Australian Government

Attorney-General's Department

Deputy Secretary
National Security and
Criminal Justice

08/24789

23 December 2008

Dr Jacqueline Dewar
Committee Secretary
Parliamentary Joint Committee
on the Australian Crime Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dewar

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

I refer to your letter of 19 November 2008 to Dr Dianne Heriot containing additional questions for the Department to help the Parliamentary Joint Committee on the Australian Crime Commission (the Committee) with its inquiry. I also refer to Senator Steve Fielding's request, at the hearing of 6 November 2008, that the Department and the Australian Crime Commission (ACC) prepare a table of the tools available to fight organised crime both domestically and internationally. He requested that the table also include a percentage to indicate the effectiveness of the tools, taking into account matters such as privacy.

Table of tools to fight organised crime

A table of some of the tools available to fight organised crime in Australia and selected overseas jurisdictions is at **Attachment A**. Canada, New Zealand and the United Kingdom were selected for inclusion in the table on the basis that they are the most readily comparable to the Australian context. A range of tools is included in the table, some of which are commonly used by law enforcement agencies (eg search warrants) and others of which are relatively new and, therefore, less common (eg financial reporting orders and control orders). The Department's submission to the Committee's inquiry contained a table, at paragraph 35, detailing substantive offences for participation in and/or association with criminal organisations.

To assist the Committee in its consideration of the table of tools, a brief explanation of some of the tools included in the table is set out below.

- ***Controlled operations*** are undercover operations where law enforcement officers conceal their identities to associate with people suspected of being involved in criminal activity and to gather evidence or intelligence about them. During a controlled operation, it will often be necessary

for law enforcement officers to commit offences to obtain evidence and to conceal their law enforcement role.

- ***Assumed identities*** are false identities used by undercover operatives to investigate an offence or gather intelligence. Assumed identities protect undercover operatives engaged in investigating crimes and infiltrating organised crime groups. To substantiate their assumed identities, undercover operatives need proper identification documents, such as birth certificates, drivers' licences, passports and credit cards. In the absence of a verifiable identity, the safety of undercover operatives can be jeopardised.

- ***Witness identity protection*** in some circumstances, it is necessary to allow an undercover operative to give evidence in court proceedings without disclosing his or her true identity. This is to ensure the personal safety of the operative or his or her family. Certain measures are provided by Australian jurisdictions to protect the identity of an operative; including holding court proceedings in private, excusing the operative from disclosing identifying details, and enabling an operative to use a false name or code name during court proceedings.

- ***Coercive powers*** enable a person to be compelled to give oral evidence and/or produce documents or things.

- ***Unexplained wealth provisions*** allow a court to issue an 'unexplained wealth declaration' unless the subject of the declaration can establish, on the balance of probabilities, that his or her wealth was lawfully acquired. Following an assessment of the quantum of unexplained wealth, the subject of a declaration must pay the amount to the State or Territory. Asset recovery schemes usually require a link between the subject and criminal conduct.

- ***Financial reporting orders*** are made where a court, sentencing an offender for a specified offence, is satisfied that there is a sufficiently high risk of the offender committing another specified offence. The effect of the order is that the subject must report his or her financial affairs. The frequency of reporting and requirement for any supporting documents is set out in the order. Orders can be in place from five to 20 years, depending upon the particular circumstances of the case.

The explanations above are based on the Australian concept of these tools and, in preparing the table, the Department looked for tools of similar kinds in the selected overseas jurisdictions. We note, however, that financial reporting orders are explained on the basis of their operation in the United Kingdom, which is the only jurisdiction in which they are currently available.

The tools included in the table are not necessarily exactly the same in each of the domestic or the selected overseas jurisdictions. They may have different applications and/or operations in the jurisdictions in which they are available. For example, while all jurisdictions (other than Tasmania and New Zealand) have provisions allowing forfeiture of criminal proceeds at a civil standard of proof, there is variation in how and under what circumstances these operate.

While we can advise the Committee on the availability of some of the tools used to fight organised crime in Australia and selected overseas jurisdictions, neither the Department nor the ACC is in a position to provide a meaningful assessment of their effectiveness. To be meaningful, such an assessment would involve a detailed analysis of the actual operation of each of the tools across the jurisdictions. Amongst other things, this would require appropriate data and information about the operation of these tools in the relevant jurisdictions being available. It would also require data being available about organised crime in the relevant jurisdictions before and after the tools

commenced operation. As some of the tools in the table are quite new (eg control orders and financial reporting orders), appropriate data and information would, at this stage, be very limited or not available. Additionally, in some cases, consideration would need to be given to the possible operation of the particular tool in the Australian context (eg financial reporting orders and serious crime prevention orders).

Additional questions from the Committee

The Department's answers to three of the Committee's four additional questions are set out below.

To provide a comprehensive response to additional question two, the Department has consulted with several other Federal Government agencies. We are awaiting input from portfolio agencies to finalise our response to this question. I anticipate being able to provide the Committee with a response to additional question two early in January.

Question 1: Would the Department provide the Committee with an overview of the different definitions [*of organised crime*] used in relevant legislation both within Australia and internationally, and in international instruments? And would the Department indicate to the Committee what problems have been encountered with these definitions, and the Department's views as to which definitions are preferable?

The table at **Attachment B** contains extracts of the definitions of organised crime used in relevant Australian and international legislation and international instruments. The approach taken in some legislation is to define the term 'organised crime' (or a like term). In other legislation, the approach taken is to define the term 'criminal group' (or a like term). While different terms are defined, they nevertheless share some common elements. Some examples of the common elements are:

- criminal groups generally involve more than two or three persons
- the objectives are often obtaining benefits from certain crimes and/or committing certain crimes, and
- offences are those that attract a certain level of penalty and/or are specified in the legislation and/or prescribed.

For completeness, the table at Attachment B includes both the approach of defining organised crime and of defining criminal group.

Definitions of organised crime relate to different understandings of the meaning of organised crime and to the different purposes for which the definition is to be used.[1] One challenge in defining organised crime is that there is no one organisational or behavioural example that provides a constant and accessible point of reference (eg criminal organisations vary in size, scale, structure, geographic scope, the instruments they use to avoid law enforcement and pursue their criminal enterprises, and the range of their legal and illegal activities).[2] Another challenge is ensuring that the definition is sufficiently flexible to recognise that organised crime groups are international,

[1] See Sabrina Adamoli, Andrea Di Nicola, Ernesto U Savona and Paola Zoffi, 'Organised crime around the world' (Publication Series No. 31, European Institute for Crime Prevention and Control affiliated with the United Nations, 1998) at 6.

[2] See Adamoli, Di Nicola, Savona and Zoffi, at 7.

entrepreneurial, innovative and adaptive. In a constantly changing environment, an unduly confined definition of organised crime and how it operates is unhelpful.

The challenges in defining organised crime were highlighted during the negotiations for the United Nations Convention against Transnational Organized Crime (UNTOC). Ultimately, it was decided not to define organised crime in the UNTOC, but to instead use a model combining the seriousness of organised criminal activity with a definition of 'organized criminal group' (see Attachment B). Defining the terms 'organized criminal group', 'structured group' and 'serious crime', and their applied scope, stimulated considerable debate amongst countries during the negotiations.[3] Specifically, some of the issues provoking debate included:

- That a 'financial and other material benefit' as a motive for criminal activity was too limited (eg would a moral benefit suffice).
- That if the 'seriousness' of the crime is based on length of possible sentences, then this may result in practical difficulties (eg different jurisdictions and legislative penalties etc).
- What constituted a 'group' – did there need to be a minimum number of persons (eg two or three) or should the language be kept silent on the matter?

The Commonwealth's definition of serious and organised crime is contained in the *Australian Crime Commission Act 2002* (Cth). This definition, which largely had its origins in the *National Crime Authority Act 1984* (Cth), has been appropriate in assisting the ACC to address the threat of serious and organised crime in Australia.

Question 3: Is there a constitutional head of power under which the Commonwealth could enact legislation to combat serious and organised crime? How would such laws interact with State and Territory legislation? And would there be any risk that any Commonwealth legislation similar to that in South Australia would be unconstitutional or unduly trespass on individual rights?

There are various sources of constitutional power available to the Commonwealth to combat serious and organised crime. Wherever the Commonwealth has a head of legislative power, it may enact offence or other regulatory provisions related to that head of power. For example, the Commonwealth has enacted offence provisions in relation to people trafficking using its external affairs power under section 51(xxix) of the Constitution. All States and Territories (except Queensland) have people trafficking laws, which co-exist with the Commonwealth laws. The Commonwealth also has plenary power with respect to Territories (section 122).

Where a co-operative approach is seen to be appropriate, section 51(xxxvii) (references from States) is another potential source of power. The Commonwealth has used the source of power in section 51(xxxvii) to enact various aspects of its anti-terrorism legislation.

How any Commonwealth legislation would interact with State and Territory legislation will depend on the precise nature of any proposed legislative scheme. As the Commonwealth is not proposing any legislative scheme in relation to serious and organised crime, it is not appropriate for the Department to speculate on this issue. Similarly, it is not appropriate for the Department to speculate on any risk that any Commonwealth legislation in this area would be unconstitutional or unduly trespass on individual rights.

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[3] See *Travaux preparatoires of negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.*

Question 4: How might civil orders be more effective than ordinary criminal laws in preventing crime from occurring? And do you have any guidelines or polices on when it is appropriate to provide for the use of civil orders?

There is a range of civil orders in domestic and overseas jurisdictions that are aimed at preventing crime and protecting the community. For example, many jurisdictions have civil orders aimed at preventing crimes of violence (eg domestic violence orders, family violence orders or apprehended violence orders). In addition to serious crime prevention orders, the United Kingdom has a variety of other civil orders including, but not limited to:

- anti-social behaviour orders which were established in the *Crime and Disorder Act 1998* (UK) and prohibit a perpetrator from committing specific anti-social acts and from entering defined areas

- banning orders which were established by the *Football (Disorder) Act 2000* (UK) to prevent known football hooligans from causing further trouble at home and abroad, and

- sexual offences prevention orders (placing prohibitions on sexual and violent offenders who pose a risk of serious sexual harm), foreign travel orders (preventing child-sex offenders from travelling outside the United Kingdom) and risk of sexual harm orders (placing prohibitions on persons who have engaged in certain sexual conduct with children) which were established by Part 2 of the *Sexual Offences Act 2003* (UK).

In general terms, civil orders might be effective in preventing crime as they allow the conduct of certain persons, such as those involved in criminal activity, to be monitored and restrained with the aim of preventing them from engaging in criminal conduct. Other civil orders allow for the continued detention or supervision of certain convicted persons, once again with the aim of preventing the person from engaging in criminal conduct. These types of civil orders may have a deterrent effect, but this can also be said of criminal laws. Generally, the breach of these types of civil orders is subject to criminal sanction.

In considering the effectiveness of civil orders in preventing crime, consideration would need to be given to the effectiveness of criminal laws, including the offences of attempt, conspiracy and incitement which all share a crime prevention rationale. Other important factors would include, but not be limited to, the nature and severity of the problem being addressed, human rights considerations, the resources required to administer and enforce the civil order regime.

The Department is able to provide general information about two of the three civil orders referred to in your letter of 19 November 2008: orders in relation to terrorism and orders in relation to convicted sex offenders.

Control orders are civil orders in relation to terrorism. The purpose of the control order regime is to protect the public from terrorist attacks. A control order can stop a person doing certain things (eg accessing the internet, using/owning certain substances/articles, or communicating/associating with certain persons), and/or require a person to do certain things (eg wear a tracking device, report to another person at a certain time/place, or remain in a premises between certain times of each day).

The control order regime commenced operation on 15 December 2005. Each year, the Attorney-General must report to Parliament on the number of control orders issued. To date, the courts have only issued two control orders. The Council of Australian Governments will consider the control order regime in its review of the 2005 counter-terrorism laws in 2010.

Civil orders for convicted sex offenders provide for the extended supervision and/or continued detention of certain such offenders, and are found in the following State legislation:

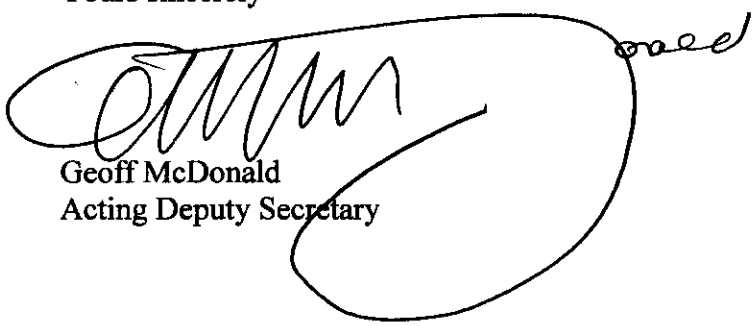
- *Crimes (Serious Sexual Offenders) Act 2006* (NSW)
- *Serious Sex Offenders Monitoring Act 2005* (Vic)
- *Dangerous Prisoners (Sexual Offender) Act 2003* (Qld), and
- *Dangerous Sexual Offenders Act 2006* (WA).

Because the Commonwealth does not administer this legislation, the Department is not in a position to comment on the effectiveness of such orders in preventing crime.

The Department does not have any guidelines or policies on when it is appropriate to provide for the use of civil orders. The Department would consider the appropriateness of the use of such orders on a case-by-case basis.

I hope the Department's responses to these additional questions will help the Committee in its inquiry. If the Committee has any questions about the responses, or requires any further information, the Department is happy to be of help. The action officer for this matter is Mandy Angus who can be contacted on (02) 6250 6319 or amanda.angus@ag.gov.au.

Yours sincerely



Geoff McDonald
Acting Deputy Secretary