



**Australian Government**  

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**Attorney-General's Department**

**Criminal Justice Division**

Parliamentary Joint Committee on the Australian Crime Commission

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

**Attorney-General's Department submission**

**August 2008**

## Introduction

The Attorney-General's Department welcomes the opportunity to provide the Parliamentary Joint Committee on the Australian Crime Commission (ACC) with this submission as part of the Committee's inquiry into the legislative arrangements to outlaw serious and organised crime groups.

2. The Department's submission is directed at paragraphs (a) and (c) of the Committee's Terms of Reference:

- (a) international legislative arrangements developed to outlaw serious and organised crime groups and association to those groups, and the effectiveness of these arrangements
- (c) Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and member of and association with those groups, and the effectiveness of these arrangements

3. The Department notes that the ACC has made a separate submission to the Committee on this inquiry, addressing, among other matters, paragraphs (b), (d) and (e) of the Committee's Terms of Reference.

4. The focus of the Department's submission is legislative provisions and approaches specifically targeted at serious and organised crime groups and at combating serious and organised crime more generally; rather than particular offences targeted at the activities in which these groups might be involved (eg money laundering or illicit drugs). The submission is divided into four parts. Part 1 sets out the general background to the issue of serious and organised crime groups in Australia. Part 2 provides an overview of the Australian context. Part 3 provides a possible framework for understanding how international and domestic legislation approaches the issue of defining serious and organised crime groups, and the legal consequences of membership of, or associating with, such groups. This part also examines Australian offences of 'consorting' with criminals. Part 4 addresses international and domestic legislative approaches to combat serious and organised crime more generally, including disrupting and dismantling serious and organised crime groups.

5. The Department notes that Dr Schloenhardt's submission to this inquiry provides a detailed analysis of legislative models to combat organised crime groups in Hong Kong, Canada, New Zealand, China and Macau SAR. Dr Schloenhardt has also examined and compared existing and proposed provisions in Australian jurisdictions designed to combat organised crime. The Department's submission is intended to complement Dr Schloenhardt's submission by drawing on and highlighting aspects of his research and providing additional information about legislation addressing serious and organised crime in the United Kingdom and the United States, which were outside the scope of his submission.

6. The Department also notes that, in outlining the domestic and international legislative provisions and approaches to serious and organised crime groups and to combating serious and organised crime more generally, the Department is not endorsing any particular provisions or approaches. The effectiveness of any provisions or approaches would need to take account of a range of matters, including the operational advice of agencies, the nature of the Australian organised crime environment, the current roles and focuses of agencies, any possible impact on rights and liberties, the potential costs versus the potential benefits, the scope of the Commonwealth's constitutional powers and its role in Australia's federal system of government, and any findings of the Committee.

7. The Department further notes that legislation specifically targeting serious and organised crime groups is only one of the possible approaches to combating such groups. While not the focus of this submission, it is noted that intelligence, investigative and operational capabilities and collaboration, both nationally and internationally, remain vital to addressing criminal networks. Further, any new legislative measures should take account of what agencies do currently, particularly in areas vital to effective law enforcement, such as national coordination and criminal intelligence. Agencies, such as the Australian Federal Police (AFP), can provide the Committee with further information and advice on these matters when they appear before the Committee as part of the hearing process.

8. In preparing this submission, the Department has consulted with and received input from its portfolio agencies, including the AFP and the ACC.

## **Part 1: Background**

9. Although organised crime has a long history in Australia, the more recent activities of outlaw motorcycle gangs (OMCGs) and the gangland killings in Melbourne have attracted significant public and political attention on the problem of organised crime groups.

10. The Committee's current inquiry follows a number of developments aimed at improving measures on a national level to dismantle groups that are involved in serious and organised crime.

11. Following the events of 11 September 2001 in the United States, the regime introduced by Division 102 of Part 5.3 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) to criminalise the activities of terrorist organisations shows one approach taken to address a specific type of organised crime group.

12. In November 2006, the ACC Board approved the establishment of the Outlaw Motorcycle Gangs National Intelligence Task Force (the OMCG Task Force) under the High Risk Crime Groups Determination. The OMCG Task Force superseded the ACC Intelligence Operation that concluded on 31 December 2006 after it identified a significant expansion in the activities of OMCGs in 2005-06. The OMCG Task Force developed national intelligence on the membership and serious and organised criminal activities of OMCGs to better guide national investigative and policy action.

13. In June 2008, the ACC Board elected to close the OMCG Task Force and replace it with a new Serious and Organised Crime National Intelligence Task Force (SOC NITF), which will remain in force until 30 June 2009. The SOC NITF will retain a focus on high risk OMCGs for at least the first 12 months, but will also allow the ACC to have a broader focus on organised crime occurring outside the structure of an OMCG.

14. In June 2007, the Ministerial Council for Police and Emergency Management – Police (MCPEMP) agreed to establish a working group to examine the issue of OMCGs (the OMCG Working Group). The Final Report of the OMCG Working Group was completed in October 2007, and made 23 recommendations to enhance a national approach to combating the problem of OMCGs. The Final Report of the OMCG Working Group was noted by MCPEMP at its November 2007 meeting. The Department notes that the Committee has been given a copy of the Report on an in-confidence basis (due to the operationally sensitive material that it contains).

15. Also since June 2007, the South Australian Government has lobbied for a national legislative response to combat serious and organised crime groups, and has developed ‘model laws’ to suppress the activities of OMCGs. The South Australian Serious and Organised Crime (Control) Bill 2007, which passed both houses of Parliament in May 2008, is currently awaiting assent and will come into force on a date fixed by proclamation. The Bill will introduce measures to outlaw criminal organisations and prohibit any deliberate association with them or their members.

16. In addition, in September 2007, this Committee completed its inquiry into the future impact of serious and organised crime on Australian society. The Department notes that while the report of that previous inquiry did touch on the subject of organised crime gangs, it is through this inquiry that the Committee seeks to specifically address the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups.

17. Finally, extensive research is being conducted by Dr Schloenhardt (a senior lecturer at the University of Queensland) and sponsored by University of Queensland, the United Nations Office on Drugs and Crime, the Australian Institute of Criminology and the AFP. Dr Schloenhardt’s two year study will examine the adequacy and efficiency of existing domestic and international laws in the Asia Pacific region to address organised crime. The aim of this research is to develop recommendations for more effective prevention and suppression of organised crime in the Asia Pacific region.

## **Part 2: The Australian context**

18. In considering the applicability to Australia of any legislative approaches to address serious and organised crime groups and serious and organised crime more generally, it is important to be mindful of the context in which any such approaches would operate.

### **A federal system of government**

19. In Australia’s federal system of government, State and Territory governments have significant law enforcement responsibilities, including maintaining peace, order and good government and public order and protecting the people and property in their jurisdiction. The Commonwealth Government’s law enforcement responsibilities reflect its constitutional powers and include immigration, social security, taxation, border control, banking regulation and national security as well as the integrity of its own programs and institutions.

20. Commonwealth, State and Territory governments have long recognised, however, that their law enforcement responsibilities and interests overlap and require national coordination both operationally and legislatively. Agencies collaborate closely to ensure there is active and effective sharing of intelligence and coordination of investigative efforts. From an AFP perspective, this includes providing the capability to address the transnational aspects of crime and facilitate international intelligence sharing. The development of national model laws by the Commonwealth, States and Territories is an example of legislative cooperation and coordination (eg the model controlled operations, assumed identities, protection of witness identity and surveillance devices laws).

## **The Commonwealth framework**

21. The Commonwealth's approach to serious and organised crime groups reflects Australia's federal system of government. It is premised on a legislative framework that criminalises the types of activities in which those groups may be involved, targets the profits of these activities, and provides appropriate powers to law enforcement agencies to prevent, investigate and disrupt that activity. Some of the key elements of this legislative framework include:

- international illicit drug and precursor trafficking offences
- people trafficking and smuggling offences
- money laundering offences
- financial transaction reporting requirements and information sharing
- proceeds of crime legislation, and
- telecommunications interception powers and access to telecommunications data.

22. Within this framework, the Commonwealth has established agencies to prevent, identify, investigate and prosecute criminal offences committed within its jurisdiction. Some of these agencies have been given a range of powers to combat this criminal activity; these powers are generally only available in relation to the more serious offences. For example, in relation to the investigation of specified offences, the AFP has access to telecommunications interception, surveillance devices, search warrants, and various powers to compel the production of documents and other information. The AFP's powers are supported by sophisticated technological and investigative capabilities, which are responsive to developments in the criminal and broader environments. The ACC has a specific statutory function, and associated coercive powers, to address serious and organised crime. Importantly, these agencies collaborate and cooperate to address criminal activity falling within the Commonwealth's responsibility.

## **New legislative measures**

23. While numerous jurisdictions have legislative provisions specifically directed to serious and organised crime groups, we note the potential risks of such legislation highlighted in the ACC's submission to the Committee.

24. We also note that the nature of organised crime is dynamic and differs across environments. For example, in the Technology Enabled Crime environment traditional organised crime groups, characterised by their structured, hierarchical formations, assignment of roles to members and enduring nature, have given way to organised criminal networks with fluid, decentralised structures who use technology as their primary means to commit offences.

25. As part of the ongoing process of continuous improvement, agencies work closely to identify and consider opportunities for enhancing and improving the Commonwealth framework. For example, where appropriate, by briefing the Government on possible legislative reforms and by reviewing agency priorities and approaches and coordination between agencies.

## **Part 3: International and domestic legislative approaches to outlaw serious and organised crime groups**

26. There are a range of international and domestic legislative approaches to outlaw serious and organised crime groups, and membership of, or association with such groups. This part provides

the Committee with a possible framework for understanding how international and domestic legislation approaches the issue of defining serious and organised crime groups, and the legal consequences of membership of, or associating with, such groups. This part also examines Australian offences of ‘consorting’ with criminals.

### Defining serious and organised crime groups

27. The framework for understanding international and domestic legislative approaches to defining serious and organised crime groups has four elements: defining the group; connecting the group to crime; determining the crimes to be captured; and the process for determining that the group is criminal. Each of these elements is explained below.

#### What constitutes a group?

28. Most jurisdictions favour a simple definition of ‘group’ that covers the structure (eg minimum number of persons) and the activities/objectives of the group.

29. As summarised in the table below, the definition of group is generally a minimum of two or three people, with the object of committing certain types of crime, and possibly for material gain.

Jurisdiction	Structure	Activities/Objectives
<i>United Nations Convention against Transnational Organised Crime</i>	3 or more persons	committing serious crime or Convention offences <u>in order to</u> obtain a financial or material benefit
<i>Canadian Criminal Code</i>	3 or more persons	facilitating/committing one or more serious offences <u>likely to result in</u> material (including financial) benefit to the group or its members
<i>China Criminal Law 1997</i>	3 or more persons	committing joint crimes
<i>Hong Kong Serious and Organised Crime Ordinance</i>	2 or more persons + substantial planning and organisation	planning specified offences <u>or</u> committing specified offences <u>and involves</u> loss of life or serious harm to a person (or substantial risk of such loss/harm) or serious loss of liberty of a person
<i>Macau Organised Crime Law 1997</i>	‘constituted organisation’	agreement to commit one or more specified offences to obtain advantages or other illicit benefits
<i>New South Wales Crimes Act 1990</i>	3 or more persons	obtaining material benefit from serious indictable offences <u>or</u> committing serious violence offences
<i>New Zealand Crimes Act 1961</i>	3 or more persons	obtaining material benefit from offences punishable by at least four years imprisonment <u>or</u> committing serious violence offences punishable by at least 10 years imprisonment
South Australian Serious and Organised Crime (Control) Bill	3 or more persons	organisation represents a risk to public safety and order <u>and</u> organises, plans, facilitates, supports or engages in serious criminal activity
United States RICO legislation	refers to the concept of an enterprise, which is broadly defined as any group of individuals who are associated in fact.	

\* Note: these elements are included in the definition of ‘serious and organised crime’ in the *Australian Crime Commission Act 2002* (Cth). See paragraph 63 below.

Connecting the group to crime

30. It is the second element of the definition of group (eg the activities/objectives of the group) that connects the group to crime. There are range of ways that this is achieved, including by reference to:

Past offences of specific kinds	United States RICO legislation requires that the prosecution prove a pattern of racketeering activity linking past offences of kinds specified in the legislation to the enterprise (eg group) under investigation.
Criminal activity in this instance	The more serious 'organised crime' offences in the Canadian <i>Criminal Code</i> link the organisation to criminal activity by requiring evidence of the commission of an indictable offence by the accused.
The criminal purposes of the group	The New Zealand <i>Crimes Act 1961</i> does not require any substantive offence to be committed, rather the group must simply have come together to commit a proscribed activity. The common intention of the group must be to commit either offences for material benefit punishable by four or more years imprisonment or serious violent offences.
	The New South Wales <i>Crimes Act 1900</i> is based closely on the New Zealand model, requiring the same sort of common purpose connection to criminal activities.
The threat of future crime or misconduct	The South Australian Serious and Organised Crime (Control) Bill provides an extra avenue for law enforcement to target criminal groups. In addition to capturing organisations that engage in activities relating to serious criminal activity, there is also the opportunity for the South Australian Attorney-General to declare an organisation as a future risk to public safety. At this stage there is no further guidance as to what factors can be used to determine this risk and what sort of connection to crime needs to be satisfied.

## Which crimes?

31. Having connected the group to crime, the definition is completed by articulating which crimes are captured by legislation targeting serious and organised crime groups. There are generally three ways to do this: crimes of a general type with a penalty of 'x' years imprisonment, listing specific offences, or a combination of these approaches, as set out in the table below.

<b>Jurisdiction</b>	<b>crimes of X years imprisonment</b>	<b>listing specific offences</b>	<b>combination</b>
<i>United Nations Convention against Transnational Organised Crime</i>			Convention offences (eg laundering proceeds of crime, corruption of public officials and obstruction of justice) <u>or</u> offences with a penalty of at least 4 years imprisonment
<i>Canadian Criminal Code</i>	offences with a penalty of at least 5 years imprisonment (+ others by Regulation)		
<i>China Criminal Law 1997</i>	not limited to any particular type of crime		
<i>Hong Kong Serious and Organised Crime Ordinance</i>		range of crime types including: murder, kidnapping, drugs, forgery, firearms, robbery and copyright infringement	
<i>Macau Organised Crime Law 1997</i>		21 different crime types including: murder, kidnapping, loan sharking, extortion, fraud and robbery	
<i>New South Wales Crimes Act 1990</i>	serious indictable offences with a penalty of at least 5 years imprisonment <u>or</u> serious violence offences with a penalty of at least 10 years or more imprisonment		
<i>New Zealand Crimes Act 1961</i>	offences with a penalty of at least 4 years imprisonment <u>or</u> violent offences with a penalty of at least 10 years imprisonment		
<i>South Australian Serious and Organised Crime (Control) Bill</i>	indictable offences		
<i>United States RICO legislation</i>		range of federal and state offences including murder, kidnapping, gambling, arson, robbery, bribery, extortion and illicit drugs	

\* Note: the definition of 'serious and organised crime' in the *Australian Crime Commission Act 2002* (Cth) requires that the crime fall both within a list and above a threshold penalty (3 years imprisonment). See paragraph 63 below.



### Process for determining that the group is criminal

32. There are generally two processes through which a group is determined as criminal: the legislative test, and proscription by government official.

33. The legislative test is favoured by most jurisdictions, and allows a court, on a case-by-case basis to decide whether an organisation meets the criteria of ‘criminal organisation’ set out in legislation. For example, under Canadian legislation, the decision in one circumstance that an organisation is criminal does not mean subsequent cases are required to deem that same organisation as criminal.

34. The proscription process allows high-level government officials to declare certain organisations as criminal. For example, the South Australian Serious and Organised Crime (Control) Bill gives the South Australian Attorney-General the power to declare an organisation a ‘criminal organisation’.

### **Specific criminal offences for participation in and/or association with criminal organisations**

35. A number of jurisdictions have substantive criminal offences which punish varying types and degrees of involvement in criminal organisations, as summarised in the table below. The maximum penalties for these ‘criminal organisation’ offences vary from one year to life imprisonment.

<b>Jurisdiction</b>	<b>lead*</b>	<b>member</b>	<b>participate**</b>	<b>recruit</b>	<b>support***</b>	<b>associate</b>
<i>United Nations Convention against Transnational Organised Crime</i>	✓		✓			
<i>Canadian Criminal Code</i>	✓		✓			
<i>China Criminal Law 1997</i>	✓		✓	✓		
<i>Hong Kong Serious and Organised Crime Ordinance</i>	✓	✓		✓	✓	
<i>Macau Organised Crime Law 1997</i>	✓			✓	✓	
<i>New South Wales Crimes Act 1990</i>			✓			
<i>New Zealand Crimes Act 1961</i>			✓			
<i>South Australian Serious and Organised Crime (Control) Bill</i>						✓

\* includes organising, directing and managing a criminal organisation

\*\* includes participating in activities as well as committing crime

\*\*\* includes collecting/providing funds and weapons, allowing use of premises and harbouring criminal organisation

36. One of the primary reasons many jurisdictions have adopted specific organised crime legislation is to enable differentiation between lower level and higher level participants.

37. The most sophisticated example of this is the Canadian Criminal Code which provides separate offences to correspond with the offender’s level of involvement in the organisation. The lowest level offence is general participation in, or contribution to, the activities of a criminal organisation, for the purposes of enhancing that organisation to facilitate or commit indictable offences (s 467.11). This offence carries a maximum penalty of five years imprisonment.

38. The next level offence is the commission of an indictable offence for the benefit of, at the direction of or in association with a criminal organisation (s 467.12). This offence carries a maximum penalty of 14 years imprisonment.

39. The highest level offence is directed at those who instruct the commission of an indictable offence for the benefit of, at the direction of or in association with a criminal organisation (s 467.13). This offence carries a maximum penalty of life imprisonment.

40. The Hong Kong offences also differentiate between lower level and higher level participants. For example, under the Hong Kong *Serious and Organised Crime Ordinance*, membership of a criminal organisation carries a penalty of one to three years imprisonment, whereas managing a criminal organisation carries a higher penalty of three to 15 years imprisonment.

41. Lower level offences have been criticised for extending liability beyond traditional concepts of criminal responsibility. Some of the broader ‘participation’ offences (eg New South Wales and New Zealand) have been criticised as what constitutes participation has been left undefined. However, most participation offences generally require that the offender: (i) had some level of knowledge or was reckless as to the nature of the organisation or the criminal activity, and (ii) intended, knew or was reckless that their involvement would facilitate the criminal organisation or criminal activity.

42. In contrast, the new offence in s 35(1) of the South Australian Serious and Organised Crime (Control) Bill will create criminal liability for a person who frequently associates with another person who is a member of a declared organisation or is the subject of a control order. Additionally, the new offence in s 35(3) will create criminal liability for a person with certain criminal convictions who frequently associates with another person who has such criminal convictions. These offences are not directed at participation in criminal organisations or involvement in their criminal activities, rather they are directed at associations with certain persons.

### **Consorting offences**

43. Consorting offences were introduced into Australian law in the late 1920s and early 1930s to break up gang related criminal activities. Today, all jurisdictions except Queensland, the Australian Capital Territory and Norfolk Island have offences for habitually consorting with criminals (see table below). Over time, these offences have been modified to apply to consorting with convicted or ‘declared’ criminals rather than merely ‘reputed’ criminals.

44. The Department is not in a position to comment on the effectiveness of State and Territory consorting laws, and considers that jurisdictions would be better placed to provide the Committee with such detail. The Department notes that police officers from South Australia and New South Wales provided their perspectives on the operational effectiveness of consorting laws as part of the Committee’s public hearings for the previous inquiry. The Department also notes that the submission of the Queensland Crime and Misconduct Commission to this inquiry also addresses anti-consorting laws.

45. The Department notes that State and Territory consorting offences have been subject to a number of criticisms, including that they are an out-dated and old-fashioned offence that are premised on ‘guilt by association’ and apply even where no substantive criminal activity has taken place. Consorting laws also have the potential to subject a convicted criminal (who has served their sentence) to further punishment by prohibiting other persons from being in that person’s company.

46. Consorting offences also generally only apply where the consorting takes place in public. The utility of consorting offences needs to be considered against a modern environment where persons can gather online in relative privacy and anonymity to plan and organise crime.

	Legislation	Coverage of offence	Maximum Penalty
NSW	s 546A <i>Crimes Act 1900</i>	Habitually consorting with persons who have been convicted of indictable offences.	6 months imprisonment or fine of 4 penalty units (\$440)
VIC	s 49F <i>Summary Offence Act 1966</i>	Habitually consorting with a person who has been found guilty of (or who is reasonably suspected of having committed) an organised crime offence.	2 years imprisonment
WA	s 557J <i>Criminal Code</i>	A declared drug trafficker, habitually consorting with another declared drug trafficker.	2 years imprisonment or \$24,000 fine
	s 557K(4) <i>Criminal Code</i>	A child sex offender, habitually consorting with another child sex offender.	2 years imprisonment or \$24,000 fine
SA	s 13 <i>Summary Offences Act 1953</i>	Habitually consorting with reputed thieves, prostitutes or persons having no lawful visible means of support. **repealed by and modernised in s 35 of the <i>Serious and Organised Crime (Control) Bill</i> .	6 months imprisonment or \$2,500 fine
Tas	s 6 <i>Police Offences Act 1935</i>	Habitually consorting with reputed thieves, known prostitutes or persons who have been convicted of having insufficient lawful means of support.	6 months imprisonment
NT	s 55A <i>Summary Offences Act</i>	Consorting with a specified person in contravention of a notice issued by the Commissioner of Police. The notice can only be issued if the specified person has been found guilty of a prescribed offence and the notice is likely to prevent the commission of a prescribed offence (punishable by imprisonment for 10 years or more) involving two or more offenders and substantial planning and organisation.	2 years imprisonment
	s 56 <i>Summary Offences Act</i>	Habitually consorts with reputed criminals.	3 months imprisonment or \$500 fine or both

47. The Department is aware that non-association and place-restriction orders as part of sentencing are available in at least two jurisdictions.<sup>1</sup> The schemes in New South Wales and the Northern Territory are generally similar and allow a court to make non-association orders or place-restriction orders to prevent an offender from committing another offence. Non-association orders prevent an offender from being in the company of, or communicating with, one or more specified persons, for a specified period, not exceeding 12 months. Place-restriction orders prevent an offender from visiting one or more specified places for a specified period, not exceeding 12 months. The orders are available where the offender is being sentenced for an offence carrying a maximum penalty of at least six months imprisonment (NSW) or 12 months imprisonment (NT). It is an offence to contravene a non-association or place-restriction order, punishable by a maximum penalty of 6 months imprisonment.

<sup>1</sup> Sections 17A and 100A – 100H *Crimes (Sentencing Procedure) Act 1999* (NSW) and ss 97A – 97H *Sentencing Act* (NT).

48. The Commonwealth does not have comparable offences for consorting with criminals. Although the Commonwealth does have offences akin to consorting, they have specific application. For example, associating with a terrorist organisation (s 102.8 of the Criminal Code) and membership of, providing support to, or dealing in publications of unlawful associations (in Part IIA of the *Crimes Act 1914*).

49. Both ‘terrorist organisation’ and ‘unlawful association’ are defined in legislation. There is a dual process for determining an organisation is a terrorist organisation. Either a court can determine an organisation is a terrorist organisation on a case-by-case basis as part of a prosecution for a terrorist organisation offence, or the Attorney-General can prescribe an organisation as a terrorist organisation. The process for determining that an organisation is an unlawful association is a legislative test applied by the court, either on application or as part of the prosecution of an unlawful association offence.

#### **Part 4: International and domestic legislative approaches to combat serious and organised crime**

50. This part provides an overview of international and domestic legislative approaches to combat serious and organised crime more generally, which can be used for disrupting and dismantling serious and organised crime groups.

51. A recent example of international legislative reform in this area occurred in the United Kingdom. In March 2004, the United Kingdom Government published a White Paper which set out its approach for tackling organised crime. It was estimated that the losses incurred by the government from organised crimes amounted to £40 billion a year.<sup>2</sup> The strategy outlined in the paper focussed on reducing profit incentives, disrupting activities of criminal enterprises and increasing the risk to the major players of being caught and convicted of organised crime.

52. In 2005, the United Kingdom Parliament passed the *Serious Organised Crime and Police Act 2005* to give effect to the reforms. A major part of this strategy was to establish a single agency to lead the response of the United Kingdom Government to organised crime. The Serious Organised Crime Agency (SOCA) is a multi-faceted agency which has brought together the National Crime Squad (NCS), the National Criminal Intelligence Service (NCIS), the investigative and intelligence work of Her Majesty’s Customs and Excise (HMCE) on serious drug trafficking, and the Immigration Service’s responsibilities for organised immigration crime.<sup>3</sup> SOCA will also co-operate closely with police, intelligence agencies, Her Majesty’s Revenue and Customs (HMRC), financial regulators and other international partners. These include the Scottish Drug Enforcement Agency and the Police Service of Northern Ireland.<sup>4</sup>

53. In 2007, powers to impose control orders on people suspected of organised crime were passed in the *Serious Crimes Act 2007*. In April 2008, the Assets Recovery Agency (ARA) merged with SOCA, meaning that SOCA now has both civil and criminal powers to reduce the impact of organised crime.

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<sup>2</sup> B Bowling and J Ross, ‘The serious organised crime agency – should we be afraid?’ (2006) December *Criminal Law Review* 1019 at 1020.

<sup>3</sup> Explanatory Notes to *Serious Organised Crime and Police Act 2005* at 6.

<sup>4</sup> *Ibid.*

54. In addition to establishing SOCA, the *Serious Organised Crime and Police Act 2005* extended and created new powers for police and non-sworn officers under the *Police and Criminal Evidence Act 1984* (UK). It also codified several common law practices in relation to accused persons providing evidence and enhanced existing witness protection measures.

55. Unlike other jurisdictions, the United Kingdom model has not attempted to construct offences around organised crime. Although there was early consideration of a United States or Canadian type offence,<sup>5</sup> the final legislation instead focuses on increasing police powers and strategies to combat crime.

56. Research suggests there are no known organised criminal groups in the United Kingdom like the mafia groups associated with United States.<sup>6</sup> Instead serious crimes are committed by “career criminals who network with each other”,<sup>7</sup> which are often small groups, based locally, operating independently with fluid roles and no identifiable structure.<sup>8</sup> The Home Affairs Committee on Organised Crime could not formulate an adequate definition to encapsulate organised crime as experienced in the United Kingdom.<sup>9</sup> Therefore a different approach to that adopted in other international jurisdictions needed to be adopted to address the issues in the United Kingdom.

57. The *Serious Organised Crime and Police Act 2005* was created to harmonise the gathering and dissemination of information amongst enforcement agencies. The functions and powers in the *Serious Organised Crime and Police Act 2005* extend to all crimes, not just traditionally organised crimes.<sup>10</sup>

#### Investigatory powers

58. Commonwealth law enforcement agencies have access to a range of investigatory tools to combat crime, and specialised powers to combat serious and organised crime.

59. Traditional police powers of search and seizure under warrant, and the use of assumed identities, are available for the investigation of all Commonwealth offences.<sup>11</sup>

60. The availability of covert tools such as controlled operations are triggered for a broad range of more serious offences that carry a maximum penalty of at least three years imprisonment.<sup>12</sup> Many of the types of offences committed by criminal organisations fall within the definition of ‘serious offences’, including for example, extortion, illegal gambling, money laundering, drugs, firearms and people trafficking.

61. Telecommunications interception and stored communication warrants, and the use of surveillance devices, are also available for the investigation of certain serious crimes as exhaustively defined in the relevant legislation.<sup>13</sup> Similarly, many of the offences committed by criminal organisations would be offences for which these powers would be available.

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<sup>5</sup> M Levi and A Smith, ‘A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales’, Home Office Online Report 17/02 (2002).

<sup>6</sup> P Stelfox, ‘Policing lower levels of Organised Crime in England and Wales’ (1998) 37(4) *The Howard Journal* 393 at 394.

<sup>7</sup> Stelfox, as above n 6, at 401.

<sup>8</sup> Ibid.

<sup>9</sup> Stelfox, as above n 6, at 394.

<sup>10</sup> Explanatory Notes to *Serious Organised Crime and Police Act 2005* at 17.

<sup>11</sup> Parts IAA and IAC *Crimes Act 1914* (Cth).

<sup>12</sup> Part IAB *Crimes Act 1914* (Cth).

<sup>13</sup> *Telecommunications (Interception and Access) Act 1979* (Cth) and *Surveillance Devices Act 2004* (Cth).

62. The *Australian Crime Commission Act 2002* (Cth) (the ACC Act) provides ACC examiners with access to examination powers for intelligence operations and investigations into serious and organised crime.

63. The definition of ‘serious and organised crime’ is set out in s 4(1) of the ACC Act as an offence:

- that involves two or more offenders and substantial planning and organisation, and
- that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques, and
- that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind, and
- is a serious offence.

64. ‘Serious offence’ is defined by reference to a broad range of types of offences punishable by a maximum penalty of at least three years imprisonment and includes theft, fraud, money laundering, drugs, illegal gambling, extortion, violence, corruption, firearms, cybercrime and offences that are serious offences within the meaning of the *Proceeds of Crime Act 2002* (Cth).

65. Examination powers include the power to call witnesses and compel evidence, as well as compel information, documents and things. These examination powers are only available where the ACC Board authorises a special intelligence operation or special investigation. Failure to comply with examination powers is a criminal offence carrying a penalty of up to five years imprisonment or a fine.

66. Outside Australia, legislation in a number of jurisdictions creates law enforcement powers, or triggers access to special law enforcement powers, for the investigation of serious and organised crime.

67. For example, the Hong Kong *Organised and Serious Crime Ordinance* enables law enforcement access to powers to conduct searches and obtain information. The United States RICO legislation works in conjunction with other police investigatory powers, providing investigators with authority for wiretapping (ie telecommunications interception) and other surveillance mechanisms. The United Kingdom *Serious Organised Crime and Police Act 2005* provides police with additional powers for the investigation of serious and organised crime, such as greater arrest powers and the ability to compel information pursuant to a disclosure notice. A disclosure notice can be issued by an authorised officer if he or she has reasonable grounds to suspect the subject has committed specified offences and has information relevant to the investigation. Certain classes of information are exempt from these orders.

#### Targeting the profits of organised crime

68. Most jurisdictions have legislation in place to target the profits of organised crime, including asset forfeiture regimes and financial reporting orders. Effective asset forfeiture regimes are an important tool in combating organised crime because they have the effect of removing the profits of these crimes. Profit is the primary motivation for the commission of organised crime offences.

### *Forfeiture of assets and unexplained wealth*

69. The *Proceeds of Crime Act 2002* (Cth) (POCA) provides for both conviction-based and civil schemes to deprive people of the proceeds and benefits gained from criminal conduct. Once confiscated, these proceeds are prevented from being used in the financing of further criminal activities. POCA also provides for the forfeiture of instruments of terrorism offences and of indictable offences in certain circumstances. Pecuniary penalty orders, based on the benefits derived from an offence or other illegal activity, and literary proceeds orders to confiscate profits made through the commercial exploitation of criminal notoriety are also available.

70. Asset recovery schemes usually require a link between the subject and criminal conduct. However, Western Australia and the Northern Territory have schemes targeting ‘unexplained wealth’. That is, a court may issue an ‘unexplained wealth declaration’ unless the subject of the declaration can establish, on the balance of probabilities, that his or her wealth was lawfully acquired. Following an assessment of the quantum of unexplained wealth, the subject of a declaration must pay the amount to the State or Territory.

71. In his 'Report on the Independent Review of the Operation of the *Proceeds of Crime Act 2002* (Cth)', Mr Sherman said that the possibility of introducing unexplained wealth declarations to POCA should be kept under review. This matter is being considered, alongside a range of other issues, in the context of the Government's response to the Sherman Report.

72. Asset confiscation regimes are also used in combating organised (and other crime) in foreign jurisdictions. In the United Kingdom, SOCA has both civil and criminal powers to reduce the impact of organised crime. The United States RICO legislation includes strict forfeiture provisions which are imposed in addition to sentences of imprisonment and/or fines. A court will order the criminal forfeiture upon conviction of properties gained from the commission of offences, including all real property, tangible and intangible property rights, privileges, interests, claims and securities.

### *Financial reporting orders*

73. The United Kingdom *Serious Organised Crime and Police Act 2005* provides for ‘financial reporting orders’ to be made where a court, sentencing an offender for a specified offence, is satisfied that there is a sufficiently high risk of the offender committing another specified offence. The effect of the order is that the subject must report his or her financial affairs; the frequency of reporting and requirement for any supporting documents is set out in the order. Orders can be in place from five to 20 years, depending upon the particular circumstances of the case. Failure to comply with an order is a criminal offence punishable by between six months and 51 weeks imprisonment.

### Control orders / crime prevention orders

74. Some jurisdictions have put legislative schemes in place for control orders or crime prevention orders.

75. For example, the South Australian Serious and Organised Crime (Control) Bill provides for a court to impose control orders on a person where the court is satisfied that the person is a member of a declared organisation and engages or has engaged in serious criminal activity. Control orders may prohibit the subject from associating or communicating with a specified class of persons, entering or being in the vicinity of a premise or premises of a specified class of persons or

possessing specified articles or articles of a specified class. In making the order the court may take into account any legitimate associations the subject may have with persons to be specified in the order.

76. The South Australian control order regime is similar to the control order regime in Division 104 of the Commonwealth Criminal Code which allows a court to impose obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act.

77. The United Kingdom *Serious Crimes Act 2007* allows designated persons to apply to a court for a 'serious crime prevention order' (SCP order). The court can make a SCP order if it is satisfied that a person has been involved in serious crime, and has reasonable grounds to believe that the order would protect the public by preventing restricting or disrupting involvement by the person in serious crime in United Kingdom. A SCP order can contain prohibitions, restrictions, requirement or other terms as the court sees necessary. For example, the court can restrict an individual's financial or property holdings, their working arrangements, communication and association with others, access to or use of certain premises or an individual's domestic and international travel. SCP orders can only be in place for up to five years. Failure to comply with the order is an offence carrying a penalty of between 12 months and five years imprisonment and/or a fine. In addition, the court can also order forfeiture of anything in possession of the person which the court considers has been involved in the offence.

#### Civil remedies for victims

78. The United States RICO legislation allows private parties to sue 'racketeers' for damage to their business property. This civil remedy allows for triple damages and costs to be awarded where successful.