Mafias and Motorbikes: New Organised Crime Offences in Australia

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Abstract

In 2006, New South Wales became the first jurisdiction in Australia to introduce specific offences aimed at criminalising the participation in a criminal organisation, with the enactment of the *Crimes Legislation Amendment (Gangs) Act* 2006 (NSW). Similar proposals have been presented to Parliament in Queensland in May 2007 and in South Australia in November 2007. This article examines the new organised crime provisions in these states, analyses the rationale, elements, advantages, and disadvantages of these laws, and assesses the adequacy and efficiency of the existing and proposed provisions.

Introduction

At 8:20am on Monday, 18 June 2007, one man was killed and two other people injured in a shooting in inner-city Melbourne (Petrie 2007:1; Chandler 2007:2; Hughes et al 2007:1). After a two day man-hunt, the shooter, Mr Christopher W Hudson, surrendered to police in Wallan, Victoria (Oakes et al. 2007:1). Mr Hudson had been known to police as a member of the Hells Angels biker gang and had previously been involved in other criminal activities in connection with 'outlaw motorcycle gangs' (Koch 2006:3; Sylvester 2007:3). For the event of 18 June, he was charged with murder, two counts of attempted murder, and one count each of unlawful imprisonment and intentionally causing injury (Oakes et al. 2007:1).

The Melbourne shooting sparked renewed calls for tougher laws against outlaw motorcycle gangs and other organised crime groups in Australia (Hughes 2007:5; Akerman 2007:9). Many criminal organisations, including 'outlaw motorcycle gangs', Colombian drug cartels, the Japanese Yakuza, Italian and Russian mafias and the like, are well established in Australia (UNODC 2002:Appendix B; Australia, Parliamentary Joint Committee on the National Crime Authority 1995; Valentin 1993:92-115; cf Australian Crime Commission 2007:5-11). The 'bikie gang war' on the Gold Coast and in Adelaide,

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and the gangland killings in Melbourne are further developments that have brought the topic of organised crime back into the spotlight in recent years (cf Sylvester 2007:3).

Organised crime poses significant challenges to the criminal justice system. Criminal law and law enforcement are traditionally designed to prosecute and punish isolated crimes committed by individuals. The structure and modi operandi of criminal associations, however, do not fit well into the usual concept of criminal liability. Moreover, it is difficult to hold directors and financiers of organised crime responsible if they have no physical involvement in the execution of the organisation's criminal activities. Equally, those who are only loosely associated with a criminal gang and provide support on an ad hoc basis often fall outside existing concepts of inchoate and accessorial liability.

In late 2006, New South Wales became the first state in Australia to introduce specific offences aimed at criminalising the participation in a criminal organisation. The new provisions under the *Crimes Act* 1900 (NSW) mirror similar offences in Canada (*Criminal Code I* ss467.11-467.13) and New Zealand (*Crimes Act* 1961 s98A) and reflect some elements of the definition of 'organised crime group' in international law (*Convention against Transnational Organised Crime* Articles 3, 5).

The other states and territories in Australia currently have no specific offences in relation to organised crime and there are also no such offences under federal criminal law. South Australia and Western Australia have so-called anti-fortification laws which were introduced specifically to 'crack down' on the criminal activities of 'outlaw motorcycle gangs'. These laws, however, are seen by many as a failure ([Editorial] 2007:16; SA/WA police, pers. comm., June 2007) and are currently under review by the High Court of Australia (see *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* and *Osenkowski v Magistrates Court of South Australia*).

It is anticipated that other jurisdictions in Australia will implement legislation similar to that in New South Wales. In Queensland, a Bill to criminalise membership in an organised criminal group was introduced in May 2007 but was defeated in Parliament in October 2007 (Criminal Code (Organised Criminal Groups) Amendment Bill 2007). South Australia proposed sweeping new measures, including offences, against criminal associations in November 2007 (Serious and Organised Crime Bill 2007 (SA)).

These new offences raise a number of important questions about the limits of criminal liability, about guilt by association and liability for membership in an organisation – a discussion that has also emerged in the context of terrorism offences. Furthermore, the offences may signal a new trend towards criminalising persons for 'who they are', rather than for 'what they do'.

This article examines the new organised crime provisions in New South Wales and the proposals in Queensland and South Australia. The aim of this article is to analyse the rationale, elements, advantages, and disadvantages of these laws, and assess the adequacy and efficiency of the existing and proposed provisions.

New South Wales

In September 2006, New South Wales became the first – and so far the only – jurisdiction in Australia to legislate specific offences against criminal organisations. The *Crimes Legislation Amendment (Gangs) Act* 2006 (NSW) introduced several new offences in relation to 'participation in criminal groups' into the *Crimes Act* 1900 (NSW) and also

increased law enforcement powers in relation to criminal organisations in a new Part 16A of the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW).

Background

Legislation to criminalise participation in a criminal organisation and related activity was first introduced in the Legislative Assembly on 30 June 2006. The introduction of the Crimes Legislation Amendment (Gangs) Bill was seen as a response to increased organised crime activity in New South Wales in order to protect 'the citizens of New South Wales [...] against gang violence, thuggery and organised criminal activity' (Stewart 2006:1142), 'increase that feeling of safety within our community' (Hartcher 2006:1517), and to 'prevent Sydney from turning into Chicago or Los Angeles' (Daley 2006:1535). In his second reading speech, Parliamentary Secretary Tony Stewart remarked:

> New South Wales cities are not plagued by violent street gangs such as those found in the United States of America. However, criminal organisations do exist. At the highest level, there are well-developed and hierarchical criminal networks such as the Russian mafia and other ethnically based organised crime groups and outlaw motorcycle gangs, known colloquially as bikies. Those organisations terrorise individuals and businesses, run sophisticated drug and firearm operations, cover their tracks through veiled money laundering operations and make innocent bystanders and businesses their victims (2006:1142; cf Roozendaal 2006:1733; cf Greene 2006:1524).

He noted further that:

> In recent years, there have also emerged significant crime gangs based on common ethnicity. They include Vietnamese and Chinese gangs with a strong involvement in the drug trade, Pacific Islander groups who are specialised in armed robberies, and criminals of Middle Eastern origin who engage in firearms crime, drug trafficking and car rebirthing. [...] Many gangs have nothing to do with ethnicity. They are formed rather on the basis of common interest, for example motorbikes, geographical proximity, or, sadly, contacts made in the prison system (2006:1142).

The introduction of this Bill was not triggered by any single, high profile case or incident and no empirical evidence has been submitted to support the statements that organised crime is increasing significantly in New South Wales. There are, however, other reports documenting the history and levels of organised crime in New South Wales which – like most other Australian jurisdictions – is home to many established criminal organisations, including 'outlaw motorcycle gangs' that are particularly prevalent in the trade of amphetamine, methamphetamine, and MDMA (ecstasy) and the associated nightclub and security industry (Caldicott et al 2005:158; Australian Crime Commission 2006:8; Wardlaw 1993:96).

In introducing this new legislation against criminal organisations, the government sought to

> recognise that crimes committed by gangs, whether they be crimes of violence, revenge attacks, systematic property damage, organised motor vehicle theft, protection rackets, armed robberies or the drug and gun trade, are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals acting alone (Stewart 2006:1142; Greene 2006:1523).

Of particular concern in New South Wales has been a perceived rise in the activities of Middle Eastern criminal syndicates in Sydney, which, according to Opposition member Mr Chris Hatcher, 'will have an impact on society unlike anything we have ever seen' (2006:1517). He noted that Middle Eastern organised crime has existed in NSW since the mid-1990s and stated that his Party 'has called upon the Government to take action against

200 identified thugs. Those are the 200 whom police have on record at the very least as being ongoing and full-time organisers and principals in criminal activity in western and south-western Sydney' (2006:1517).

Earlier attempts by the NSW Opposition to legislate against criminal organisations failed, including a recent proposal to make leadership of a criminal group an aggravating offence under the *Crimes (Sentencing Procedure) Act* 1999 (NSW) (see Crimes (Sentencing Procedure) (Gang Leaders) Bill 2005 (NSW); Hartcher 2006:1517).

It should be noted that the measures against organised crime are not the only feature of the *Crimes Legislation Amendment (Gangs) Act* 2006 (NSW). The Act simultaneously introduced new provisions relating to public order which were a response to xenophobic riots that occurred in Cronulla in southeastern Sydney on 11 December 2005. The magnitude of this incident and subsequent revenge attacks, and the coverage these riots obtained in the international media, forced the NSW Government to amend existing public order offences (sometimes referred to as 'mob offences'; see new ss60(1A), (2A), (3a), 60A(1), 195(2), 196(2), 197(2), 199(2), 200(2) of the *Crimes Act* 1900 (NSW)), increase penalties for offences against law enforcement officers (*Crimes Act* 1900 (NSW) ss60B, 60C), and enhance related enforcement powers (*Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s87MA). While these provisions feature prominently in the debates of the Crimes Legislation Amendment (Gangs) Bill, they are otherwise unrelated to the provisions relating to organised crime.

The *Crimes Legislation Amendment (Gangs) Act* was assented to on 28 September 2006. Prosecutions and case law on the new provisions are only slowly forthcoming and the medium and long-term effects of the legislation have yet to be seen. Critics remain sceptical about the need for this legislation, arguing that it is simply another attempt 'to grab headlines and win votes [rather] than to address crime rates and community safety' (Rhiannon 2006:1756; cf Miralis 2007:54, 58).

Definition of 'Criminal Group'

At the heart of the New South Wales amendment stands the definition of the term 'criminal group' in s93IJ(1) of the *Crimes Act* 1900 which is in many parts identical to the definition of 'organised criminal group' in New Zealand (*Crimes Act* 1961 (NZ) s98A). In New South Wales, criminal groups are defined as groups of three or more people who have as one of their objectives to obtain material benefits from serious indictable offences (s93IJ(1)(a) and (b)) or to commit serious violence offences (s93IJ(1)(c) and (d)). In simple terms, criminal groups in New South Wales include two types of associations of three or more people: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence. The Second Reading speech of the Bill confirms that the legislation 'attacks the foundations of two very different types of gangs. It deals with both organised criminal groups and impromptu groups of violent individuals or mobs' (Stewart 2006:1142).

Figure 1: 'Criminal group', *Crimes Act* 1900 (NSW) s93IJ(1)

Terminology Elements	**Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s98IJ(2)): o Some of them are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o Its membership changes from time to time.
Activities	o [no element]
Objectives	Either: o Obtaining material benefit from serious indictable offences (a) in New South Wales or (b) equivalent elsewhere; or o Serious violence offences (s93IJ(1)) (c) in New South Wales or (d) equivalent elsewhere.

Structure

The minimum number of people required for a criminal group in New South Wales is three – the same as in most other jurisdictions. There is no further requirement of any formal structure (such as membership or a division of labour) between these people. It is assumed that there is some association between the people in the criminal group but it is not required that the group existed for any length of time, thus spontaneous association of people can also be criminal groups. Section 93IJ(2) confirms that:

> A group is capable of being a criminal group [...] whether or not:
>
> (a) any of them are subordinates or employees of others, or
>
> (b) only some of the people involved in the group are planning, organising or carrying out any particular activity, or
>
> (c) its membership changes from time to time.

Objectives of the Criminal Group

The core feature of the criminal group definition in New South Wales is the requirement that the criminal group shares a common objective. There is no requirement of any actual joint activity by the group members – the shared objective is the central feature of this definition and the shared objective need not be sole objective of this group, s93IJ(1). The objectives of criminal groups in New South Wales capture two types of associations: (1) those that seek to profit from serious offences, and (2) those that seek to engage in serious violence.

The first possible objective of a criminal group is 'obtaining material benefit from conduct that constitutes a serious indictable offence' in New South Wales (para (a)) or an equivalent offence outside NSW (para (b)). 'Serious indictable offence' is defined in *Crimes Act* 1900 (NSW) s4 as 'an indictable offence that is punishable by imprisonment for

life or for a term of 5 years or more'. There is no limitation in s93IJ(1)(a) and (b) as to the nature of the offence; it can be any kind whatsoever. But the requirement that the group seeks to 'obtain material benefit' from that offence suggests this would generally involve serious offences against property, property offences involving violence, as well as drug offences, homicide, and a small number of other crimes.

The second possible objective of criminal groups is 'committing serious violence offences' in New South Wales (para (a)) or equivalent offences outside New South Wales (para (b)). 'Serious violence offence' is a new term defined in s93IJ(1) as offences punishable by imprisonment of ten years or more that involve either (a) the loss (or risk of loss) of life, (b) serious injury (or risk of serious injury), (c) serious property damage thereby endangering the safety of a person, or (d) perverting the course of justice in relation to a serious violence offence. This second type of criminal group encompasses people who associate in order to commit grave offences against the person, such as homicide, rape, or inflictions of grievous bodily harm. While this second objective is reflective of some crimes committed in New South Wales in recent years, in particular gang-rapes (cf *R v Bilaf Skaf*), it marks a sharp departure from general concepts of organised crime. In particular, the second objective does not require any purpose relating to financial or other benefit. It encompasses situations that may be purely emotional or spontaneous and it does not feature the characteristics of an ongoing criminal enterprise for material gain.

The criminal objective element shares some resemblance to the requirement of 'agreement' in the doctrine of conspiracy. To that end, the NSW Legislation Review Committee noted that the concept of a criminal group in s93IJ(1) 'is akin to a permanent or at least long-term conspiracy, which lasts for as long as three or more people maintain an association in pursuit of at least one of the criminal objectives listed in s93IJ(1)' (NSW Parliament Legislation Review Committee 2006:[19]). In contrast to conspiracies, however, there is no requirement of any specific agreement among the three or more people to commit particular (identifiable) crimes (NSW Parliament Legislation Review Committee 2006:[19]). The absence of a requirement to establish any specific activity planned by the group is also noticeable in the mental elements of the new offences (see below).

In summary, only one part of the definition of 'criminal group' deals with organised crime while another part deals with groups seeking to engage in serious violence. It is debatable whether the concept of criminal groups adequately captures the characteristics of organised crime. Concerns may arise over the breadth of the NSW definition although the legislator has assured that 'the threshold used to define an organised criminal group is quite high' (Stewart 2006:1144). The term 'organised' is, however, not used anywhere in the legislation. It has been stated that, for example, 'three kids spraying graffiti on a billboard could not be classified as an organised criminal group, but a 10-person car rebirthing operation would be' (Stewart 2004:1144), but the legislation offers little guidance to draw this distinction.

The strong emphasis on the objectives of the criminal group rather than on its structure and its activities creates some uncertainty about the scope of application. It is left to the courts to limit the application of this definition and ensure that there are no infringements on the freedom of association and other civil liberties. The current legislation does not contain these safeguards.

Participation in Criminal Groups

Section 93IK *Crimes Act* 1900 (NSW) contains four new offences relating to participation in a criminal group. Under subs(1) it is an offence to knowingly participate in a criminal

group. This offence is the basic participation offence; the other offences are aggravations involving some violence. Subsection (2) criminalises assaults relating to criminal group activity and subs(3) contains a similar offence in relation to property damage. Under subs(4) it is an offence to assault law enforcement officers whilst intending to participate in a criminal group. The four offences are discussed separately below.

New s93IK(1) criminalises participation in a criminal group. This requires proof that the accused 'participated' in a group of people that meets the definition of 'criminal group' under s93IJ(1) (see above). The offence has two mental (or fault) elements: (a) the accused's knowledge that the group is a criminal group; and (b) knowledge or at least recklessness that the accused's participation in that group may contribute to the occurrence of any criminal activity (see Figure 2 below) (NSW Parliament Legislation Review Committee 2006:[15]). Offences under s93IK(1) are punishable by up to five years imprisonment.

Figure 2: Elements of s93IK(1) *Crimes Act* 1900 (NSW)

S98IK(1)	Elements of the offence
Physical elements	• participating in • a criminal group (s93IJ(1)).
Mental elements	• knowledge/recklessness as to whether the participation in that group contributes to the occurrence of any criminal activity, s93IK(1)(b); • knowledge that it is a criminal group, s93IK(1)(a).
Penalty	Maximum 5 years imprisonment

Physical Elements

The single physical element of the offence under s93IK(1) is proof of participation in a criminal group as defined in s93IJ(1). The term 'participation' is not further defined in the *Crimes Act* 1900 (NSW) and its exact meaning is unclear (Tink 2006:1525). The term is usually used in the context of complicity and accessorial liability – which are governed by common law in New South Wales – to describe any aiding, enabling, counselling, or procuring of a criminal offence. From the wording of s93IK(1) it is not clear whether the participation must actually have the consequence of contributing to the occurrence of any criminal activity, or whether any participation suffices, including acts unrelated or only remotely related to 'any crime, whether complete or incomplete, at any time in the future' (NSW Parliament Legislation Review Committee:[16], [30]-[32]).

Membership is not a separate element of the new offence and the legislator confirmed that the legislation 'does not make membership of a criminal organisation an offence per se, nor does it make every transaction with a criminal organisation an offence. A person can be a member of the gang and not a criminal participant' (Stewart 2006:1144; NSW Parliament Legislation Review Committee 2006:[26]). In the eyes of the legislator, participation is more than simple membership, but the distinction between participation and membership is not an easy one to make and the mental elements for this offence further blur this division.

The new offence has also been criticised for not adequately targeting the organisers and financiers of organised criminal activity. The offence under s93IK criminalises any participation in a criminal group and does not differentiate between different levels of involvement or between the roles people occupy within a criminal organisation. In

particular there are no references, no aggravating elements, and no higher penalties provided for gang leaders (Tink 2006:1525). This is seen by some as a major weakness of the new offence:

> It is time that leadership of a gang, by virtue of that leadership without anything else, puts the activities of the person involved as leader in the worst category of that crime. Gangs form around leaders; a key condition precedent to a gang forming is that there is a leader. Gangs comprise leaders and followers, and most members are followers. There may be one or two leaders, but nothing in this legislation tackles leaders (Tink 2006:1525).

> In the corporate world a hierarchy exists between chairmen, directors, company secretaries and other office bearers, and the same exists within the criminal realm. Some recognition should be give to these distinctions (Moyes 2006:1753).

The omission of leadership from the concept of criminal group and the participation offence was deliberate. As stated earlier, the legislator designed the new offences to target a diverse spectrum of criminal groups and participants, not just those organisations with clear internal hierarchies. From the legislative material it appears that the legislature sought to criminalise a great range of people who are directly and indirectly associated with criminal groups:

> That offence targets a range of activities and people who work with criminal organisations, and obviously some of them will be members. They will wear the colours and have the tattoos. Others will wear tailored suits and appear to be the pinnacle of respectability. The offence targets those hiding in the background of a criminal enterprise and those who facilitate organised criminal activity. They may be accountants, bookkeepers, executives, or even lawyers who fudge records, launder money, construct sham corporate structures and hide assets. It also targets the front men.

> These are the so-called cleanskins, people with no criminal record who give criminals a legal front behind which to commit their crimes and minimise the risk of detection by law enforcement. They may be licensed hoteliers, real estate agents, smash repairers, pharmacists or public officials, who, in various ways, aid and abet ongoing criminal activity. And, of course, the bill targets the heavies—the people who actively commit ongoing criminal acts: the drug runners, the gun traffickers, the car rebirthers, the armed robbers and the standover men (Stewart 2006:1144).

But the possible application of the participation offence is much wider than that. It has been noted that a criminal group can equally be constituted by 'a number of youths with no particular leader – with a lot of alcohol induced bravado [...] going around pulling out sprinklers and street signs and causing nuisance' (Fardell 2006:1534). There is, however, a fundamental difference between this type of juvenile delinquency and multinational drug cartels. The legislation does not recognise this important distinction.

Mental Elements

Section 93IK(1)(a) *Crimes Act* 1900 (NSW) requires that an accused has knowledge of the criminal nature of the group. This means that the person must positively know of the three or more people involved in that group and must also know that the group is pursuing one of the stated objectives. There is no separate requirement that the accused himself or herself pursues these objectives independently and there is no element requiring that he or she intended to provide assistance or encouragement to others (NSW Parliament Legislation Review Committee 2006:[21]).

Further, a person must be at least reckless – that is, must be at least aware of the possibility – that his or her participation in the group could or might contribute to the occurrence of any criminal activity (s93IK(1)(b)). Recklessness is an alternative to

knowledge, thus it is not necessary that an accused is virtually certain that his or her participation will actually make such a contribution. Proof of foresight that there might or could be a contribution will suffice (see *La Fontaine v The Queen, R v Crabbe* and *Boughey v The Queen* at 21). It is not necessary to show that this mental element relates to the commission of a specific criminal activity; the statute states that foresight of 'any criminal activity' will suffice (NSW Parliament Legislation Review Committee 2006:[21]).

It has been argued that the inclusion of recklessness as an alternative mental element to knowledge in s93IK(b) assists in the deterrence of criminal activity by criminal groups. 'The message, particularly to young people,' stated Mr Michael Daley MP, 'is: When in doubt stay away. It places a responsibility for their own actions. [...] It will no longer be a defence to claim ignorance' (2006:1537). On the other hand, the mental elements for the offence under s93IK(1) have been criticised for being too broad and lacking clarity (NSW Parliament Legislation Review Committee:[33]). Including recklessness as a mental element is seen as displacing 'the common law threshold of a knowledge of essential matters as a basis of liability' (Pearce 2006:1533). Dennis Miralis remarked that:

> Under this Act there is no requirement that the accused must have intended to provide assistance or encouragement to a criminal group. Additional, it isn't necessary for the prosecution to prove that the accused knowingly or recklessly contributed to the commission of a specific crime. These are fundamental departures from the requirement in criminal law that an accused is guilty only if they had a guilty mind and intended to commit an offence (2007:55).

Concerns have been expressed that the new offence can potentially target people who are only rudimentarily associated with criminal groups if they are reckless that their participation might contribute to criminal activity (NSW Parliament Legislation Review Committee 2006:[33]-[34]), such as 'businesspeople who are trying to make a living being out in harm's way and falling victim to the Government in relation to gangs' (Kerr 2006:1532). During the parliamentary debates Ms Lee Rhiannon raised the questions:

> Does this mean that someone who catches a lift with friends who have committed a crime will be caught by the provision? Can that person be sent to gaol for a car ride? [...] How does someone know whether he or she is associating with a gang, which is not allowed, or a group, which is allowed. It seems inevitable that innocent people will be caught in the wide net of this legislation (Rhiannon 2006:1757).

In summary, it is not fully possible 'to predict, with reasonable confidence and on the basis of reasonably accessible legal materials, the circumstances in which a power will be used so as to interfere with one's rights' (NSW Legislation Review Committee 2006:[35]).

Aggravations

The new provisions relating to participation in a criminal group also include three aggravated offences in subss93IK (2), (3), and (4), punishable by 10 and 14 years imprisonment. The offences include assaulting another person (subs(2)), destroying or damaging property (3), and assaulting a law enforcement officer (4).

These new offences are aggravations to existing offences such as assault, property damage, and assaults of law enforcement officers. The aggravating feature of the new offences is the additional mental element requiring an intention to participate in a criminal activity of a criminal group by that action. The stated purpose of these aggravations is to recognise 'that crimes committed by gangs, whether they be crimes of violence, revenge attacks, systematic property damage [...] are a far greater threat to the safety and wellbeing of the community than most crimes committed by individuals alone' (Stewart 2006:1143).

Assault with Intent to Participate in a Criminal Group

The first of the aggravations involves assaults of another person with intention to participate in a criminal group (s93IK(2)). The single physical element of this offence is the assault of another person. The term assault is understood in the same way as elsewhere in the *Crimes Act* 1900 (NSW) and at common law (see *Fagan v Commissioner of Metropolitan Police* at 444 per James LJ; cf Bronitt & McSherry 2005:503-504; cf McSherry & Naylor 2004:158). Participation is not a separate physical element of this offence; in contrast to s93IK(1), it must be established that by the assault the person intended 'to participate in the criminal activity of a criminal group'. In other words, it needs to be shown that the assault was accompanied by an intention to participate; actual participation is not required and there is also no requirement that the criminal group approves or is aware of the assault.

Property Damage with Intent to Participate in a Criminal Group

The second aggravation in s93IK(3) relates to actual or threatened damage or destruction of property (cf *Crimes Act* 1900 (NSW) s195). It requires proof that the person damaged or destroyed another person's property or threatened to do so. The physical acts need to be accompanied by an intention to participate in criminal activities of a criminal group. The structure of physical and mental elements is identical to subs(2) and, as with the other aggravations, it suffices to show that the intention relates to 'any' criminal activity. It is not necessary to demonstrate that the intention (or the actions) is aimed at a specific criminal enterprise, but the intention must relate to criminal activities, not to other, legitimate conduct of the group.

Assaulting a Law Enforcement Officer with Intent to Participate in a Criminal Group

The third and final aggravation in s93IK(4) mirrors the offence in subs(2) with an additional physical element relating to the status of the person assaulted. Subsection (4) criminalises assaults of law enforcement officers whilst they are executing their duties intending by that action to participate in any criminal activity of a criminal group. The meaning of law enforcement officers and their relevant duties are set out in the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW). The offence also extends to assaults of officers who are off-duty in the situations specified in s93IK(5). These situations relate to instances in which the assault is deliberately targeting law enforcement officers.

One of the difficulties associated with the aggravating offences in s93IK(2)-(4) is again the uncertainty over the meaning of the term 'participation'. It is also not fully clear what evidence would be required to link the assault or property damage with the intention to participate in a criminal group. It appears that the assault or property damage may be completely unrelated to the criminal activities of a criminal group so long as the accused believes or wants these acts to be participatory in some way. Questions may also be raised about the selection of aggravations. In order to criminalise organised crime more effectively, it may be beneficial to combine the mental element of 'intending to participate in a criminal group' with offences that are closely associated with criminal organisations such as drug trafficking, firearms trafficking, or organised motor vehicle theft.

Queensland

On 24 May 2007, a private members Bill was introduced into the Queensland Parliament 'to break up organised crime groups and equip law enforcement agencies with the power to arrest these groups' (Criminal Code (Organised Crime Groups) Amendment Bill 2007 (Qld) Explanatory Notes p 1; M McArdle 2007, pers comm, 26 November). Supporters of

the Bill argued that 'Brisbane has more crime gangs than Chicago' (Langbroek 2007:4012) and that the proposed legislation will 'help this state ensure that it does not become an attractive haven for organised crime' (Flegg 2007:4011).

The Criminal Code (Organised Criminal Groups) Amendment Bill 2007 (Qld) proposed the introduction of s545A into the *Criminal Code* (Qld) to make it an offence to participate as a member in an organised criminal group. The proposed legislation has been designed to extend the spectrum of criminal liability 'beyond parties to offences and break down the group mentality of these organised crime elements' (Criminal Code (Organised Crime Groups) Amendment Bill 2007 (Qld) Explanatory Notes 1). The legislative material also makes brief reference of the *Convention against Transnational Organised Crime* (McArdle 2007:4015).

Organised Criminal Group

The definition of 'organised criminal group' in proposed s545A(2) is identical to the definition of 'organised criminal group' in New Zealand (*Crimes Act* 1961 (NZ) s98A) though there is no acknowledgement of this connection anywhere in the legislative material. 'Organised criminal groups' are defined as groups of three or more people who have as one of their objectives to obtain material benefits from offences punishable by at least four years imprisonment[1] (s545A(2)(a) and (b)) or to commit serious violent offences (s545A(2)(c) and (d)). 'Serious violent offence' is defined in s545A(2) using the same criteria as the equivalent provision in New South Wales. There is no further requirement of any structure, formal association, or any existence of the group for any length of time, and there are no elements relating to the actual activities the group engages in.

Unlike the equivalent definition in New South Wales, the Queensland proposal does include the word 'organised'. This inclusion may be purely rhetorical but it may also lead to think that random clusters of people without any association between them cannot be regarded as organised criminal groups. However, to constitute an 'organised criminal group' it does not matter whether or not membership changes over time, whether different people may be engaged in the planning and execution of the criminal activities, and whether there is a hierarchical structure between persons in the group (s545A(2)(e)-(g)).

As in those jurisdictions with similar legislation, common concerns relate to the breadth of its application and the difficulties of establishing the existence of an organised criminal group. It has been argued that the objectives of the group 'would be virtually impossible to prove as crime gangs do not usually have a charter of aims and objectives that includes participation in criminal activity' (Lawlor 2007:4013). Concerns were also expressed that the definition

> may in fact target persons who are not themselves engaging in any criminal activity and have no association whatsoever with what members of the public would consider an organised criminal group. Social groups and culturally relevant organisations could be targeted, resulting in prosecution of people based on race, ethnicity or membership of a social group (Shine 2007:4010).

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1 'The reasoning behind the reference to the 4 year offence is to capture the stealing type offences': Criminal Code (Organised Crime Groups) Amendment Bill 2007 (Qld), Explanatory Notes, 4.

Figure 3: 'Organised criminal group', proposed *Criminal Code* (Qld) s545A(2)

Terminology Elements	**Organised Criminal Group**
Structure	• Three or more persons. Irrelevant whether or not (s545A(2)(e)-(g)): o Some of the persons are subordinates or employees of others; or o Only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or o The group's membership changes from time to time.
Activities	o [no element]
Objectives	Either: o Obtaining material benefit from offences punishable by at least four years imprisonment (a) in Queensland or (b) equivalent elsewhere; or o Commission of serious violent offences (s545A(2)) punishable by ten years imprisonment (c) in Queensland or (d) equivalent elsewhere.

Participation in an Organised Criminal Group

The proposed offence of participating in an organised criminal group is similar in structure to the offences in New Zealand and New South Wales, though the Queensland proposal contains some subtle yet significant differences. Under s545A(1) of the proposal:

> A person who participates as a member of a group knowing—
>
> (1) that it is an organised criminal group; and
>
> (2) that the person's participation contributes to the occurrence of any criminal activity of the group;
>
> commits a crime.
>
> Maximum penalty — 5 years imprisonment.

The threshold for liability under the proposed offence appears to be higher than in New South Wales. In particular, the Queensland proposal is limited to participation 'as a member'. Membership is an integral part and a physical element of this proposed offence and includes by definition associate members, prospective members, and those who identify themselves as members, for example by wearing or carrying the group's insignia, cloths, et cetera (s545A(2)). Accidental associations with criminal groups thus fall outside the application of this offence. Membership itself, however, is not an offence:

> The Bill does not propose to make membership of a gang a criminal offence. Quite simply, the Bill is all about checks and balances. It is not about identifying who is a card-carrying member of a gang and proving beyond reasonable doubt that the offender is a gang member. Rather, the Bill is about identifying organised and ongoing criminal activity in the name of a gang and punishing people accordingly (Messenger 2007:4016).

Figure 4: Elements of proposed *Criminal Code* (Qld) s545A(1)

S545A(1)	**Elements of the offence**
Physical elements	• participating • as a member (s545A(2) of a group
Procedural matters	Examples for people identifying themselves as members, s545A(2).
Mental elements	• knowing that the participation contributes to the occurrence of any criminal activity of the group; • knowing that the group is an organised criminal group (s545A(2)).
Penalty	5 years imprisonment

In practice, establishing membership will be difficult as it involves an inquiry into the persons actually constituting the group. In many cases, it will be difficult to either identify three or more persons and establish that they form a criminal group, or to find witnesses to give evidence against other members. To help establish that an accused is associated with a criminal organisation, the proposal under s545A(2) includes examples of certain indicia (cf Levitz & Prior 2003:378). These include:

(a) Wearing clothing, patches insignia or symbols relevant to the group;

(b) Having a tattoo or brand that is an identifying mark, picture or word relevant to the group;

(c) Making statements about membership of or belonging to the group;

(d) Having a known association with members of the group.

These examples are not conclusive evidence but are designed to assist the prosecution in establishing whether a person identifies himself/herself as a member, especially in the absence of confessions or other witnesses. The use of evidence such as insignia, tattoos, and other marks and logos confirms that the legislation is suitable for use against criminal organisations with a clear visual presence and identity, but is not helpful to target organisations that operate less visibly and keep their membership covert. It was noted by the Attorney-General that:

> The Bill will not assist in the investigation of organised criminals who operate in secret with a high degree of technological sophistication. In fact, there is a real risk that such a law would be counterproductive by driving gangs and similar organisations further underground (Shine 2006:4010).

From the text of the proposal and the parliamentary debates it remains unclear whether the proposed offence requires a nexus between the participation and any actual criminal activity. The wording of the Bill suggests that there is no additional requirement that the person engages in any criminal activity; participation as a member are the sole physical elements. It is the stated objective of this proposal to make

> group members liable for the criminal activities of others. Group members do not need to participate in the actual crime committed or know that the offence would occur. It is enough to be a member of the gang and have others committing the crime (*Criminal Code (Organised Crime Groups) Amendment Bill 2007* (Qld) Explanatory Notes p 2).

This, however, would confirm concerns that mere membership in an organised criminal group is indeed a crime. Furthermore:

> The presence of the defendant, as a group member while another member/s commits an offence renders them guilty. This is seen as passive participation and still contributes to the occurrence of criminal activity (Criminal Code (Organised Crime Groups) Amendment Bill 2007 (Qld) Explanatory Notes p 2).

On the other hand, it has been argued that the key requirement of the offence is 'that the participation must contribute to the occurrence of any criminal activity. Participation alone is not an offence [...]' (Messenger 2007:4017). Sensible interpretation of the legislation suggests that there should be no liability unless criminal activity by the group occurs, but there is no requirement that the accused's participation makes any actual contribution to that activity.

The mental elements of the proposed offence require that the person (a) knows that the group in which he or she participates is an organised criminal group (i.e. he/she knows the objectives of the group) and (b) also knows that the participation contributes to the occurrence of any criminal activity of that group. Accidental participation and – in contrast to New South Wales – recklessness will not result in criminal liability under the Queensland proposal.

Further Remarks

It has been argued that the main purposes of the Queensland Bill are deterrence and prevention:

> I believe that a five-year sentence for associating with organised crime will be a deterrent to a lot of people. Facing being locked away for five years for breaking the law in such a way is something that young people certainly would not want to be confronted with. [...]
>
> [W]e introduce these laws in our state so that we can keep more people out of jails and send a message to the drug barons and the law breakers that their activities will not be condoned here. People who had thought of associating with organised crime will think, 'I don't want to be a party to that.' [...]
>
> At the end of the day this legislation is about prevention, so that young people are not subjected to prison terms. [...] This is about protecting our young people from the organised crime element (Johnson 2007:4013-4014).

It is doubtful that the proposed provisions are able to achieve these goals. Higher penalties are rarely, if ever, an effective deterrent and there is no empirical evidence that the participation offence stops people from becoming involved with criminal organisations. Given the broad application of the provisions there is a real danger that the offence creates criminal liability for large numbers of people that would go unpunished otherwise and it seems unlikely that the proposed laws 'can keep more people out of jail' – in contrast, it seems more likely that, if enforced rigorously, the new laws would result in more people going to gaol.

The Queensland Bill failed to pass the second reading in Parliament on 31 October 2007. 'The government opposes this bill', stated Attorney-General and Minister for Justice Mr Kerry Shine,

> as it is ill conceived, unnecessary and aims to extend the basic principles of criminal liability to guilt by association. The fundamental right of freedom of association is potentially eroded by this bill because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group. No specific act or omission by the accused is necessary and no specific criminal act or activity need be contemplated by the accused for the offence to be committed. [...]

> A one-size-fits-all response is therefore not the answer to this complex problem. In any event, such an approach is unlikely to be effective in targeting organised criminal groups which may operate under the cover of legitimate business enterprises and with a high degree of sophistication (Shine 2007:4010).

There are currently no further proposals by the state government in Queensland to add new offences against criminal organisation to the *Criminal Code*. The Opposition expressed that it may re-introduce the failed Bill in the future (M McArdle 2007, pers. comm., 26 November).

South Australia

In South Australia, new laws against organised crime were first proposed by Premier Mike Rann and the Director of Public Prosecutions in June 2007 (Nicholson 2007:6; Akerman 2007:9). On 20 November 2007 the Premier outlined the new provisions before Parliament and introduced the Serious and Organised Crime Bill 2007 (SA) – an instrument specifically designed to suppress the activities of 'outlaw motorcycle gangs'. If enacted, this legislation will introduce radical new measures to outlaw criminal organisations and prohibit any deliberate association with them and their members.

The stated purposes of the legislation are:

(a) to disrupt and restrict the activities of—

  (i) organisations involved in serious crime; and

  (ii) the members and associates of such organisations; and

(b) to protect member of the public from violence associated with such criminal organisations (s4(1)).

The central part of the proposal is the Attorney-General's power to 'declare a criminal bikie gang an outlaw organisation' on the basis of police intelligence and hold 'gang members who engage in acts of violence that threaten and intimidate the public' liable for serious offences (Rann 2007).

The proposed legislation in South Australia marks a significant departure from the concept of organised crime in international law. The definition and criminalisation of organised crime groups also differ considerably from the concepts used in New South Wales and Queensland. The following sections explore the key features of the Serious and Organised Crime Bill 2007 (SA).

Declared Organisations

The proposed South Australian laws do not define the term criminal group. Instead, the Bill authorises the Attorney-General to declare organisations if he or she 'is satisfied that—

(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and

(b) the organisation represents a risk to public safety and order (proposed s10(1) Serious and Organised Crime (Control) Bill 2007 (SA)).

The declaration is made on the application of the Commissioner of Police (s8), and the application must be gazetted, allowing members of the public to make submissions within 28 days of the publication (s9).

The criteria and methods used by the Attorney-General to determine whether or not to declare an organisation are not a model of clarity and are a complex mix of evidential indicia and administrative discretion. Figure 5 seeks to visualise the key points required to declare an organisation.

Figure 5: 'Declared organisations', proposed Serious and Organised Crime (Control) Bill 2007 (SA) s10

Terminology Elements	**Declared organisations**
Structure	• association of members (s3) of the organisation (s3)
Activities	• organisation represents a risk to public safety or order
Objectives	• organising, planning, facilitating, supporting or engaging in serious criminal activity.
Determination of purpose, s10(4)	AG may be satisfied of the purpose of the association regardless of whether or not (a) all the members or only some members associate for the purpose; (b) members associate for the purpose of organising, planning, facilitating, supporting or engaging in the same serious criminal activities or different ones; and (c) members also associate for other purposes.
Information to be considered when making declaration, s10(3).	

In simplified terms, the Attorney-General's decision to declare an organisation (and thus criminalise any association with members of the group, s35) is based on three criteria set out in proposed s10(1) of the Serious and Organised Crime (Control) Bill 2007 (SA): (1) the association of members of the organisation, (2) the risk posed by that group to public safety and order, and (3) the purpose of the people associated in that group. Subsection 10(3) sets out some indicia that may assist the Attorney-General in making the declaration.

Association of Members of the Organisation

The first criterion relates to the structure of the organisation by requiring an association of members of the organisation. The definition of organisation in proposed s3 makes clear that it is not required that the organisation is incorporated, structured, is based in South Australia, or involves residents of South Australia. This enables the Attorney-General to declare organisations with no physical presence and no members in that state. The definition in s3 renders the term 'organisation' synonymous with the term 'group' and also includes incorporated bodies (i.e. legitimate organisations).

Under the Bill, it is necessary that the organisation has members. Unlike similar legislation elsewhere, there is no minimum number of members or associates. According to proposed s3, members also include:

(a) in the case of an organisation that is a body corporate—a director or an officer of the body corporate; and

(b) in any case—

(i) an associate member or prospective member (however described) of the organisation; and

(ii) a person who identifies himself or herself, in some way, as belonging to the organisation; and

(iii) a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belongs to the organisation.

This definition of membership is of such breadth as to be almost meaningless. Membership does not relate to any formal association with the organisation; it also includes people who believe to be members, take steps to be members, or who are treated as members. The definition does in fact not explain what 'real' membership is. In the context of this Bill, the term is void of any real meaning and, in summary any person with any actual, perceived, or desired association with a group is by virtue of s3 automatically a member.

The Bill does not further define how the word 'associate' is to be understood. Using the common interpretation of the term, it is assumed that the 'members of the organisation' meet, come together, connect or otherwise communicate for one of the purposes stated in proposed s10(1)(a) (cf Serious and Organised Crime (Control) Bill 2007 (SA) s35(11)(a)).

Risk to Public Safety and Order

The second criterion to declare an organisation relates to the risk that the organisation poses to public safety and order. The Bill contains no further guidance about the meaning and interpretation of these terms and the level of risk required. It is also not clear whether the risk has to be actual or perceived, who determines the risk, and what methods and criteria are used in this decision.

Proposed s10(3) lists some indicia such as serious criminal activity and criminal convictions that assist the Attorney-General in deciding whether or not to declare an organisation. These indicia include, for instance, known links between the organisation and serious criminal activity, criminal convictions of associates, current and former members, and the existence of interstate and overseas branches of the organisation that pursue similar purposes. The points listed in subs(3) are not conclusive evidence and the connection between these indicia and any 'risk to public safety and order' is not always obvious.

The declaration of organisations is specifically designed to outlaw biker gangs and prohibit any association with them. The list of indicia in s10(3) makes specific references to 'interstate and overseas chapters' of the organisation, one of the key characteristic of 'outlaw motorcycle gangs'. The provision is, however, wide enough to capture a great range of organisations, especially those that have a history of engaging in serious offences (cf Serious and Organised Crime (Control) Bill 2007 (SA) s10(3)(a) and (c)), and those that involve persons with a criminal history (including gangs formed in prisons) (cf Serious and Organised Crime (Control) Bill 2007 (SA) s10(b)).

Purpose of Declared Organisations

Lastly, to declare an organisation the Attorney-General needs to be satisfied that the purpose of the association is the 'organising, planning, facilitating, supporting or engaging in serious criminal activity'. The purpose of the association must be directed at serious criminal activity (i.e. the commission of serious offences, including indictable offences and specified summary offences, s3). It is not necessary that all members of the group associate for that purpose (s10(4)). The objective of the association does not need to relate to criminal activities that generate any benefits for the organisation. In other words, the proposed legislation is not specifically designed to ban only those organisation that engage in criminal activities for the purpose of profit.

Control Orders

As stated in s4, the measures under the Serious and Organised Crime (Control) Bill 2007 (SA) are designed to disrupt and restrict criminal organisations and also the members and associates of these groups. Accordingly, in addition to the declaration of organisations, the Bill also proposes to place current and former members of declared organisations under a

control order (s14(1), (2)) and to criminalise any association with them (s35(1)(b)). A control order may be sought by the Commissioner of Police and can be issued by the Magistrates Court against a person that

- is a member of a declared organised under s10, s14(1); or
- has been a member and continues to associate with members of a declared organisation, s14(2)(a)1st alt; or
- engages or has engaged in serious criminal activity (s3) and regularly associates with members of a declared organisation, s14(2)(a)2nd alt; or
- engages or has engaged in serious criminal activity and regularly associates with persons who, too, engage or have engaged in serious criminal activity, s14(2)(b).

Proposed s14 is designed to prohibit the person who is the subject of the control order to communicate with other known offenders, to visit certain premises (such as clubhouses of biker gangs), to associate with members of criminal organisations, and to posses weapons or other dangerous articles (s14(5)). Moreover, s35 creates criminal liability for persons who associate with someone placed under a control order.

Criminal Association Offences

Proposed s35 of the Serious and Organised Crime (Control) Bill 2007 (SA) creates a new offence entitled 'criminal associations'. In essence, the section creates criminal liability for persons who frequently associate with members of declared organisations or who associate with known criminals or other persons posing a risk to public safety and order (see Figure 6 below). The proposed legislation exempts certain associations, such as those between close family members, lawful businesses, and those of educational or therapeutical nature from criminal liability (s35(6)).

Figure 6: Elements of proposed Serious and Organised Crime (Control) Bill 2007 (SA) s35(1), (2)

S35(1), (2)	**Elements of the offence**
Physical elements	• associating with another person; • at least six times over a 12-months period; • the other person is either o a member (s3) of a declared organisation (s10); or o the subject of a control order (s14).
Procedural matters	Certain associations to be disregarded, s35(6).
Mental elements	• knowledge or recklessness that the other person was (s35(2)): o a member (s3) of a declared organisation (s10); or o the subject of a control order (s14).
Penalty	5 years imprisonment

Section 35(1)(a) makes it an offence, punishable by imprisonment of five years, to associate on no less than six occasions over a 12 months period with members of declared organisations. Associating 'includes communicating [...] by letter, telephone or facsimile

or by email or other electronic means', s35(11)(a). Membership is further defined in s3 of the Bill to include prospective members, persons who identify themselves as belonging to the group, and persons treated by the group as belonging to it. It is further required that the accused knew that the other person was a member or was reckless as to that fact (s35(2)(a)).

The Bill also proposes to criminalise persons who associate (six times or more over 12 months) with certain known criminal offenders, including those that are the subject of a control order (ss35(1)(b), 14) or that have a criminal conviction for a prescribed offence (s35(3)). For liability under these offences, it is required that the accused knew the person was subject of a control order (s35(2)(b)) or was at least reckless about the other persons previous convictions (s35(4)).

Unlike the organised crime provisions in New South Wales, the proposed offence in South Australia is not directed at participation in criminal organisations or involvement in their criminal activities. The central focus of the offences in proposed s35 is on associations with certain people. The Bill does not conceal that it seeks to prohibit communication and other forms of associations with certain organisations and their members. The only exemptions apply to some family or professional associations and to associations that occur less frequently than the required six occasions during a period of 12 months. Persons who unwittingly associate would also not be liable (s35(2), (4)), while persons with some awareness that the other person could or might be a member of a declared organisation or the subject of a control order would meet the threshold required to establish recklessness.

In addition to the criminal association offences, the Bill proposes the introduction of two new offences into the *Criminal Law Consolidation Act* 1935 (SA) for making threats or reprisals against public officers and persons involved in criminal investigations or judicial proceedings (the proposed ss248, 250 of the *Criminal Law Consolidation Act* 1935 (SA)).

Observations

The analysis of the measures under the Serious and Organised Crime (Control) Bill 2007 (SA) demonstrates that the proposed legislation goes well beyond criminalising participation in organised crime groups. The scope of application of this Bill is much wider and, despite statements to the contrary, is not limited to outlaw motorcycle gangs. There are no clear boundaries that limit the provisions under this Bill to organised crime; it has the potential to ban any organisation that, in the eyes of the Attorney-General, is seen as a 'risk to public safety and order'.

The proposed declaration of criminal organisations in South Australia shares many similarities with laws relating to terrorist organisations. Division 102 of Australia's *Criminal Code* (Cth) sets out detailed procedures to list terrorist organisations and creates a range of criminal offences relating to membership in and other associations with these organisations. The effect of the South Australian proposal is similar to the federal terrorism laws in that it, first, establishes a mechanism to prohibit certain organisations and, second, criminalises associations with these organisations. Unlike federal laws, the South Australian Bill is of much wider application as it allows the prohibition of any organisation seeking to engage in serious criminal activity. The federal procedures for declaring a terrorist organisation, however, have much greater safeguards build into them (such as parliamentary approval etc) while the South Australian Bill vests the power to declare organisations in a single person. The proposed legislation raises serious concerns about this concentration of power and the loose criteria used in making declarations.

The offence created under proposed Serious and Organised Crime (Control) Bill 2007 (SA) s35 is not concerned with participation, membership, or other contributions to

criminal organisations. Its emphasis is on associations between persons. Proposed s35 gives rise to grave concerns about infringements of the freedom of association. The breadth of application and vagueness of the terminology used create a real danger that the legislation may be excessive and is widely open to abuse against a suite of groups, associations, and individuals that may be seen as undesirable by senior government officials.

Conclusion

The laws targeting the participation in or association with criminal organisations mark a considerable extension of criminal liability beyond the existing limits of inchoate and accessorial liability. The provisions now in operation in New South Wales and also proposed in Queensland and South Australia create liability for persons distantly connected to actual crimes. The new offences cross the existing boundaries of criminal responsibility and signal a new trend towards criminalising persons for 'who they are'.

This extension of criminal liability raises concerns about how remotely a person can be connected to a criminal group and still be liable for participation. The current legislation offers no answer to the question when participation ends and where it begins. Moreover, nothing in the laws suggests that it is not possible to charge a person with attempted participation in a criminal group, thus creating liability for acts even further removed from any actual criminal activity. In this context, Timothy Mullins remarked that '[t]his 'remoteness of social danger' can undermine the justification for criminal liability to apply. [...] In a properly minimalist system of criminal law, conduct that is too remote from social harm should not be criminalised' (Mullins 1996-99:852).

Some critics argue that the existing extensions of criminal liability are sufficient to capture the core of organised crime and that any further broadening of the principles of criminal liability or the creation of specific offences is dangerous and unwarranted. 'With targeted organised crime laws', states David Freedman, 'we move [...] closer, some might say, to guilt by association' (2006:173). According to Kent Roach, 'the answer lies in increasing policing and prosecutorial resources, not new offences. [...] There may be a need for some amendments relating to investigative powers and forfeiture, but we do not need another offence. We have plenty' (2000:3).

A further difficulty of these laws is the fact that they rely on a particular stereotype of criminal organisation. In particular, many of the criteria used reflect the hierarchical structure of 'outlaw motorcycle gangs'. Despite the breadth of the offences and the definitions of criminal groups, the provisions do not seem to capture sophisticated criminal networks loosely based on kinship rather than on firm hierarchical structures. Michael Moon remarked in relation to similar provisions in Canada that '[a]t best the legislation attacks the symptoms of organised crime, ie the activities of individual gang members, yet ignores the symptoms between them — the organisation within which these individuals commit their acts' (1996:466). Suggestions have been made that the legislation only targets the most visible, the most 'slow and stupid' groups. Allan Castle noted that 'all successful prosecutions in Canada to date have been against gangs with a relatively public structure; other patterns and more clandestine groups have not been explored' (Castle & Schloenhardt 2007). In order to achieve the stated goals of these organised crime offences it is necessary to systematically analyse the whole spectrum of criminal organisations and base the legislation upon this kind of analysis and distinguish between diverse group formations such as criminal syndicates, youth gangs, et cetera.

In contrast to the Australian laws, Canada's *Criminal Code* ss467.1-467.14 capture different types and different levels of involvement with criminal organisations and offer higher penalties for those more closely associated with the group. Unlike the Australian laws, Canada's offences are more suitable to criminalise core directors of criminal organisations as well as persons who only provide rudimentary support. The Canadian provisions operate simultaneously as new offences for criminal organisations and as aggravations to already existing offences.

It is to be expected that the new offences in Australia will find limited application in practice. This has also been the experience in New Zealand and Canada, where prosecutors and courts continue to use other substantive offences and only resort to the participation offence in isolated cases that cannot be tried otherwise. It is also noteworthy that neither in Canada, nor in New Zealand has there been any noticeable decline in organised crime activities since the introduction of these laws in 1997. In fact, the biker gangs who were the main target of these laws at the time of their inception continue to thrive and control large parts of the illicit drug market in these countries.

In conclusion, it remains doubtful that the new organised crime laws achieve the stated goal of 'increasing that feeling of safety within our community'. More importantly, the organised crime laws mark a significant extension of criminal liability and allow for the prosecution of organised crime in new ways. The limits of this extension are, however, not clear and the legislation lacks sufficient safeguards to pre-empt their misuse.

In the absence of further empirical research it is difficult to determine what measures are best suited to reduce organised crime most effectively without infringing on basic civil liberties. To prevent and suppress organised crime in Australia, it is important that all States and Territories and the Commonwealth Government identify and address the shortcomings of the existing laws and work together towards a uniform approach throughout the country which is based on thorough empirical research and analysis of international best practice.

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