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This Briefing Paper summarises scholarly approaches to the concept of organised crime, noting that such perspectives reflect the dominant socio-historical discourses pertaining to each proposed model. The authors then examine current Australian legislative initiatives on thwarting organized crime – in particular, outlaw motorcycle gangs – querying whether such approaches are effective, when based upon historical concepts of organised criminal activity. The authors argue that policy and legislative initiatives should reflect upon recent academic research into this phenomenon.



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## Capturing “Organised Crime” In Australian Law

Monique Mann & Julie Ayling

### Introduction

This briefing paper presents and foreshadows ongoing PhD research by the first author into how understandings of organised crime in Australia have been shaped, and the extent to which these perceptions have influenced legislative and policing responses. It begins with an historical survey of significant models of organised crime, then reviews current Australian legislative strategies, and goes on to raise questions about the conceptual model that underpins these strategies. The paper concludes with a discussion of the potential policy implications of this research.

### Constructing “Organised Crime”

Early theorists of organised crime (Cressey, 1969; Albin, 1971; Ianni, 1972) examined the phenomenon through an ethnic lens focusing on hierarchical structure and power relations within criminal “organisations”, “syndicates” and “families.” Theorists then shifted to a focus on form of business “enterprise” (Smith, 1980; Haller, 1992), and the “illicit market” (Reuter, 1985). The concept of “transnational organised crime” and the organised crime/terrorism nexus (Makarenko, 2004) extended the perceived “threat” organised crime poses to contemporary society. Theorists then applied network models to examine organised crime as “criminal networks” (Morselli, 2008). Moreover, when contemplating the organised crime literature in hindsight, as a body of *(in)coherent* thought, scholars have called for the integration of theories into an all encompassing meta-model (von Lampe, 2003; Spapens, 2010).

The following section traces many of the major conceptions of organised crime from the earliest focus on hierarchical structures, to the most recent, being networked enterprises.

#### *Hierarchies, Syndicates and Families*

Cressey (1969) depicted organised crime as a hierarchically structured Italian bureaucracy with rigid division of labor and role allocation. Cressey’s language (e.g. “theft of the nation”, “nullify” state sovereignty, roles according to military positions) and emphasis on ethnicity point to links between organised crime and national security that correspond to a time at which the United States of America faced a similar “threat” of “theft of the nation” by alien communist powers.

Albin’s (1971) model describes criminal “syndicates” structured according to power relations between patrons and clients. “Syndicated crime” involves fluid relationships structured

according to the power relations that are relevant to the activity that participants are involved in at any point in time. Albini's model foreshadows current models that emphasise flexible forms of organising.

Ianni's (1972) patrimonial model of "family business" structured organised crime as a patriarchal hierarchy, in which respect equaled power, and family and business were intertwined. Blood or significant relations (for example, godparent-child relationships) bonded business. Ianni's model coincided with the release of *The Godfather* film (released in 1972) based on the Mario Puzo novel (1969) of the same title.

#### *Illicit Enterprise and Markets*

Smith (1980) articulated a model of "illicit enterprise," arguing that enterprise occurs on a spectrum of legality. Organised crime is distinguished only from conventional enterprise by the illicit task environment in which it occurs. Smith assumes that enterprise behavior is the same, regardless of where the line of legality is drawn from time to time. Later Haller (1992) extended Smith's ideas, by focusing on the entrepreneurial partnership rather than bureaucracies. In contrast to Smith's argument that illicit and licit enterprise operate in fundamentally the same way, Haller argues illicit enterprise is markedly less bureaucratic and centralised than enterprise within the legitimate sphere.

Reuter was the pioneer of the market approach to studying "illicit markets," forging a cross-disciplinary link with economics. His earliest works scrutinised the notion of monopoly over illicit markets while tentatively exploring the fragmented and competitive nature of the illicit market (Reuter & Rubinstein, 1978). Later Reuter (1983) applied theories of industrial organisation and economics (i.e. supply and demand) to examine the consequences of product illegality: a competitive and fragmented illicit market, described by Reuter as "disorganised crime." His model was consistent with an increasing focus on neoliberal markets based on neoclassical economic principles at that time.

#### *Transnational Criminal Networks*

There has been a reshaping of the "threat" that organised crime poses at a transnational level, afforded by new opportunities of globalisation. "Transnational organised crime" is seen as representing a significant threat because it escapes the reach of any sovereign state, with profits sometimes feeding into terrorist "organisations"/"networks" (Makarenko, 2004). Once again, links to national, and now *international* security are evident.

Finally, organised crime has been examined as networks (Morselli, 2008). This perspective is founded on the notion that all individuals (including those who participate in organised crime) are embedded in a social network of relationships and interactions (McIllwain, 1999). Morselli, a prominent author in the application of social network theory to organised crime, argues that organised crime emerges from bottom-up interactions. Against the background of an ever more interconnected and networked information age, the network perspective has been applied to organised crime with a focus on flexible and spontaneous forms of organisation. This contemporary bottom-up model stands in direct opposition to the earliest models of rigid top-down command.

Looking back at these changing conceptions of organised crime, it might be argued that organised crime is simply a construct (von Lampe, 2003). Various ways of thinking about organised crime reflect their disparate social-historical contexts and have been influenced by the political-intellectual climate of the time. This historical-conceptual assessment invites contemplation about whether the intrinsic properties of organised crime have changed over time or whether it is the lens through which organised crime has been viewed that has altered the perceived reality of the phenomenon. (See Table 1, Page 3).

#### *Current Australian Legislative Climate*

Australia's nine jurisdictions employ different combinations of legislative strategies to deal with organised crime. In varying measures

they grant specific law enforcement powers for overt and covert investigations, confiscation of assets and witness protection. Each jurisdiction also addresses, and sometimes goes beyond, standards set by international law for addressing the organised nature of group crime at a transnational level.

As a party to the United Nations Convention against Transnational Organized Crime (UNTOC), Australia is required to criminalise participation in organised crime groups. Scherrer (2009) highlights the difficulties of tracing the development and etiology of international norms and standards that lead to international policy, a point also made by Nadelmann (1990) in his examination of the complex processes of advancing global prohibition regimes. Nevertheless, Nadelmann (1990) notes that international prohibition regimes (for example the prohibition of international drug trafficking) tend to reflect the interests and moral values of the dominant members in international society (in particular the United States and Europe). While Australia has indeed adopted international norms in criminalising participation in organised crime groups, several Australian jurisdictions have also moved beyond the obligations of the UNTOC, demonstrating the importance of a context specific examination of the Australian legislative climate.

For offenses having a federal aspect, criminalisation of participation in an organised criminal group (as required by the UNTOC) was realised in amendments to the *Criminal Code Act 1995* (Cth) passed in 2010. At state level, participation prohibitions have existed in New South Wales since 2006 (*Crimes Act 1900*, amended in 2012) and the Australian Capital Territory since 2010 (*Criminal Code 2002*). Both grants of police powers and participation offences are aimed at *individuals*. It is not possible, as it is in the U.S. under the *Racketeer Influenced and Corrupt Organizations Act* (RICO), to collectively prosecute whole criminal groups as "enterprises" (Ayling 2011a), demonstrating a key difference in organised crime policy between the U.S. and Australia. Under RICO there has been large-

TABLE 1. Conceptual models of “organised crime”

Period	Model	Key Author(s)	Key Attributes
1960s-1970s	Organised Crime	Donald Cressey	<ul style="list-style-type: none"> <li>• Focus on ethnicity</li> <li>• Strategic monopoly</li> <li>• Hierarchy and division of labour</li> </ul>
	Syndicated Crime	Joseph Albini	<ul style="list-style-type: none"> <li>• Patrons and clients</li> <li>• Stratification of power</li> <li>• Decentralized syndicates</li> </ul>
	Family Business	Francis Ianni (with Elizabeth Reuss-Ianni)	<ul style="list-style-type: none"> <li>• Focus on ethnicity and kinship</li> <li>• Roles according to generational status</li> <li>• Patriarchal hierarchy</li> </ul>
1980s-1990s	Illicit Enterprise	Dwight Smith	<ul style="list-style-type: none"> <li>• Spectrum of enterprise behaviours</li> <li>• Licit and illicit enterprise is the same</li> <li>• Illicit task environment</li> </ul>
	Entrepreneurial Partnership	Mark Haller	<ul style="list-style-type: none"> <li>• Overlapping partnerships</li> <li>• Power over enterprise activity</li> <li>• Enterprise activity determines structure</li> </ul>
	Illicit Market	Peter Reuter	<ul style="list-style-type: none"> <li>• Economics of illicit market</li> <li>• Fluid, competitive, supply and demand</li> <li>• Illicit market is disorganised</li> </ul>
2000s-Present	Criminal Networks	Carlo Morselli (most prominent)	<ul style="list-style-type: none"> <li>• Social system of interactions</li> <li>• Bottom-up interactions generate self-organisation of the network</li> <li>• Fluid, flexible, spontaneous</li> </ul>
	Transnational Organised Crime	UNTOC	<ul style="list-style-type: none"> <li>• Global economy</li> <li>• Occurs in more than one sovereign state</li> <li>• International security</li> </ul>

scale disruption of organised crime groups. In contrast, Australian participation offences so far have had little use.

Recent legislation in some Australian states has attempted to deal with the problem of outlaw motorcycle gangs (OMCGs), currently perceived as Australia’s primary organised crime problem, as criminal *groups* rather than collections of criminal individuals. In 2008 the state of South Australia passed the *Serious and Organised Crime (Control) Act*. The main thrust of these laws was to empower state authorities to impose controls over interactions between and with

members of criminal organisations using a combination of civil instruments (declarations and control orders) and criminal penalties for non-compliance (thereby exceeding the obligations of the UNTOC). This scheme was based on the Commonwealth’s terrorism laws in its reliance on membership of a declared organization (rather than criminal convictions or proven involvement in crime) to provide a pretext for state action (Ayling 2011b). Spurred by several public acts of violence between OMCGs (particularly the Sydney airport murder of Anthony Zervas) and the ‘moral panic’ that followed (Morgan et al., 2010), the South Australian legislative

model subsequently cascaded through several other Australian jurisdictions: New South Wales (*Crimes (Criminal Organisations Control) Act 2009*), the Northern Territory (*Serious Crime Control Act 2009*) and Queensland (*Criminal Organisation Act 2009*).

In the midst of this surge of legislation, the Standing Committee of Attorneys-General (SCAG) resolved in April 2009 that: “... organised crime is a national issue requiring a nationally coordinated response by all jurisdictions” (SCAG 2009). SCAG suggested the introduction of specific measures by

States and Territories, including consorting and/or anti-association offences. However, some other states and territories (Tasmania, the ACT and Victoria) decided not to follow South Australia's example. While agreeing to SCAG's recommendations, Western Australia adopted a 'wait and see' attitude.

The primary aim in enacting anti-association laws was crime prevention. It was thought that control orders would thwart members in their planning and conduct of criminal activities, thereby fragmenting the groups and deterring recruits. As well as prohibiting communications between members of organised crime groups, the orders could also prohibit controlled members from entering or being near certain premises, applying for or undertaking certain occupations or possessing specified items (such as firearms).

Criticism of the laws quickly followed their introduction. Concern was expressed that many of the evidential and procedural innovations in the legislation were inconsistent with accepted principles and practices of criminal justice. Another criticism concerned the role that the laws gave to "criminal intelligence" in providing a basis for declaration and control order decisions,

especially given that the intelligence could not be disclosed, even to defendants. Commentators suggested this would have a dire effect on the ability of defendants to contest the case against them. Arguments that the laws allowed for abuse of civil liberties such as freedom of association and for the criminalisation of innocent people also figured prominently in critical analyses.

Legal challenges to the South Australia and NSW laws by OMCG members successfully halted their implementation. The High Court's decisions in *South Australia v Totani* [2010] HCA 39 and *Wainohu v New South Wales* [2011] HCA 24 both invalidated provisions of those laws on constitutional grounds.

Since then, both states have redrafted their respective laws, effectively reinstating the earlier legislative model with modifications to overcome the deficiencies identified by the High Court (*Crimes (Criminal Organisations Control) Act 2012* (NSW); *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012* (SA)). Each state has also taken the opportunity to strengthen their law as it applies to OMCGs, introducing new offences and giving police new powers. In New South Wales these

changes include new consorting offences (*Crimes Amendment (Consorting and Organised Crime) Act 2012*), which have already been employed against high-ranking Nomads bikies, and new offences relating to drive-by shootings. In South Australia the parliament has passed legislation to further restrict the availability of certain weapons and of firearms and other permits (*Summary Offences (Weapons) Amendment Act 2012*; *Statutes Amendment (Criminal Intelligence) Act 2012*).

The Western Australian parliament, too, is currently debating anti-association laws (*Criminal Organisation Control Bill 2011*), and Victoria, under a new government since the 2009 SCAG meeting, aims to introduce OMCG-targeted legislation into parliament this year. Moreover, the Northern Territory has preemptively revised its legislation to take account of the High Court decisions (the *Serious Crime Control Amendment Act 2011*). A 'nationally consistent approach' to organised crime is also being considered by the Standing Council on Law and Justice (previously SCAG) (SCLJ 2012), but it is as yet unclear whether this would involve new national laws or harmonisation of existing laws.



## Policy Implications And Future Research Directions

Anti-association measures have been designed to prevent criminal conspiracies among OMCG members. However, research emerging from Canada suggests that the criminal activities of members and their associates may operate largely independently from the formal structure of the organisations that are targeted by this legislation (Morselli, 2009). This suggests that the legislation may be less than fully effective (Ayling 2011b). Why then have Australian jurisdictions favoured these legislative strategies over others (for example, RICO style legislation)? There is as yet an absence of evidence that any of these legislative measures in fact reduce organised crime. Despite this, and the vocal critiques of and successful constitutional challenges to the laws, Australian jurisdictions have demonstrated and continue to demonstrate high-levels of commitment to the anti-association and organisational participation legislative strategies.

It seems that the earliest scholarly models of organised crime, such as Cressey's (1969) model with its focus on structure and hierarchy, may still have significant influence on how organised crime is conceptualised in Australia. The current anti-association approach simultaneously spotlights some forms of organising (overt and semi-permanent groups whose members commit criminal acts) while shadowing others (more fluid, opportunistic and temporary criminal collectivities). Similarly, in relation to the amendments that introduced participation provisions into Commonwealth legislation, Broadhurst and Ayling (2009) have commented that:

"This continuing use of the language of organisations [in the legislation] suggests a focus on criminal groups with clear boundaries, defined membership and exclusively criminal objectives, despite the fact that these forms of organising now seem to be the exception rather than the rule..."

The concept of organised crime that is accepted at any one time limits and confines the "appropriate" legislative response. Therefore, there is a need to interrogate the conceptual model underpinning the legislative

measures in force in Australian jurisdictions. It is this conceptual model that directs the aims and impacts of any intervention. If the model is inaccurate, the laws and the law-enforcement strategies that derive from it may be misdirected, ineffective, unnecessary or even positively harmful.

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## About the Authors

### Monique Mann

Monique Mann's PhD research aims to examine the construction and constitution of knowledges of organised crime across different perspectives (in particular, the perspectives of criminology and criminal justice policy). In order to illuminate evolving Australian understandings of organised crime, she is examining archival documents and conducting interviews with key stakeholders including law enforcement officials. Her research will contribute to a better understanding of how conceptual models of organised crime have informed the legislative and policing responses of Australian authorities and may assist legislatures and law enforcement agencies to more deeply consider the foundations of organised crime laws and policies.

### Julie Ayling

Julie Ayling is a CEPS Research Fellow, based in the Regulatory Institutions Network (RegNet) at the Australian National University in Canberra. Her current research focuses on illicit organisations and networks, particularly organised crime, and the state's responses to them. She is also co-investigator on two ARC linkage projects. The first concerns emerging trends in transnational environmental crime and examines the conditions for successful regulatory and enforcement responses. The second relates to criminal services and the role of place in transnational crime in Asia. Julie also continues to work on her longer-term interest in the operation and resourcing of police organisations, in relation to which she co-authored a book published in 2009.

In 2011-12 Julie spent five months as a visiting fellow at the European University Institute in Florence, Italy where she completed research on the need for a more deliberative system of lawmaking in relation to serious crime (forthcoming Australian and New Zealand Journal of Criminology). In 2010 she was awarded the Australian and New Zealand Society of Criminology New Scholar Prize for her article 'Criminal Organizations and Resilience' (International Journal of Law, Crime and Justice 2009).

Julie is admitted as a solicitor and barrister in the Australian Capital Territory and as a solicitor in New South Wales. Prior to joining RegNet, she worked as a senior lawyer in the Australian Public Service on issues relating to international law and communications law. She holds degrees in Arts and Law (with first class honours) from Macquarie University and a Master of International Law degree from the ANU.

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