification of criminal enterprise and increasingly flexible structures and activities are strong features of the serious and organised crime threat in Australia and internationally. These judgements remain valid in the current environment, and are likely to remain valid for the foreseeable future. In addition, Australia's organised crime environment is influenced by the capacity to direct capital offshore—a major ongoing threat to the Australian economy.

The dynamic nature of this threat demands the pursuit of constant innovation in intelligence capabilities, including a vigorous all of government commitment to information sharing, adaptation to the shifting threat environment, a high level of operational readiness and the optimal deployment of dedicated operational resources.

The ACC is currently developing a number of innovative approaches to identify, prioritise and proactively monitor groups and individuals that represent the highest threat to the Australian community and economy. The focus of the ACC's attention is on the criminal enterprise structures that support the generation of illicit profit and wealth. These approaches, which are outlined in this submission, have been developed along similar lines to those of some overseas national criminal intelligence agencies, notably those in the United States, Canada and the United Kingdom.

This submission considers the potential impact on the functions and performance of the ACC of legislation which would outlaw criminal groups and membership of and association with these groups. The submission outlines a number of new initiatives currently being developed by the ACC to target high risk criminal activity. It also addresses briefly some of the international legislative arrangements developed to outlaw serious and organised crime groups and association with those groups, and the effectiveness of these arrangements.

The ACC has contributed to the Federal Attorney-General's Department submission, and notes the department addresses terms of reference (a) and (c) in detail.

Inquiry Terms of Reference

International legislative arrangements developed to outlaw serious and organised crime groups and association to those groups, and the effectiveness of these arrangements

The apparent success in overseas jurisdictions of certain measures designed to address the threat from significant individuals involved in, or facilitating, serious and organised crime gives rise to consideration of the potential effectiveness of comparable measures in the Australian environment.

Measures applied in the UK

Serious Crime Prevention Orders

The UK *Serious Crime Act 2007* includes provisions relating to Serious Crime Prevention Orders (SCPOs). SCPOs are civil orders, a breach of which is a criminal offence. They are a tool to prevent, restrict or disrupt serious criminal activities.

SCPOs may be made for a maximum period of five years against individuals, bodies corporate, partnerships or unincorporated associations. Their function is to prohibit, restrict, impose requirements or include other terms the Court considers appropriate to protect the public by preventing, restricting or disrupting serious crime. For individuals, the imposition of an SCPO could relate to, for example:

- Financial, property or business dealings or holdings
- Working arrangements
- Means by which the individual communicates or associates with another or others
- Premises to which the individual has access
- Use of any premises or item by the individual
- Travel

Where bodies corporate, partnerships and unincorporated associations are concerned, SCPOs could, for example, relate to:

- Financial, property or business dealings or holding of such persons
- Types of agreements to which such persons may be party
- Provision of goods or services by such persons
- Premises where to which such persons have access
- Use of any premises or item by such persons
- Employment of staff by such persons.

Financial Reporting Orders

A Financial Reporting Order (FRO) is a conviction-based reporting order that the court can impose on an individual for a period of up to 15 years. Qualifying offences include people trafficking, money laundering and a range of drug offences and other serious offences. They are intended to serve as a preventative measure and there are penalties for non-compliance and providing false or misleading information.

A person under an FRO can be required to report on their finances at intervals and in detail commensurate with their level of offending. For example, reporting regimes can involve quarterly reporting of all sources of income, accounts held, interest in property or businesses, assets and expenses.

To verify the accuracy of information provided in a financial report, UK agencies can request information from any source without use of a production order and disclose information in the financial report to any party. Where a person's lifestyle is inconsistent with the financial position reported, there are avenues to pursue the seizure of assets.

US and Canada

Due to the US and Canadian constitutional guarantees of freedom of association, US and Canadian criminal legislative approaches have centred on legislation which targets participation in - rather than membership of - a criminal enterprise or organisation. Aspects of the US and Canadian approaches that could have applicability in the Australian context are:

- Use of objective indices of membership of an organised crime group (for example: course of conduct, in concert with others, derives substantial income or resources) as a circumstance of aggravation which attracts a higher penalty for a range of serious offences.

- Parole and bail conditions used to impose non-association conditions on organised crime members. Higher thresholds apply to organised crime members (based on objective indices) seeking bail or parole.
- Aspects of investigative law (telephone interception and controlled operations) have been amended to take into account the challenges presented by organised crime investigations, such as increased duration of telephone interception warrants and the ability to undertake long term controlled operations in the context of organised crime money laundering investigations.
- The introduction of "Special Administrative Measures" within the corrective services system to address organised crime members who continue to participate in or direct organised crime activities from within the corrective system.
- The use of regulation around certain premises, occupations and sectors to prevent organised crime members from holding licences or participating in high risk occupations or sectors.
- Investment in proactive strategies to educate and engage high risk sectors and industries to harden them to organised criminal infiltration.

The ACC views measures implemented in the UK to support the work of its Serious Organised Crime Agency (SOCA) as offering some of the more relevant options for consideration in the Australian context. Directed at organised crime groups that represent the highest threat to the community, the measures available in the UK are designed to reduce the harm caused by the most serious manifestations of organised crime. SCPOs would appear to offer powerful tools for the medium to long-term management of enduring and resilient offenders, notably in relation to constraining the capacity of such criminals to engage in legitimate commercial activities that might conceal illicit activities.

The ACC notes that consideration of SCPO-style powers in the Australian environment would most likely stimulate a vigorous debate about the balance between the protection of the community and the rights of the individual. The ACC also acknowledges that the nature of Australia's federated system of government may give rise to law enforcement and regulatory challenges in the administration of such orders that are largely absent from the UK environment.

Similar challenges to effective administration might also be present in the application of FROs but the ACC believes that a program designed to provide continuing assurances about the legitimacy of the financial circumstances of convicted, high risk criminals would be a more viable and sustainable tool. FROs would directly address the profit motive that lies at the heart of much serious and organised crime activity. The fluid and adaptive nature of organised crime means that it can often frustrate law enforcement interdiction efforts by shifting seamlessly between illicit commodities; the regimen imposed by FROs make irrelevant the nature of the criminal commodity and provide instead an emphasis on the money trail.

The ACC notes however that before legislation of this nature could be adopted, further detailed consideration would be required.

The need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups

Reducing the harm caused by serious and organised crime is a complex composite of policy and intelligence issues that are beyond the capacity of any one jurisdiction or agency. There are no straightforward solutions: innovation and a range of coordinated intelligence, investigative and legislative responses are required.

Higher threat organised criminal groups are typically flexible, entrepreneurial, resistant to law enforcement intervention and with their principals based overseas. Some groups form for short periods for specific activities, while others are more enduring. Many exert cross-jurisdictional influence and have the capacity to expand their operations quickly, both domestically and internationally, in order to exploit opportunities or maintain competitive advantage. Groups may comprise established syndicates or networks of independent criminals and are now frequently formed on an ad hoc basis to meet a specific demand or to exploit a specific crime market.

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

Membership of Outlaw Motorcycle Gangs (OMCGs) remains, for the moment, more structured, more enduring and more easily attributable. Legislation based upon the identification of specific groups may prove effective in disruption of the activities of groups such as OMCGs where they retain strong self-identification. The character of OMCGs has, however, changed over the last few years to embrace more flexible forms of membership, association or cooperation. It is a trend likely to continue, and one which may be accelerated if proscriptive action is applied to OMCGs or similar high-visibility groups. Outlaw Motor Cycle Gangs are one of the most visible groups in the organised crime landscape. They present a significant threat to law and order at a jurisdictional level and have national and international links that will ensure that they feature in any list of high risk crime groups for the foreseeable future.

OMCGs are, nonetheless, not typical of the majority of organised crime entities that attract national law enforcement attention. While other syndicates and networks might share a common ethnicity or ethos, they are rarely the defining characteristics; and there are few, if any, examples of public self-identification by those groups. Moreover, the fluid and entrepreneurial character of organised crime means that groupings can form and dissolve in short periods of time and for highly specific purposes.

As a consequence, the outlawing of criminal groups and any membership or association with them is likely to prove extremely challenging for all but the most visible groups.

While there would undoubtedly be a disruptive impact on those individuals who engage with groups such as OMCGs if it became a criminal offence to do so, for the majority of the organised crime figures of concern to the ACC it is unlikely to make a significant difference to their respective modus operandi.

As noted above, managing the threat to the community from specific groups known to undertake criminal activities, and membership of and association with those groups, can not be resolved simply through legislation. Instead a strategic approach that combines possible legislative changes with policy measures informed by intelligence and analysis, and ensuring operational measures continue to be flexible and effective in targeting these groups and key individuals, is required.

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

The ACC has contributed to a separate submission from the Commonwealth Attorney-General's Department which addresses this issue more comprehensively.

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

Displacement of criminal activity is a potential consequence of legislation to outlaw serious and organised crime groups. Legislative reforms targeting criminal groups may lead to shifts in the dispositions and activities of some criminal groups or the displacement of criminal activities to new locations, new targets or other crime types. Displacement of criminal activity generally creates new intelligence gaps for national law enforcement, albeit sometimes for a relatively short period.

Anticipating legislation that will effectively outlaw OMCGs in South Australia, there are indications that some outlaw groups have already relocated to other jurisdictions. In similar fashion, the tightening of domestic controls on precursor chemicals for illegal methylamphetamine production, including the initiative to control abuse of pseudoephedrine and related compounds, appears to be shifting the focus of some criminal groups from manufacturing to other criminal markets.

Such developments may or may not be in the community's overall interests. Changing the legislative regime to establish an environment more hostile to crime may discourage some players, such as prospective new entrants into illicit markets, or act as a disincentive for existing groups to expand. However, where law enforcement's knowledge of a relatively visible criminal group is beginning to emerge, it may be disadvantageous for legislative or other initiatives to effectively pressure a group to move its operations to another jurisdiction or to adopt more effective covert measures.

The ACC notes there is a reluctance to pursue charges relating to criminal organisation provisions in the US and Canada because they are factually and legally complex and time and resource intensive. Prosecution in US and Canada does not normally deal with more than 5-6 co-offenders in one trial. While it is difficult to be precise, the ACC anticipates that the Australian experience would not be any easier.

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

In the event that legislation to outlaw was passed, it seems likely that, subject to the availability of coercive powers in the relevant field of criminal activity, the ACC's coercive powers would be used to gather information to support submissions for proscription.

It would seem unlikely that the volume of requests for assistance would be sufficient to cause disruption to other priority requests of the ACC for access to the powers and there would most likely be a significant dividend in terms of the acquisition of intelligence that builds understanding of the criminal environment.

It is not yet clear what impact the South Australian legislation will have on the ACC's current and proposed approaches to targeting.

Key elements of the ACC's approach include expanded engagement with the private and public sectors, a bulk data collection and analytical capability (supported by an indicators and warning program), improved use of financial intelligence for target generation, an enhanced threat and risk assessment program, target prioritisation and profiling methodology, and an operational target development capability.

The underlying strategy of the new operating model is to identify serious criminal targets through identification of financial activity and resource movements. The identification of money transfers and repositories, for example, is a key methodology for target generation and development. The ACC's reinvigorated approach to investigating money laundering recognises that serious and organised crime groups are adopting more sophisticated and rapidly changing methods to conceal their wealth. Unlike traditional money laundering investigations, which follow the money trail after the identification of an offence, the ACC takes a proactive, risk-based approach to identify high-risk money flows.

The seizure of criminal proceeds is a key available means of disrupting the activities of serious and organised criminal groups. Whereas they continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities.

Existing arrangements for the seizure of criminal proceeds at the Commonwealth level in Australia are arguably not as effective as other models. An examination of the effectiveness of arrangements operating at State level (e.g., the NSW Crime Commission) and in international jurisdictions (e.g., the United Kingdom's Serious & Organised Crime Agency) suggest the need for a clearer separation of responsibility for prosecution and seizure action at Commonwealth level.

Although a variety of models are available, there are compelling arguments for the location of responsibility with an agency at the national level with responsibility for targeting the most resilient and enduring serious and organised crime groups and equipped with the cost-effective capability offered by coercive powers. In addition, agencies being able to draw on a range of tools, including the appropriate use of coercive powers from another service agency, provides another model for consideration. While the primary purpose would be improved rates of criminal asset recovery, there would also be opportunities to improve a broader range of outcomes in terms of disrupting and dismantling criminal enterprise structures through corporations or taxation law action.

Proposals to strengthen the proceeds of crime regime—including the recommendations of the Sherman Report on the operation of the *Proceeds of Crime Act 2002* (Cwlth) which are currently under government consideration, together with possible additional measures such as improving information sharing arrangements and requiring "career criminals" to explain the legitimacy of their wealth (a measure Sherman considered was not currently justified but should be kept under review)—would also be beneficial to the ACC in chasing the money trail.