



Taskforce into organised crime legislation 2015 – Inquiry Area 9

Submission by the
Crime and Corruption Commission

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Introduction

The Crime and Corruption Commission (CCC) notes that the Taskforce is charged with developing a new offence of “serious organised crime”. Point 7 of the terms of reference is set out here in full:

Note the Queensland Government’s intention that the new ‘serious organised crime’ offence will carry a maximum penalty of life imprisonment and any person convicted of this offence would serve a mandatory minimum non-parole period of 80% of their term of imprisonment or 15 years, whichever is greater.

The Taskforce is to “determine the elements of the new ‘serious organised crime’ offence, including whether any defences or evidentiary provisions, specific to the new offence are required”.

The CCC does not advocate for a particular position regarding elements, defences or evidentiary provisions for the proposed new offence of “serious organised crime”. However, as an agency with involvement in combating organised crime, the CCC has prepared this submission to compare the legislative approach taken in various comparable jurisdictions in drafting such offences.

Legislating to tackle organised crime is a vexed issue which has presented challenges in most jurisdictions. Approaches have varied across jurisdictions, both within Australia and internationally. Several comparable jurisdictions have introduced specific legislative schemes to target criminal offending which has an organised crime component. In each such jurisdiction, this represents a view that the threat posed by organised crime cannot be sufficiently met through the existing criminal law.

This submission will focus on the approaches to tackling organised crime through specific legislative mechanisms that have been adopted in comparable jurisdictions.

Defining “organised crime”

It has been observed that the nature of organised crime is shifting away from traditional hierarchical structures to more dynamic, fluid and flexible groupings of loosely associated criminal actors.

One of the challenges in drafting elements of an offence is in defining the criminal organisation broadly enough to capture evolving organised crime activity, while at the same time not casting the net too widely and incorporating networks or criminal groups that do not truly represent an organised crime threat.

The *Vicious Lawless Association Disestablishment Act 2013* (VLAD) (in its reference to an “association”) is broad enough to capture any three-person criminal conspiracy which engages in certain kinds of offending. This definition provides a substantial degree of flexibility and can be applied to a wide range of criminal networks.

The definition of an association under VLAD can include an association which has formed on one occasion only, and only for the purpose of the commission of a single criminal offence.

The CCC submits that, in seeking to define “organised crime”, the Taskforce should strive for a definition which creates uniformity in Australian State and Federal legislation, insofar as that may be possible. This would serve to enhance the cooperative benefits to be gained by any exchange of information, and would avoid the situation in which an activity is “organised crime” in one State and not another.

The international approach

International convention

Many jurisdictions adopt a definition of organised crime which bears at least some resemblance to the definition under the *Convention on Transnational Organized Crime* (the Palermo Convention).¹ Article 2(a) defines an “organized 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.

A “structured group” is defined (Art 2(c)) as:

a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

The express exclusion of a criminal association which is “randomly formed for the immediate commission of an offence” from the ambit of the legislation has much to commend it, and sharpens the focus on truly criminal organisations.

It should be noted that under Art 2(a) it is contemplated that the association may form for the purpose of the commission of “one or more serious crimes or offences”. Thus a group which coalesces for a single criminal enterprise is still captured, so long as it has some aspect of ongoing activity, association or enterprise which has gone into the commission of the offence.

Canada

The language of the Palermo Convention can be seen in other international instruments. The Canadian *Criminal Code*² defines a “criminal organization” as “a group, however organized, that:

- a) Is composed of three or more persons in or outside Canada; and
- b) Has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group. It does not include a group of persons that forms randomly for the immediate commission of a single offence.”

The parallels between the Canadian definitions and those in the Palermo Convention are obvious. Again they focus on the concept of an organised or enduring group, rather than an immediate association.

Under this legislation, certain conduct in aid of a criminal organization is made unlawful. Section 467.11 creates the offence of enhancing the ability of a criminal organization to facilitate or commit any offence (maximum penalty – 5 years imprisonment). Section 467.12 creates the offence of committing an indictable offence for the benefit of, or at the direction of, or in association with, a criminal organization (maximum penalty – 14 years imprisonment). Section 467.13 makes it an offence for a member of a criminal organization to instruct, directly or indirectly, any person to commit an offence for the benefit of, at the direction of, or in association with, a criminal organization (maximum penalty – life imprisonment).

Various other offences exist for members of criminal organizations who engage in offences interfering with the justice system. Criminal organization offences are served cumulatively, not concurrently.

Offenders serve at least half of their term before being eligible for parole, unless otherwise directed by the court.

¹ The Palermo Convention was created on 12–15 December 2000, and came into effect by ratification on 29 September 2003. As of January 2015 it has 185 parties.

² s467.1(1)

The United Kingdom

The UK has recently introduced the *Serious Crime Act 2015*. This legislation deals with various matters, including confiscation of proceeds of crime. However, it also creates an offence (s45) of “participating in activities of organised crime group”. The structure of the provision is unwieldy, and so is set out in full below:

45 Offence of participating in activities of organised crime group

- (1) A person who participates in the criminal activities of an organised crime group commits an offence.
- (2) For this purpose, a person participates in the criminal activities of an organised crime group if the person takes part in any activities that the person knows or reasonably suspects—
 - (a) are criminal activities of an organised crime group, or
 - (b) will help an organised crime group to carry on criminal activities.
- (3) “Criminal activities” are activities within subsection (4) or (5) that are carried on with a view to obtaining (directly or indirectly) any gain or benefit.
- (4) Activities are within this subsection if—
 - (a) they are carried on in England or Wales, and
 - (b) they constitute an offence in England and Wales punishable on conviction on indictment with imprisonment for a term of 7 years or more.
- (5) Activities are within this subsection if—
 - (a) they are carried on outside England and Wales,
 - (b) they constitute an offence under the law in force of the country where they are carried on, and
 - (c) they would constitute an offence in England and Wales of the kind mentioned in subsection (4)(b) if the activities were carried on in England and Wales.
- (6) “Organised crime group” means a group that—
 - (a) has as its purpose, or as one of its purposes, the carrying on of criminal activities, and
 - (b) consists of three or more persons who act, or agree to act, together to further that purpose.
- (7) For a person to be guilty of an offence under this section it is not necessary—
 - (a) for the person to know any of the persons who are members of the organised crime group,
 - (b) for all of the acts or omissions comprising participation in the group’s criminal activities to take place in England and Wales (so long as at least one of them does), or
 - (c) for the gain or benefit referred to in subsection (3) to be financial in nature.
- (8) It is a defence for a person charged with an offence under this section to prove that the person’s participation was necessary for a purpose related to the prevention or detection of crime.
- (9) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 5 years.

While there are again parallels with the Palermo Convention definition of an organised criminal group, it can be seen that this definition of an organised crime group does not carve out “random associations” formed for the “immediate commission of an offence”. Of course it is conceivable that the expression “carrying on of criminal activities” may be intended to capture ongoing criminal enterprises.³

³ Noting the similarity in language with the element of drug trafficking requiring the carrying on of a business.

The United States

Much has already been written about the US experience, and in particular in reference to the *Racketeer Influenced and Corrupt Organizations Act* (RICO) – the chief legislative tool used to tackle organised crime. RICO relies on the following elements:

- a) Two or more acts of racketeering activity (meaning that the conduct is ongoing)
- b) Involving an enterprise in which the participant is invested or maintained an interest
- c) The activities affected interstate or foreign commerce.

The last element, it is noted, is to meet constitutional requirements.

A similar regime deals with violent crimes – the *Violent Crimes in Aid of Racketeering Act*. The elements for that offence are:

- a) A criminal enterprise
- b) Engaging in one or more acts of violence
- c) To get or maintain a position in the charged enterprise.

The concept of a “criminal enterprise” has been extensively litigated, and may be a formal or informal association, with or without independent legal existence.

RICO has been historically used to prosecute traditional organised crime groups like the US mafia, but since these prosecutions in the 1980s, RICO has been extensively used to prosecute groups as diverse as white supremacists, street gangs and OMCGs. A large number of RICO prosecutions are undertaken each year.

It is considered that the structured nature of OMCGs (like mafia organisations) makes them susceptible to RICO prosecutions. A criticism of RICO is that it may be insufficiently flexible to respond to the changing nature of organised crime.

When RICO prosecutions in the US started targeting OMCGs in the 1990s, some American OMCGs were advised to eschew their traditional hierarchical structures. It was thought that a lack of office bearers would make RICO prosecutions more difficult, as a clear command structure could not be shown. This was adopted by foreign chapters of US-based clubs (such as the Nomads and Hells Angels) including in Queensland.

One of the successes of the RICO legislation has been in members of criminal organisations cooperating with law enforcement and becoming informants so as to avoid the consequences of severe penalty regimes.

A criticism of RICO has been that it may have been used inappropriately by prosecutors seeking to increase the potential penalties and forfeiture potential in criminal matters which may not truly reflect the organised crime activities at which the legislation was originally directed.

Other Australian jurisdictions

A number of Australian jurisdictions have also introduced legislative provisions targeting criminal activity undertaken for an organised crime purpose. This is done either by making it an offence to undertake certain activities in support of a criminal organisation or organised crime, or by introducing an aggravated sentencing regime for criminal activities undertaken to support an organised crime group. Of particular note are the Commonwealth provisions and those in the NSW *Crimes Act 1900*.⁴

⁴ Western Australia provides under the *Criminal Organisations Control Act 2012* an offence of directing an offence for the benefit of a declared criminal organisation (s221F), but this relies on a declaration by the Supreme Court of a criminal organisation, similar to the process in Queensland under the *Criminal Organisations Act 2009*. It does not appear there have been any prosecutions under this provision.

Crime and Corruption Act 2001 definition of “organised crime”

The CCC observes that the *Crime and Corruption Act 2001* (CC Act) itself contains a definition of “organised crime”. Section 12 provides, *inter alia*, that “**organised crime** means 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.”

The definition echoes some aspects of the definition in the Palermo Convention, but with some differences. The number of persons involved is reduced to two, the offending conduct is more precisely articulated, and the nature of the association is defined differently.

The definition in the CC Act is to define the jurisdictional criteria for an investigation in relation to organised crime activity. Limbs (c) and (d) of the definition are not legally defined terms or attributes. While they are words of ordinary English meaning, and capable of being understood by a jury, they may not be particularly apposite as elements of a criminal offence.

Commonwealth

There is also a Commonwealth analogue, which makes certain activities undertaken in support of, for the purpose of, or at the direction of, a criminal organisation, an offence. These offences are contained in Chapter 9, Part 9.9 of the *Criminal Code (Cth)*, and were introduced in 2009. The offences appear to be closely modelled on anti-terrorism offences, including an offence of “providing material support” for a criminal organisation.

The Commonwealth provisions are unwieldy. The offences focus on “criminal organisations” rather than “organised crime”. “Criminal organisations” are characterised as organisations of two or more persons, whose aims or activities include facilitating the engagement in conduct, or engaging in conduct, constituting an offence against any law (punishable by imprisonment of at least 3 years) that is, or would if committed be, for the benefit of the organisation.

The offences are: s390.3 – associating in support of serious organised criminal activity (maximum penalty – 3 years imprisonment); s390.4 – supporting a criminal organisation (maximum penalty – 5 years); s390.5 – committing an offence for the benefit of, or at the direction of, a criminal organisation (maximum penalty – 7 years); s390.6 – directing activities of a criminal organisation (maximum penalty – 10 years, or 15 years if the activities directed are in contravention of a law).

Section 390.5 is the section which conceivably would have the most application in practice. It effectively involves proof of the commission of a predicate offence (described as an “underlying offence”), and then proof that the offence was committed for the benefit of, or at the direction of, a criminal organisation. This requires proof of the existence of the criminal organisation, as well as proof of the direction (and inferentially also proof that the direction was given for the purpose of that organisation). Subsection 6 of that section makes clear that a person may be punished for either the underlying offence or the overarching offence, but not both. In such circumstances, the CCC has been unable to find any cases dealing with prosecutions under this provision.

The Commonwealth provisions highlight one of the difficulties in a stand-alone offence seeking to deal with criminal activity undertaken for an organised crime purpose. In many situations the offence provisions will require a substantial degree of additional proof with little additional punitive outcome. In the case of the offences under Part 9.9 of the Commonwealth Code, the substantive criminal activity would attract a far higher penalty (or at least, have available a higher maximum penalty) than would the organised crime offences.

NSW offence

Provisions in the *Crimes Act 1900* (NSW) provide the closest Australian analogue for a “serious organised crime”-type offence which has been actually applied and considered by Australian courts.⁵

The provisions in the NSW legislation proscribe a range of conduct in connection with a “criminal group”.

A “criminal group” means:

a group of 3 or more people who have as their objective or one of their objectives:

- (a) obtaining material benefits from conduct that constitutes a serious indictable offence, or
- (b) obtaining material benefits from conduct engaged in outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious indictable offence, or
- (c) committing serious violence offences, or
- (d) engaging in conduct outside New South Wales (including outside Australia) that, if it occurred in New South Wales, would constitute a serious violence offence.

Again, there are obvious parallels between the criteria set out in the NSW legislation and the Palermo Convention. The definition encompasses a group of three or more persons who have as a purpose engaging in serious indictable, or serious violent, offences. As with the UK legislation, though, there is no express exclusion of a group that forms randomly for the immediate commission of a single offence.

The offence provisions are contained in ss93T and 93TA. They are chiefly directed to engaging in conduct for the purpose of, or for the benefit of, a criminal group. The maximum penalties available for the offences increase depending on the gravity of the predicate offence being undertaken. Section 93U allows for an alternative verdict providing for conviction under a lesser subsection if not satisfied that the accused is guilty of an offence that has attached specific unlawful conduct as an element.

It appears from the cases that the offence can be charged alongside a substantive offence, rather than a choice having to be made. That said, the cases only deal with offences under s93T(1), charged alongside a substantive offence. Section 93T(1) makes an offence participation in a criminal group, without any added specified conduct, as under the other subsections. A question must arise as to whether charges under the other sub-limbs of this offence may be bad for duplicity if charged alongside a substantive offence. For this reason it is assumed that the prosecution would have to elect in such a case whether to proceed with the substantive offence or the criminal group offence.

Other considerations

Appropriately targeting offences

As set out above, it is inferred that the new “serious organised crime” offence is intended to be directed at organised criminal groups, rather than ad hoc formations of opportunistic criminal enterprise. The limitation in Art 2(c) of the Palermo Convention, that it is “a group that is not randomly formed for the immediate commission of an offence”, seems an appropriate measure to ensure that the offence targets offending at a sufficiently high level of criminality.

Whether it is a qualification within the element of the offence that is to be proved, or whether it is introduced as a stand-alone defence provision is a matter which may bear some consideration.

⁵ A number of NSW authorities involve sentence appeals incorporating sentences imposed against these provisions. The recent decision of *Czako v R* was an appeal against conviction in respect of an offence against s93T (participation in a criminal group). That decision involved a consideration of the elements of the offence, and appropriate jury directions.

Avoiding duplicity

In many cases the offence that is to be prosecuted (a large drug trafficking network, for example) will already attract a substantial term of imprisonment as a penalty. In such situations, investigators, police and prosecutors may consider that the additional deterrent feature of the proposed sentence may not be worth pursuing.

This is particularly so having regard to the additional investigative and evidence-gathering resources that may be required to prove the additional elements – that there was a criminal organisation or organised crime group, that the group had as one of its purposes engaging in the kind of conduct alleged, and that the offence was committed for the purpose or benefit of that group.

Groups which have identified branding or a formalised structure and rules regarding membership, such as OMCGs or mafia-style organisations, may make proof of this element easier. But it is the less overtly branded criminal networks where proof of this element will require a significant deployment of resources. In such circumstances, law enforcement may be reluctant to charge the “organised crime” offence rather than the substantive offence, thereby risking the entire criminal prosecution.

The NSW position is different. At least subsection (1) of s93T (participating in a criminal group) may be charged alongside a substantive offence. A number of such prosecutions have succeeded. But this sub-limb of the offence does not involve specific criminal conduct as a predicate to proof of the overall charge. Where the predicate offence is an element of the “organised crime” offence, proceeding with that and the predicate offence alone would be duplicitous. Thus the prosecution is forced to elect between the organised crime offence and the predicate offence.

Obviously tools for fighting organised crime are most effective when they do not contain disincentives for deploying them. The risk that a trial could fail because the “organised crime” element of the offence is not made out, when there is a solid case for the predicate offending, may operate as a disincentive to charge with the organised crime offence. In this respect it is noted that no prosecutions have been taken under the Commonwealth legislation.

There are a number of ways in which this could be addressed. The CCC submits that a possible means of addressing this issue is by providing that a jury may return an alternative verdict of guilt on the predicate offence if not satisfied beyond reasonable doubt of the “organised crime” element, but otherwise satisfied that the offence has been committed.

Circumstance of aggravation

An alternative would be that the “organised crime” aspect of the offence operate as a floating circumstance of aggravation which could be brought in respect of criminal offending of certain kinds. It could attach to indictable offences that attract a certain maximum penalty, or the offences in respect of which the circumstance of aggravation could be alleged could be defined in a schedule (as is presently the case under the VLAD legislation).

The advantage of proceeding with a circumstance of aggravation rather than a separate substantive offence is that, by operation of s575 of the *Code*, the jury could return a verdict of guilt in respect of the predicate offence if not satisfied that the “organised crime” circumstance were made out.

Proof of “organised crime” aspect

The terms of reference for the Taskforce include consideration of whether any defences or evidentiary provisions specific to the new offence are required.

One of the advantages attributed to the US approach under the RICO laws is that, in proving an organised criminal group’s existence, it is necessary to prove participation in other offences – namely other charges, criminal histories and criminal associations. These are matters that would be regarded as prejudicial and not

admissible in a criminal prosecution as we know it. Absent consideration of matters such as similar fact or propensity evidence, these matters are generally regarded as anathema to a fair trial, and to have the potential to lead the jury down the path of an impermissible process of reasoning.

It is regarded as a “fundamental” principle of our legal system that a jury may not reason that, because a person has been guilty of criminal acts other than those covered by the indictment, they may conclude that an accused is likely to have committed the offence for which he (or she) is being tried.⁶

In seeking to prove the existence of a criminal organisation or an organised crime group, it would be necessary, or at least desirable, to show that the persons who comprise the group are people who have engaged in serious criminal acts before, or who have associated for criminal purposes in the past. This would be of particular relevance to prove that the association was not “randomly formed” for the “immediate commission” of an offence.

Thus it may be necessary to specifically provide that in determining whether an association had an unlawful purpose the court may have regard to the previous criminal histories of the participants, and evidence about their associations and other criminal activity in which they have been involved.

In so doing, there may be a serious risk that a jury might reason to a conclusion of guilt of the substantive offence in an impermissible way – that because the person had previously convicted of drug trafficking, for example, they must be guilty of drug trafficking in this instance. Safeguards would need to be put in place to ensure that this did not happen.

It may be or may not be that this could be achieved by appropriately worded directions to the jury from a trial judge.

Sentencing reduction for cooperation

The sentencing regime under the US RICO laws may be regarded as draconian. Similarly, the approach under the VLAD legislation, where a condign sentence well in excess of what the substantive offence would attract is imposed because the person is a participant in a criminal organisation may be considered unduly harsh. However, one advantage noted in respect of RICO, and similarly in VLAD, is that an offender may avoid the drastic consequences of the sentencing regime in exchange for cooperation with law enforcement.

Criminal organisations succeed, in part, by insulating those at the top of the “food chain” from criminal liability, while providing lesser protection for lower players. Experience has been that the persons at the very top have systems in place to protect themselves. The draconian sentencing regimes under these legislative schemes are intended, in part, to coerce those in a network to provide information against the “bigger fish”.⁷

Even those considered at the top of the “food chain” should be able to avail themselves of these provisions. Large-scale drug traffickers rely on wholesale suppliers, producers and importers. Those operating at the upper echelons of organised crime could also be supposed to have information regarding competitors and others operating at the same level. Thus the capacity to reduce a sentence by cooperating should be made available to all who may be subject to the offence.

Any serious organised crime offence that introduces mandatory sentences of the order suggested should also include provision allowing for an offender to avoid the mandatory consequences of the sentencing regime by cooperating with law enforcement.

6 *Pfennig v R* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at par 41

7 It is noted that the two offenders sentenced under the VLAD legislation so far have each cooperated with law enforcement to avoid the serious consequences of the sentencing regime.

Conclusion

As set out above, the CCC does not advocate following one particular legislative scheme or another. However, the CCC notes from the above that there are aspects of some legislative schemes which could be meaningfully considered as providing useful guidance in structuring an offence to target organised crime.

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