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Home Office

BUILDING A SAFE, JUST
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A comparative analysis of organised crime conspiracy legislation and practice and their relevance to England and Wales

Michael Levi
Alaster Smith

Home Office Online Report 17/02

The views expressed in this report are those of the authors, not necessarily those of the Home Office (nor do they reflect Government policy).

Foreword

The Government aims to provide a criminal justice system which is, and is seen to be, modern, in touch with the community, efficient and fair. To this end it is committed to a continuing programme of reform. Within this context, the prosecution of organised crime is an extremely important area in which reform may be particularly beneficial. This report examines the operation of the US Racketeer Influenced and Corrupt Organisations (RICO) legislation and similar legislation from elsewhere in the world, and considers the applicability of like legislation for England and Wales.

The results of this research have already informed the debate on organised crime legislative reform. The report will be of interest to all concerned with improving investigation and prosecution of organised crime.

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December 2002

Executive summary

Purpose

The objective of this paper is to examine the operation of the Racketeer Influenced and Corrupt Organisations (RICO) legislation in the US, and similar European legislation aimed at counteracting organised crime, and to consider their applicability to England and Wales. This study focuses upon aspects of legislation dealing with incrimination and proof of organised crime activity. Legal and practical issues arising from measures to seize or confiscate actual or imputed proceeds of crime are outside the scope of this review.

The work reported here has formed a part of the guidance drawn on in Government review of the issues surrounding the effective policing and prosecution of organised crime. In this context it serves to frame the arguments for and against a potential offence of 'racketeering'. The RICO legislation is held to represent a cornerstone of the US response to organised crime. The complex and involved nature of organised crime investigation, and the role of the key people involved in this level of criminality, has had severe implications for the successful prosecution of such offences in England and Wales and elsewhere. This is an area for which reform of the criminal justice system has critical significance, as issues such as the rules for the presentation of evidence and the disclosure of operationally sensitive information need careful consideration.

Methodology

More than 30 investigators and prosecutors from the US, Canada, New Zealand, the Netherlands, Italy and England and Wales were interviewed to develop an understanding of the available legislation in both principle and practice. In the US and Canada both federal and state investigators and prosecutors were contacted. In New Zealand and the Netherlands both investigators and prosecutors were involved and in Italy investigative judges were interviewed. Both the police and prosecutors were involved in England and Wales.

The RICO legislation

The RICO statute is generally afforded pride of place amongst measures tackling public and private sector corruption and extortion in US cities. Combined with the necessary investigative resources and political will, RICO legislation can force entire organisational infrastructures into court and, via civil powers, put the management of 'racketeer-influenced organisations' such as gangster-run unions and pension funds into public trusteeship, thereby breaking the economic power of some criminal groups.

The RICO legislation's aim is to penalise persons who engage in a 'pattern of racketeering activity' or 'collection of an unlawful debt' that has a specified relationship to an 'enterprise'. Until the RICO Reform Act 1989 and recent court rulings, either the RICO enterprise or the pattern of racketeering was required to have an economic goal. The courts have held that this concept of a RICO 'enterprise' included the commission of serious acts for gain such as extortion in order to obtain funds for a terrorist group.

Advantages of RICO legislation

1. RICO legislation gives the Department of Justice the power to use otherwise state-based crimes as predicates in any Federal Court (this also makes the investigation easier).
2. It facilitates the obtaining of electronic surveillance and wiretapping, though as in other crimes, a court order is required. Interviews suggest that it is substantially more difficult to justify an intercept warrant in the US than is the case currently in England and Wales.
3. It allows the charging/prosecution of sufficient members to incapacitate an organisation (but see disadvantage 3).
4. It side-steps some restrictive statutes of limitations provided that the offences remain within the overall ten-year period (especially important in cases such as telemarketing frauds).
5. Issues of joinder and severance are eased, permitting the trial of more co-defendants.
6. It generates a higher sentencing tariff than many primary offences alone.
7. It enables prosecutors to show the nature of an enterprise, putting forward a context within which offences occurred.

Disadvantages of RICO legislation

1. It takes a lot of work to build up a case. Investigators need accurate intelligence about an organisation before they can start. They need database and intelligence analysts and good computer systems that are capable of dealing with 10 years of data including assets, upfront businesses and covert businesses.
2. There are Performance Indicator implications, as there will be smaller *numbers* of cases brought forward under RICO legislation – the number of individual defendants could be used as an alternative.
3. It lengthens trials and the jury sometimes loses track of particular defendants and their roles, this in turn sometimes leads to severance of cases.
4. It may also be hard for jurors to appreciate what constitutes an 'enterprise' under the legislation. It is somewhat labyrinthine to show a pattern of crimes and the existence of an organisation to carry them out, and then that the organisation is operating through a pattern of criminal activity.
5. There are regional variations. Judges in Manhattan get many cases, whereas regional ones are rarer. The level of judicial experience, as well as regional court cultures, sometimes produces what is regarded as 'bad law'.
6. There is a risk of abuse of the powers which, both as an issue of principle and to preserve existing powers from judicial and political attack, has to be monitored. There are human rights concerns over the potential for the legislation to be used over-zealously.

Other legislation

Various alternative anti-organised crime legislative acts and approaches were considered, including:

- New York State Organised Crime Control Act (OCCA) 1986
- Canadian legislation
- New Zealand legislation
- Dutch legislation
- Italian legislation
- UK legislation.

These seem to represent a range of broadly similar approaches, but with some critical variations. Unfortunately, the lack of material on which to base comparative evaluation meant that no empirical assessment could be made of either the police operational or court's prosecution effectiveness.

Conclusions/recommendations

This review has to be somewhat tentative in spelling out policy implications; the data are not readily testable, and the cross-cultural differences are very considerable. One can think of no 20th century UK parallels to the levels of corrupt control over city life and aspects of commercial services that have been witnessed in the US. Although there have been instances of entrenched local cultures of corruption in England and Wales, there have been none yet revealed that include large tranches of police as well as elected officials. Although RICO legislation in the US has proved a potent remedy for such cases, no systematically corrupt union domination of pension fund abuses or toxic waste dumping has surfaced in England and Wales.

Conspiracy legislation in England and Wales

Conspiracy law and practice in England and Wales may not be fully effective in combating organised crime as a consequence of the following:

1. Conspiracy contemplates an agreement to engage in conduct which relates to one or a series of closely related crimes: it does not contemplate the activities of a multi-faceted criminal enterprise. It can accommodate certain broad conspiracies such as have been employed in terrorist prosecutions such as 'conspiracy to cause explosions on the United Kingdom mainland', but that is a single form of offence.
2. Each defendant in single conspiracy indictment has to be shown to be party to the same agreement. Proof of the agreement and its terms is usually indirect. It is thus often difficult to distinguish related or sub-conspiracies.

3. Agreement, in the sense of a meeting of two or more minds, does not accord with common experience and how people actually associate in criminal endeavour.
4. Strict rules of evidence dislocate and obscure the presentation to the court of a full or clear picture.

Rules of procedure militate against an indictment where a conspiracy is charged along with other counts which represent overt acts carried out in the conspiracy's execution: see the Practice Direction (Conspiracy), 64 Cr. App. R. 258. The prosecutor may be required to elect between the conspiracy and the overt acts despite the obvious link between the counts. Thus, by a practice direction, the 'enterprise' is cut away from the 'predicates'.

Implications of disclosure rules

Some senior police officers consider the criminal justice system to be poor at protecting sensitive information and sensitive techniques, and with ever-growing pressure on judges to disclose information to the defence, the unwillingness to do so means that there are significant areas of organised and determined criminality that are effectively immune from prosecution. Once criminals have moved beyond the front-line operational stage and have acquired substantial business interests through which they can front activities, infiltration and other undercover tactics may prove too difficult. Some interviewees referred to the inhibitions on potential informants (and victims) arising from fear of the principals. However, it is not clear that RICO legislation would provide a solution to this, for the prosecution must prove a connection between the accused and the set of people performing the predicate acts, and this requires either live witnesses or surveillance from which plausible inferences can be made (or both). If the police or other investigative agencies are not prepared to reveal their 'product' because they do not wish to reveal their methods, and/or if the audio product is not admissible under current evidential rules, then RICO legislation or any other conspiracy law would add little.

Confiscation of assets

The problem of incapacitating persons suspected of making large profits from crime is acute because of the conviction-based nature of confiscation procedures in England and Wales (and in most other jurisdictions). If civil forfeiture were introduced which required proof (albeit to a civil standard) of some sort of criminal offence to activate the procedure, both the incentive and the capacity to become 'organised' might be lessened, though it would still leave the alleged organisers at liberty. Such measures have been examined in detail by a recent Home Office Working Group and by the Cabinet Office Performance and Innovation Unit, and resulted in the Proceeds of Crime Bill 2001. In theory, even if some overseas assets remained unconfiscated because of intelligence or mutual legal assistance 'failures' (or differences of principle over the propriety of such a proceeds of crime process), this national confiscation should have some incapacitation effect on the 'Kingpins' at the national and local level. If it did not, then the theory of financial strategy against organised crime might be viewed as a theory failure, not just an implementation failure. Whether such forfeitures would affect the general *level* of crime or simply reduce social threats by making a similar level of crime less well organised remains uncertain.

Alternative possibilities

There are some initiatives that fall short of full RICO legislation that might also be worth considering. One model is offered by the Customs & Excise Management Act 1979, section 50(3) offence of 'being knowingly concerned' (for example, in the importation of drugs). This could be extended as a simplified form of statutory conspiracy, provided it were considered politically, morally and legally appropriate to put up with a higher level of prejudicial risk to defendants than has normally been accepted. Provided that there is equality of arms in the ability to defend oneself and that the presumption of innocence is maintained, the human rights aspect would not appear to be violated by this.

The more general relationship between surveillance and privacy will doubtless be a deeply contested terrain for years to come. How far and under what conditions the right to privacy may be infringed subject to the Human Rights Act is unresolved at a general level. The conventional way in which this might be dealt with would be by distinguishing – as the more defence-minded New York legislation does

– between surveillance for intelligence purposes and surveillance for evidential purposes. Whether or not this applies to intelligence collection, it seems clear that for evidential purposes, judicial approval must be sought prior to the use of the device, and that unless it is so granted, the information is not admissible. Put another way, if the legislation on telephone intercept admissibility were to be altered, arguably it would make sense mainly within the context of a wider ranging series of anti-organised crime laws of which some RICO-like instrument might be a part but would be unlikely to be either necessary or sufficient. The introduction of RICO or some simplified statutory conspiracy would be worthwhile from a policing perspective only if it led to the incrimination of those ‘actually guilty’ crime organisers/important contributors to continuing criminal enterprises who currently would not meet the current CPS thresholds for prosecution for conspiracy to commit substantive offences.

Clearly define purpose

There is no research evidence or even serious policy discussion from the US about the effects of RICO legislation on general levels of drug-taking, drugs trafficking, toxic waste dumping and fraud (other than pension fund embezzlement by corrupt union officials), though there has been some criticism of the effects of asset forfeiture on fuelling the ‘organised crime control industry’. This points up to more general problems in what we seek in the way of impact from anti-organised crime measures. Do we want to reduce the level of organisation, possibly irrespective of any effect on crime levels, to reduce the economic, political and social danger from powerful individuals and groups? Or do we intend actually to reduce levels of criminal behaviour, including consensual crimes such as drug-taking and vice? The answer may be ‘both’ but they are separable. RICO legislation was aimed more at breaking the political and economic stranglehold of organised crime in some areas, and at reducing organised crime take-over of legitimate business than at some of the more fundamental issues such as reducing crime levels. Those introducing it may have taken for granted that this would generate crime reduction also, but contemporary evidence and observations give grounds to doubt this simple relationship between levels of crime and levels of criminal organisation.

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1. Introduction

The objective of this paper is to examine the operation of the Racketeer Influenced and Corrupt Organizations (RICO) legislation in the US, and similar European legislation aimed at counteracting organised crime, and to consider their applicability to England and Wales. This study focuses upon aspects of legislation dealing with incrimination and proof of organised crime activity. Legal and practical issues arising from measures to seize or confiscate actual or imputed proceeds of crime are outside the scope of this review.

The work reported here has formed a part of the guidance drawn on in Government review of the issues surrounding the effective policing and prosecution of organised crime. In this context it serves to frame the arguments for and against a potential offence of 'racketeering'. The RICO legislation is held to represent a cornerstone of the US response to organised crime. The complex and involved nature of organised crime investigation, and the role of the key people involved in this level of criminality, has had severe implications for the successful prosecution of such offences in England and Wales and elsewhere. This is an area for which reform of the criminal justice system has critical significance, as issues such as the rules for the presentation of evidence and the disclosure of operationally sensitive information need careful consideration.

2. Methodology

More than 30 investigators and prosecutors from the US, Canada, New Zealand, the Netherlands, Italy and England and Wales were interviewed to develop an understanding of the available legislation in both principle and practice. In the US and Canada both federal and state investigators and prosecutors were contacted. In New Zealand and the Netherlands both investigators and prosecutors were involved and in Italy investigative judges were interviewed. Both the police and prosecutors were involved in England and Wales.

3. US legislation on racketeering

The RICO statute is generally afforded pride of place amongst measures tackling public and private sector corruption and extortion in US cities. Combined with the necessary investigative resources and political will, RICO legislation can force entire organisational infrastructures into court and, via civil powers, put the management of 'racketeer-influenced organisations' such as gangster-run unions and pension funds into public trusteeship, thereby breaking the economic power of some criminal groups.

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, for the purpose of "seek[ing] the eradication of organized crime in the United States" (923). Such crime was considered to be proliferating and weakening the economy through undermining legitimate business. The available legislation at the time was considered to be too limited in scope and impact.

RICO legislation has been used against most of the major New York organised crime families and against some elsewhere, most recently against one of the longest-serving 'family' leaders in Detroit. It has been used in almost every American organised crime prosecution since 1981. It is best seen as part of an array of techniques including telephone tapping, official plea bargaining, structured sentence guidelines, and witness protection programmes, all aimed at dealing with criminal enterprise as a system rather than simply with incapacitating individuals.

3.1. Objectives of the US legislation

The RICO legislation's aim is to penalise persons who engage in a 'pattern of racketeering activity' or 'collection of an unlawful debt' that has a specified relationship to an 'enterprise'. Until the RICO Reform Act 1989 and recent court rulings, at least one of either the RICO enterprise or the pattern of racketeering was required to have an economic goal. The courts have held that this concept of a RICO 'enterprise' included the commission of serious acts for gain such as extortion in order to obtain funds for a terrorist group.

A 'pattern' consists of two or more predicate offences from a list including extortion, theft, drugs, mail fraud and securities fraud within a statutorily defined period. 'Enterprise' is defined to include any individual, partnership, corporate entity, and *any group of individuals associated in fact although not a legal entity*. This includes wholly illegal as well as legal businesses. Given the fluid nature of criminal associations, the definition of the term 'enterprise' can be a shifting one.

The prosecutor may allege within one 'RICO' conspiracy numerous predicates against an individual defendant at different times and perhaps in collaboration with different defendants. For that defendant to be convicted, at least two of those predicates need to be proven to the jury's satisfaction. The prosecution can introduce a picture of a long-term group engaged in perhaps a variety of criminal acts – some violent, some consensual, some predatory and some involving fraud – perhaps related only by their connection with group members.

RICO legislation prohibits four different offences, including conspiracy:

- S 1962 (a) criminalises the investment of the proceeds of a pattern of racketeering or collection of an unlawful debt in an enterprise affecting interstate commerce
- S 1962 (b) criminalises acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity or collection of an unlawful debt (an organised crime figure violates this if s/he uses extortion or arson to pressure the owners into selling out)
- S 1962 (c) criminalises conducting affairs of an enterprise 'through' a pattern of racketeering activity or collection of an unlawful debt (this would catch the car dealer who uses his/her business to assist a stolen car ring)
- S 1962 (d) makes it a crime to conspire to commit any of the three substantive RICO offences.

Violation of any of the above prohibitions may result in a fine of \$250,000 or twice the loss or gain, imprisonment for 20 years per violation, plus forfeiture of ill-gotten gains and of any interest that the defendant has acquired or maintained in a business in violation of the Act. These sentences can be *consecutive* for each predicate proven in addition to the 'RICO' violation and a 'RICO' conspiracy. Thus, in *United States v Salerno* (1986) – often referred to as 'The Commission' case – the defendants received sentences of 100 years each for taking kickbacks from concrete contractors. These convictions resulted from a combined federal, state and local (New York City) operation commenced in 1980 involving at times over 200 FBI agents, and 171 court-authorised bugs and telephone taps, infiltration and intensive surveillance of all the New York 'crime families'.

Each 'family' was indicted under RICO legislation, charging the participation of the leaders in their enterprises. The central allegation was that together, the families constituted a Commission, which was a criminal enterprise; and that defendants were engaged in predicate acts including bid-rigging, extortion, loan-sharking and murder. The jury found that senior Cosa Nostra figures had indeed authorised, aided and abetted a series of predicate acts, a deduction made in part from their status in a hierarchy on which expert evidence – supported by the content of wiretaps – was given.

The RICO legislation unusually specifies that "provisions of this title shall be liberally construed to effectuate its remedial purposes". There is also an array of *civil* powers including injunctive relief (i.e. the ability to get a court order to stop something happening) (1964 (a)) and a *private* right of action awarding up to treble damages plus costs of the suit (not normally awarded to successful plaintiffs in the US, where in civil cases, each side bears its own costs) and 'reasonable' legal fees.

Proceeding usually in the criminal courts before pursuing additional sanctions in the civil courts, the prosecution has to prove that the defendants have been participating in the affairs of the enterprise; that the people had previously engaged in such violations (for example, previous relevant convictions) or testimony showing how they conspired. The extensive pre-trial civil disclosure rules afford many opportunities for requiring testimony from parties who otherwise might be silent. Finally, the judge

makes an order requiring 'RICO' offenders to refrain from such actions in the future, and may place the organisation under public trusteeship, often under a former senior law enforcement official or prosecutor. Such appointments may be unlimited in time, and trustees may be granted powers such as the authority to require access to books and records, and to compel testimony. It is also possible to require unions and other bodies in trusteeship to hire independent audits of their ongoing measures at organised crime control.

3.2. Defining RICO conspiracy

There is no requirement of some overt or specific act in the RICO statute. So long as they share a common purpose, conspirators are liable for the acts of their co-conspirators. While RICO legislation broadened conspiracy coverage by omitting the requirement of an overt act, it did not require the Government to prove that each conspirator agreed that s/he would be the one to commit two predicate acts.

3.3. Who is addressed by RICO legislation?

A 'person' for the purposes of RICO legislation includes 'any individual or entity capable of holding a legal or beneficial interest in property'. An enterprise for the purpose of RICO legislation is one of the key issues, since it is the identification of this that is the core conceptual basis for comparison with the situation in England and Wales. For dealing with a Mafia-type or even Hells Angels-type association with known or knowable membership and admission rites is one thing; dealing with flatter and less formal networks is another. In the US Federal legislation, an enterprise includes 'any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity'. Both legitimate and illegitimate businesses can be subject to RICO legislation.

3.4. Proving the existence of an enterprise

Proof depends upon 'evidence of an ongoing association, formal or informal, and by evidence that the various associates function as a continuing unit'. This is a factual determination for the jury, and it does not require membership to be stable. It must be shown that some sort of decision-making structure – hierarchical or consensual – exists within the group. There must be some mechanism for controlling and directing the affairs of the group on an ongoing, rather than ad hoc, basis. This does not mean that every decision must be made by the same person, or that authority may not be delegated.

The requirement that 'associates function as a continuing unit' does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure and which furthers the activities of the organization.

The organization must be 'an entity separate and apart from the pattern of activity in which it engages'. This does not mean that the prosecution has to prove that it engages in legitimate commerce; rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offences. The function of overseeing and co-ordinating the commission of several different predicate offences and other activities on an ongoing basis is adequate to satisfy the separate existence requirement. All US interviewees agreed that RICO legislation would still work with flatter networks structures of criminal organisation (commonly considered to be the case in England and Wales).

3.5. The use of RICO legislation

The RICO prosecutions unit in the US Department of Justice reviews all public cases, civil and criminal (though they have no control over civil RICO cases brought by members of the public, which are many and various, motivated usually by the prospect of large financial returns if successful). They refer indictments in money-laundering and corruption cases to the asset forfeiture unit for comment. Department of Justice officials consider that this oversight review is necessary to prevent over-aggressive use of the legislation by field offices. The exercise of discretion can be controversial, and others suggest that the central unit excessively inhibits the use of RICO legislation in areas that might aggravate the Congress politically.

Investigators (at local and state level) frequently consider that when they have sufficient evidence to get permission to prosecute under RICO legislation, they already have more than sufficient evidence to prosecute in the substantive counts. What this means in practice is that *where inter-offender links exist*, they may simply be failing to investigate in sufficient depth to use evidence collected for Target A for leads to Target B and other network or gang members in the more general infrastructure that facilitates serious and organised crime. As in the English and Welsh context, this may simply reflect the tension between volume crime processing and specialist national squads.

Proving organisational membership requires the following internal criteria:

1. Organisational member source *or*
2. Intercept from telephone bug *or*
3. Undercover witnessing the person being 'made' a member *or*
4. Two independent non-member sources confirming.

The courts are generally satisfied with this level of evidence when supported by FBI expert witnesses.

3.6. Advantages of RICO legislation

1. RICO legislation gives the Department of Justice the power to use otherwise state-based crimes as predicates in any Federal Court (which also makes the investigation easier).
2. It facilitates the obtaining of electronic surveillance and wiretapping, though as in other crimes, a court order is required and interviews suggest that it is substantially more difficult to justify an intercept warrant in the US than is the case currently in England and Wales.
3. It allows the charging/prosecution of sufficient members to incapacitate an organisation (but see disadvantage 3).
4. It side-steps some restrictive statutes of limitations provided that the offences remain within the overall ten-year period (especially important in cases such as telemarketing frauds).
5. Issues of joinder and severance are eased, permitting the trial of more co-defendants.
6. It generates a higher sentencing tariff than many primary offences alone.
7. It enables prosecutors to show the nature of an enterprise, putting forward a context within which offences occurred.

To a sceptic, the view produced by 7 above may colour the proper view of the case in the traditional criminal law activity of breaking activities up into artificial fragments. Certainly, RICO legislation enables the introduction of the general weight of the evidence, e.g. prior involvement in a series of robberies and the general previous bad character of the accused. The defendant may find himself/herself facing charges involving a variety of different crimes, committed at different times and in different places, and prosecutors are required only to prove that all these crimes were committed by the defendant in furtherance of his/her participation in conducting the affairs of the same enterprise. The defence have to defend the group as much as the individuals.

The US interviewees considered that RICO legislation has become less important in the US since the development of fuller money-laundering legislation, with tough sentences and their own forfeiture regime. RICO legislation is most effective when combined with undercover work and electronic surveillance, plus witness protection programmes for those informers who cannot be protected from being 'burned' (e.g. by using electronic surveillance instead as the 'source'). It works best when the prosecutors are working their way up the organisational hierarchy, using the dependence of defendants on 'substantial assistance to the prosecutor' to obtain a reduction in the heavy Guideline Sentence; but even where structures are flatter, it has many benefits. At the end of the 1990s, about half of the cases – especially in the Manhattan US Attorney's Office – related to violent and street gangs involved in crime for economic gain.

3.7. Disadvantages of RICO legislation

1. It takes a lot of work to build up a case. Investigators need accurate intelligence about an organisation before they can start. They need database and intelligence analysts and good computer systems that are capable of dealing with 10 years of data including assets, upfront businesses and covert businesses.
2. There are Performance Indicator implications, as there will be smaller *numbers* of cases (though the number of individual defendants could be used as an alternative).
3. It lengthens trials and the jury sometimes loses track of particular defendants and their roles, this in turn sometimes leads to severance of cases.

4. It may also be hard for jurors to appreciate what constitutes an 'enterprise' under the legislation. It is somewhat labyrinthine to show a pattern of crimes and the existence of an organisation to carry them out, and then that the organisation is operating through a pattern of criminal activity.
5. There are regional variations. Judges in Manhattan get many cases, whereas regional ones are rarer. The level of judicial experience, as well as regional court cultures, sometimes produces what is regarded as 'bad law'.
6. There is a risk of abuse which, both as an issue of principle and to preserve existing powers from judicial and political attack, has to be monitored.
7. There are human rights concerns over the potential for the legislation to be used over-zealously.

There were 155 new Federal RICO charges filed by the government in 1998, of which only two or three were white-collar crimes (e.g. Russians involved in securities frauds and in counterfeiting). However, there is no control over private rights of action in RICO legislation, which was viewed by government and most private lawyer interviewees as being an undesirable development, though others praised it for enabling them to avoid complex bankruptcy administration rules and situations where the government was unwilling to prosecute.

Shortage of resources is a much lesser problem in financial crime prosecutions in the US than it is in England and Wales, and although the FBI seldom takes on a case where losses are less than \$250,000, frauds under this sum are also of less interest to private RICO lawyers since their contingency fees will be correspondingly modest.

In RICO legislation, all property that affords a 'source of influence over the enterprise' is forfeitable, and this can lead to massive forfeitures where an entire organisation's wealth is taken out. (This could happen under the proposed UK changes to forfeiture law in the Proceeds of Crime Bill 2001 *provided that UK criminal groups have sufficient identifiable assets to generate these levels of confiscation.*) RICO forfeiture has the perceived advantage in that it is mandatory, whereas (in crimes with victims), restitution is discretionary with the judge.

4. An alternative RICO model: the New York Organised Crime Control Act (OCCA) 1986

The New York model reflects some human rights concerns about the potential overreach of the federal legislation. The Governor's Memorandum accompanying the legislation specifically notes that the restriction to persons employed by or associated with criminal enterprises was an attempt to distinguish it from overly broad federal law. However, it applies not just to traditional organised crime families but to "any group with a shared criminal purpose and continuity of existence and structure....[G]roups that have both legitimate and illegitimate purposes, like a social club that 'fronts' for a criminal gang, or a pawn shop that is the centre of a fencing operation, can constitute criminal enterprises".

Unlike the federal law, the New York law (Article 460.10(4)) requires three, not two, predicate acts which must be related through a common scheme or plan or "were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise". Participation entails (1) an intent to participate in or advance the affairs of the criminal enterprise, and (2) guilt, as principal or accomplice, in at least three criminal acts included in the 'pattern', though the acts may be part of a single criminal transaction but must *all* have been committed within 10 years prior to the commencement of the criminal charges, and two of which must have been within five years.

These tighter provisions make it more likely that a genuine 'organised crime group' is in place. To further ensure this, the relevant prosecutor must submit a statement to the Court "attesting that he has reviewed the substance of the evidence presented to the grand jury and concurs in the judgement that the charge is consistent with legislative findings" (CPL 200.65). This judgement must be personal, not delegable, and ensures that there is central control over when it is appropriate to charge OCCA violations. Where the Court is not so satisfied, it may dismiss the case in the interests of justice.

New York prosecutors state that it is a good discipline against the potential overreach of the Federal statute to have to prove the existence of a criminal enterprise separate from the three predicate acts, and that they use the legislation especially where there are facilitative roles, e.g. against those who provide false identification to make credit card and other documentary fraud easier; against securities brokers; look-outs for burglary gangs; and mechanics who change the Vehicle Identification Numbers on trucks. All of these are acts that viewed as individual incidents might not attract significant sentences but when part of a racketeering crime-facilitative role should do so. The legislation also makes some people vulnerable to enforcement who otherwise might not be prosecuted, since acts committed overseas or outside the State can qualify as predicates for the purpose of the legislation. The fact that most such acts may occur outside New York is irrelevant.

The importance of plea bargaining is also important (as it is in the Federal system), in encouraging criminal co-operation against their colleagues. In New York, telephone and other wiretaps are used extensively and are admissible provided that they are sealed immediately on the orders of the Court, before whom probable cause has to be developed, often using existing probative intelligence wiretaps to justify their usefulness and necessity for the purpose of evidence gathering in the particular case.

5. The Canadian organised crime legislation

In 1997 the Canadian Criminal Code was amended to produce a simplified version of statutory conspiracy which appeared to circumvent the traditional problem of judicial reluctance to admit any evidence wider than the narrow proof of substantive issues. However, it contained traditional views about the nature of conspiracy, being essentially the aiding and abetting of crime rather than membership of a criminal organisation.

The offence of contributing to organised crime acts abided by existing rules of how to establish the liability of the suspected party. It would not be appropriate here to deal with the forfeiture provisions, which moved Canada closer to the English and Welsh model prior to the Proceeds of Crime Bill 2001. However, the criminal organisation offences constituted an attempt to deal with collective behaviour, granting specific supplementary powers such as enabling the content of wiretaps to be used evidentially. Senior prosecutors expressed the view that they could not consider the use of this legislation without evidential telephone and other forms of wiretaps, which are used in drugs, fraud and telemarketing cases. This is so especially in those drugs cases in which drugs themselves are not seized.

Given the time lag between the legislation coming into force and investigation and prosecution in complex cases, there has been no opportunity to evaluate the impact – only a handful of cases have been prosecuted to date. One of the benefits is that in a Federal/Provincial split of jurisdiction, where the federal authorities deal mostly with narcotics, tax frauds and mutual legal assistance cases, it grants greater flexibility to the federal jurisdictions in 'taking over' as criminal organisation predicates behaviour that otherwise would be exclusively Provincial. Another major benefit from a law enforcement perspective is that while the normal limit for evidential wiretaps is 60 days, this was extended considerably – normally to a year – where organised crime can be substantiated before the judge as part of the comprehensive material required to support an application for a court-authorised evidential wiretap (which requires the consent of senior prosecutors). It was considered very burdensome to have to spend time and effort in supporting an application every 60 days in a context where crucial evidence might be rare.

In a recent drugs case, the defendants were charged with conspiracy to import and to traffic in cocaine, but not with organised crime offences. The reason was that until the late stage of the investigation, the prosecution did not have a key informant, and they were concerned that they would be unable to prove beyond reasonable doubt that the members of what – with hindsight – clearly was an organised crime group had committed the required predicates within the past five years. Proactive police enquiries were appropriate for current and future events, but were less orientated towards past events. As the case developed, they believed they had obtained sufficient evidence to proceed under s.467 (Criminal Code of Canada – participation in criminal organisation), but by then they were reaching the final stage of elaborating the charges so there was no point. In that case, the combination of admissible wiretap evidence and ‘ordinary’ conspiracy legislation was sufficient to obtain convictions even of a higher level offender. Presumably, therefore, it would only be where the connection was less well established that the s.467 legislation would make a difference.

In December 2001 new legislation to deal with organised crime was passed. Bill C-24 builds on the 1997 amendments to the Criminal Code discussed above, further strengthening law enforcement powers to act against organised crime and emerging forms of crime. The provisions under Bill C-24 will come into force soon after measures for implementation have been arranged. Considerable investment is being made over the next five years to implement this legislation and related prosecution and law enforcement strategies.

The amendments to the Criminal Code will:

- introduce three new offences and tough sentences that target various degrees of involvement with criminal organisations
- improve the protection of people who play a role in the justice system from intimidation against them and their families
- simplify the current definition of ‘criminal organisation’ in the Criminal Code
- broaden powers of law enforcement to forfeit the proceeds of crime and, in particular, the profits of criminal organisations and to seize property that was used in a crime
- establish an accountable process to protect law enforcement officers from criminal liability when they commit what would otherwise be considered illegal actions while investigating and infiltrating criminal organisations.

In making participation in a criminal organisation a criminal offence, the legislative amendments directly address the issue of membership in organised crime. The provisions could target anyone (not just members) who knowingly became involved in activities that further the organisation’s criminal objectives. This offence could include, for example:

1. people who recruit others to join a criminal organisation or who facilitate illegal transactions for the organisation. The maximum penalty for this offence would be five years
2. people involved in committing indictable offences for the benefit of criminal organisations. The maximum penalty for this offence would be 14 years
3. people acting as leaders of a criminal organisation. These persons will include anyone within the criminal organisation who instructs another person to become involved in a criminal offence. This offence would carry a maximum penalty of life imprisonment.

Sentences for these offences would be served consecutively, not concurrently. Unlike other types of penalty provisions that require offenders to serve only a third of their sentence before becoming eligible to apply for parole, offenders convicted of criminal organisation offences would have to serve at least half of their term before they are eligible to apply for parole, unless the court directed otherwise.

The new legislation will also help protect people in the criminal justice system from intimidation. Under the new provisions, it will be an offence to use violence to intimidate people involved in the justice system or a member of their family with the intention of impeding the administration of justice. Justice participants include witnesses, jurors, police, prosecutors, prison guards, judges, members of Parliament and Senators. The offence of intimidation of a justice system participant would be punishable by up to 14 years imprisonment. The legislation also contains provisions to protect the privacy of jurors.

The new definition of 'criminal organisation' responds to concerns expressed by police and prosecutors that the previous definition was too complex and narrow in scope. The amended definition will:

1. reduce the number of people required to constitute a criminal organisation from five to three. This brings Canadian legislation into line with legislation used in other countries
2. no longer require prosecutors to show that members of the criminal organisation were involved in committing a series of crimes for the criminal organisation in the last five years. Instead, prosecutors will be able to focus on the evidence relevant to the crimes that are on trial
3. broaden the scope of the offences which define a criminal organisation (currently limited to indictable offences punishable by five or more years) to all serious crimes, including prostitution and gambling.

Previous legislation allowed for the seizure, freezing and confiscation of proceeds of about 40 types of crimes defined as 'enterprise crimes', for example, firearms trafficking or stock market fraud. The amendments expand the proceeds of crime provisions so that they apply to most indictable offences. The amendments also allow Canadian authorities to enforce foreign criminal confiscation orders involving proceeds of crime. Such an approach is proposed in international agreements such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and the recommendations of the Financial Action Task Force on Money Laundering. Innocent third party interests would be protected. To ensure that the provisions are applied fairly, the law requires that a test be applied so that the punishment of forfeiture would not be disproportionate to the seriousness of the crime.

Police officers investigating crimes such as people-smuggling, smuggling of contraband such as liquor, tobacco and firearms, hate crimes, international terrorism and environmental crimes must use a variety of techniques, including, on occasion, committing offences to infiltrate, destabilise and bring down these operations. The provisions do not give blanket immunity to police for any criminal conduct, however, and the actions for which immunity would not be granted are clearly set out – for example, there would be no immunity for intentionally or recklessly causing death or bodily harm, sexual offences or deliberately obstructing the course of justice.

The Government of Canada will mount a new 'Intensive Federal Prosecution Strategy' against organised crime that will ensure increased co-ordination between investigators and prosecutors and more effective investigations and prosecutions. This strategy recognises the increasingly complex legal environment in which investigations of criminal organisations take place. These prosecutions are often characterised by large numbers of accused, voluminous evidence and challenging legal issues. The intensive prosecution strategy will feature dedicated anti-organised crime Justice prosecutors working in integrated enforcement teams with law enforcement officers to provide prompt and expert legal advice to investigators during their investigations. Specialised federal Justice disclosure units will manage the large amount of evidence that must be disclosed in order to ensure fair trials, but which first must be carefully reviewed to protect informant sources and confidential investigative techniques. A key component of the new prosecution strategy is the creation of teams of seasoned and experienced prosecutors who will handle these complex cases at trial. These specialised prosecutors will be able to respond to organised crime prosecutions involving federal offences such as drug trafficking and smuggling of human beings. Funding will also be invested in sophisticated and multi-disciplinary enforcement action at the Canada–United States border and elsewhere, improving the RCMP intelligence gathering capacity, and enhancing technology and infrastructure to support complex investigations.

6. New Zealand legislation against organised crime

At first sight, New Zealand might seem an unlikely place for organised crime legislation to be developed. Indeed, during Parliamentary debate, it was conceded that there was no independent evidence of endemic gang activity there. Nevertheless, when passing the Harassment and Criminal Associations Bill 1996, which came into force in December 1997, Parliament found little difficulty in supporting its adapted version of the Californian RICO equivalent – the Street Terrorism Enforcement and Prevention Act 1988. It was stated during the passage of the Bill that it complied with the New Zealand Bill of Rights Act 1990. The Minister of Justice stated to the media in 1996 that the legislation would go beyond doctrines of accessory liability and permit the prosecution of gang bosses, as well as deterring others from joining for fear of incurring collective liability. The legislation does not require proof that the gang has crime as its purpose – primary or secondary –

merely that crime is part of its activity set. In this respect, the New Zealand offence is easier to prove than its American equivalents.

The derivative liability for persons who intentionally promote or further the activities of the gang (s.98A(2)(b)) seeks to incriminate crime facilitators, whether professional persons or those who offer assistance with accommodation, transportation, otherwise legal weapons, etc., though it is not certain whether the prosecution must prove that the person(s) intended the crime or that the person(s) merely knew material facts and did not care about the possible outcome.¹ Derivative liability arguably can occur only if the accessory's conduct contributes causally to the offence, and this may be difficult sometimes to overcome except where a specific service can be demonstrated to have been provided. This might work in a money-laundering case but the same problems of inference might arise in some UK organised crime cases as do in existing conspiracy law that has proven to be difficult to operate, especially without telephone conversation content admissibility.

The courts' views about the breadth of the term 'promotes or furthers' will determine whether the existing accessory liability for gang participation – under s.66 of the Crimes Act 1961 'if the commission of that offence was known to be a *probable* consequence of the prosecution of the common purpose' (ss.2) – will be extended or simply reinforced by the substantive offence. Such an extension to a lesser burden than accessory to crime would certainly *appear* to have been intended by subsection 98A(3), which frees the prosecution from the need to prove that the accused had committed any other offence or was a party to any particular offence committed by any other person. Subsection 4 develops this theme still further, though one presumes that it is intended to cover the promotion of criminal conduct generally, even though no particular offence needs to be specified. The liability becomes close to strict liability for the acts of another, but it is by no means certain that the courts will construe it in this way. It does seem that this represents an improvement over the need to specify a particular act or even sort of act as the basis for liability. It could even be that the commission of an imprisonable offence by a gang member will be sufficient for conviction of all other members under s.98A(4)(b). It is not clear what level of withdrawal from the group would be a sufficient legal excuse to negate culpability. Active co-operation with the police or other law enforcement body *might* be sufficient, even if mere refusal to continue with support for offenders would not.²

7. European legislation against organised crime membership

There are two European models of legislation against organised crime that are of particular relevance. Italian legislation that prohibits membership of the Mafia or Mafia-type associations (it is regarded by the Italian law enforcement bodies to be a very necessary component of their struggle against organised crime) and Dutch legislation (since Dutch organised crime is generally considered to resemble that in England and Wales in many ways).

7.1. Italian legislation

Looking first at the Italian legislation, the amount of aggregate data available – even to the Italian authorities themselves – on the operations of many aspects of the Italian criminal justice system is rather limited, since such questions have historically not been seen to be of great importance. In 1982 the Italians essentially adapted their equivalent of UK conspiracy legislation, Article 416 of the Criminal Code – which prohibited association between delinquents for criminal purposes – to deal with the Mafia-type associations, under Article 416 (bis³) of the Criminal Code. 416 (bis) states that:

- (1) whoever is part of a Mafia-type conspiracy consisting of three or more people is punishable with three to six years' imprisonment. Punishment may be increased by up to one third if the defendant has previously been subjected to Mafia preventative measures
- (2) whoever promotes or manages or directs such an association is punishable with four to nine years' imprisonment
- (3) conspiracy is of a Mafia type when whoever belongs to it uses the power of intimidation which arises from Association membership *and* uses the system of subordination *and* the *omerta* (code of silence) that arises from this in order to commit crimes *or* to obtain – directly or

¹ The 1993 English Law Commission Report, *Assisting and Encouraging Crime*, proposed that such conduct be an offence even where there was no offence ultimately committed and therefore no actual perpetrator.

² It is not clear where this would leave publicans who allow their premises to be used for exchange of criminal intelligence.

³ 'bis' indicates that a legislative item was added subsequent to the original.

indirectly – control over economic activities, over activities contracted out to the private sector by the State or to obtain unfair profit for himself or for other people.

If the Association uses weapons or threatens to use them, the punishment is increased. Following the Mafia murders in Sicily of judges Falcone and Borsellino, Law No.8 of 20 January 1992 and Law no.356 of 7 August 1992 altered the previous balance of powers in organised crime cases, differentiating them in terms of admissibility of evidence, right of cross-examination and identification of sources of evidence. The strengthened powers included:

1. the broadening of the territorial reach of the public prosecutor, enabling more systematic patterns of behaviour to be obtained (in collaboration with the police), analysed and included in evidence
2. increased time to investigate, and the ability to keep the investigation secret rather than informing suspects that they were under formal investigation.

Previously, under the Italian system, magisterial prerogatives were guarded, keeping to a minimum the risk of invasion of 'their' territory by a magistrate investigating the larger ramifications of a crime committed elsewhere. For the combating of organised crime, such territoriality is counter-productive and changes in the Code of Civil Procedure meant that investigators could be given wider powers.

To avoid the risk of central obstruction of cases involving political and economic élites – a characteristic of the Italian organised crime process, but not one that is exclusively theirs – these superior co-ordinating bodies cannot interfere with the substance of the investigations. They can, however, require the co-ordination of diverse cases by diverse regional and central bodies and the suspension of prosecution until further investigations are complete.

As in England and Wales, Italian prosecutors have an obligation to furnish the defence as well as the court with all material relevant to guilt or innocence, though it is not customary in Italy to provide schedules of all unused material. Article 7(4), Decree Law No.306 of 1992 conferred a new evidential value to statements made prior to a court hearing for that used in pleadings, they stand as evidence, and even if they contain inconsistencies, they may still be admissible in the trial unless there are demonstrated threats or inducements to give false evidence or unless there have been other 'compromising' features. This may inhibit the prior tendency for witnesses to 'disappear' (or be 'disappeared'). Under Italian law, where special measures are implemented, targets have to be informed that they are under investigation, but in anti-Mafia investigations, the investigative authorities are granted an extension to two years before either the target is informed or the case is abandoned.

Witnesses are the main source of evidence, and these are mainly criminal insiders. Electronic eavesdropping and phone tapping may be carried out 'even if there is no reason to suppose that criminal activities are being pursued in such places' (Article 614, Code of Criminal Procedure). The alleged directors of organised crime associations are often well known to the authorities but are very difficult to detect and prove in action; some have been in hiding for up to ten years and are well resourced for practising discretion in their language and instructions. Although the absence of normal conversation and the repetition of words in odd contexts may be used circumstantially to indicate guilt, this inhibits the value of tapping, especially when it is difficult to bug the landline or cellphone of someone in hiding.

Combined with the *pentiti* ('supergrass') system⁴ to encourage the breakdown of the culture of silence and to sow distrust, the anti-Mafia legislation has been used to powerful effect in the cultural and political context that now exists. It has certainly damaged the sense of impunity that many major criminals had. However, this system has proven problematic. Corroboration rules have gradually relaxed, enabling *two pentiti* to corroborate each other, provided there is sufficient specificity in their allegations, even if there is no other substantial evidence. This could be viewed as a shift from a pure due process to a crime control model, to cope with what is agreed to be a serious social problem – the political, social and economic power of Italian organised crime. An additional difficulty is caused by the common relapse of those *pentiti* who cannot resist the urge to return to the criminal careers they once embraced. It should be noted that this is a problem for all witness protection schemes, including those in the US.

In England and Wales, apart from the Hell's Angels and from terrorist groups that are already covered by terrorist legislation, it is difficult to see the immediate relevance of a combined strategy of the use of *pentiti* and anti-Mafia legislation to looser networks that do not have formal membership. No evidence was forthcoming for or against the proposition that the *pentiti* system as such had any deterrent or preventative effect on crime levels generally, though it is unlikely that the level of corruption in Italy is the same now as it was before the 1990s.

7.2. Dutch legislation

As with the Italian legislation, there has been very little evaluative research on the operation of the Dutch anti-organised crime legislation. However, the 1995/96 Commission of Enquiry under Parliamentarian van Traa was highly critical of anti-organised crime practice, and in the light of this, a new law on investigative techniques came into force on 1 February 2000. Article 140 of the Dutch Penal Code states:⁵

1. Participation in an organisation whose object is the commission of crimes shall be punished by a term of imprisonment not exceeding six [five] years or a fifth [fourth] category fine of 100,000 guilders [25,000 guilders]
2. Participation in the continuation of the activity of a legal entity that has been declared illegal by a final and conclusive decision of the courts and thus dissolved shall be punished by a term of imprisonment not exceeding one year or a third category fine [5,000 guilders]
3. In respect of founders or managers, the terms of imprisonment may be increased by a third [it no longer adds to the maximum fine, as it did under the previous legislation].

Article 140, which was passed in 1886 and amended subsequently, has its origin in two penal provisions: s.265 of the Penal Code which prohibits the association of malefactors and s.4 of the Act on Association and Assembly. It is necessary to prove only that the organisation has a *purpose* of crime commission, so preparatory acts are sufficient to ground criminal liability. Appellate decisions show that profit does not have to be the sole or even primary motive. Preparatory discussions, before a formal agreement has ever been reached, may also constitute participation. Moreover, the prosecutor does not have to prove participation in an actual crime, since participation in the organisation is itself punishable, though merely belonging to an organisation is insufficient. The prosecutor must prove that the defendant takes part in or supports acts which are conducive to or are directly connected with the realisation of the criminal purpose. What has to be proven is a lasting and structured form of association which acts as a unit and whose *immediate* purpose is to commit crimes, whether or not its ultimate purpose is so to do. Article 140 has often been used in cases of overt violence committed by several people, and is advantageous to the prosecutor who need not prove that the individual actually used violence personally, though some degree of organisational continuity needs to be demonstrated.

⁴ Offering favourable prison conditions to those who co-operate with the authorities.

⁵ Following amendments in February 1999 – the previous penalties are in square brackets.

Constructive participation can be criminalised, in the sense that if the person in charge, having the authority, fails to take measures to stop others in the organisation from carrying out illegal acts, he or she commits an offence under Article 140. There has been criticism that Article 140 as currently interpreted punishes the systematic commission of crimes, but that it should rather operate only where crime is the principal *raison d'être* of the organisation. However, if the criticisms were accepted, it would prevent the legislation being used in most cases of organisational or corporate crime. In general, unlike England and Wales, Dutch judges take into account before verdict all previous convictions of the suspect (though they do not take into account prior accusations that have not led to conviction). If known to the judge, the fact that the same defendant may have been named (but not convicted) as a member of an organised crime group in a previous trial may reduce the fairness or objectivity of the court, but it is not obvious what the solution to that might be.

In one case investigated by the National Criminal Investigation Team, the director of an unlicensed (and therefore illegal) *bureau de change* was the sole proprietor of the company – a silk flower shop – he used as a front, while laundering funds for his clients. During his trial, the prosecution argued that the owner, his firm and his clients together constituted a criminal organisation within the terms of sub-section 1. The clients were not arrested but their phone conversations with the principal accused were recorded and used in evidence against him. Both owner and firm were convicted. This led to much higher penalties than for running an unregistered *bureau de change*. Such measures clearly extend the criminal law, and generate the possibility of abuse, whose control lies in procedural measures.

Given the increased sentence maxima, Article 140 also triggers special investigative powers such as telephone tapping and pre-trial detention after arrest, even where the substantive crimes committed or planned would be insufficient to grant those powers and even where the conduct is at an early preparatory stage. This is an important feature of the advantages of the provisions in the eyes of investigators and prosecutors, in the more formally regulated criminal procedure provisions prevalent in continental Europe compared with England and Wales.

7.3. Organised crime: the English dimension

It is easy to see how the RICO or the Dutch legislation might be applied against some past English crime groups, such as the Krays and Richardsons in the 1960s. There are at least a few such instances in current National Crime Squad (NCS) and Customs caseloads. However, there has to be a plausible link demonstrable to the court between the defendant and the group, and the mere possession of unaccounted wealth and mixing in clubland circles is unlikely to be sufficient (though it might be sufficient for civil asset recovery proceedings or taxation demands). There has been a dearth of cases available to test out the applicability of RICO legislation. However, let us examine the following edited and summarised example case (all names changed).

7.3.1 Case study: Operation Fou

George Hamlin (all names changed) was a member of a Masonic Lodge whose Master was a man with considerable experience of money-laundering and was later a target in a major sting operation. Hamlin had been involved in two business transportation enterprises that had failed, one of which led to his conviction for two offences of deception against creditors, though this probably was not a major scheme. However in common with other 'sideliners'⁶ it was probable that at this time, he turned to cannabis trafficking to supplement his income. At that time, and several times over the next decade, he was looked at by local police and by the Regional Crime Squad (RCS), but apparently there was insufficient evidence with which to proceed.

An arrest of Chester Gold in France in the mid-1990s, bringing back a lorry-load of cannabis, led to the discovery that Hamlin was a leading organiser. Hamlin was sentenced *in absentia* (which would have been quashed had he reappeared for trial). However, though the French authorities presumably knew that he was in the UK (and was discoverable on reasonable enquiry there), for unexplained reasons, no action was taken and there was no attempt by the French to extradite him until he was arrested in the UK at the end of this operation (the extradition proceedings were stayed pending the conclusion of the case).

⁶ People with legitimate occupations who supplement their income 'on the side'.

However, Hamlin kept coming up on the fringe of a variety of investigations, and the operation that led to his conviction commenced some years ago, without initial result. Hamlin declares his occupation as 'professional gambler' – a useful cover for the possession of substantial quantities of cash and for sudden rises in wealth, since it involves far less accounting/falsifiable audit trails than most other occupations. One of the generic difficulties of such investigations is that investigators find it very hard to determine who – solicitors, bankers, etc. – is a conspirator and who is an innocent intermediary. However, they started to look at people around him, and an informant stated that he was a serious player, alongside his assistant Winston.

Surveillance began and they also began the financial investigation. Hamlin has a small farm, valued at £500,000 now, but costing half that when purchased. The mortgage was paid off with a cheque from an offshore account sent to his solicitors. He then bought another property, containing first class sports facilities (with an estimated market value of around £2 million) with a mortgage of £500,000. There was good evidence of his handing over a six-figure sum in cash to be laundered by a high-level suspect who was diversifying his own money-laundering activities formerly conducted simply for one criminal group. This was probably sent offshore, since it came back from an Offshore Finance Centre in the form of a matching six-figure transfer to a firm of solicitors who were negotiating the purchase of property 2. There were many bankers' drafts paid into the corporate account of the sports facilities, so it was plainly being used for laundering.

Hamlin was found to be very difficult to track. He repeatedly changed mobile phones, using one for each 'customer'/accomplice. His domestic landline never made any outgoing calls and he used the dedicated mobile to call the person back, so that any intercept would not be able to cross-refer. They never used normal language, nor on any of the intercepts was drugs or any obvious alternative word used.

One of his contacts in a different part of the country was Jim Close, who was such a powerful figure in the small community in which he lived that there was no possibility of making discreet enquiries. He had been the subject of enquiries by the Regional Crime Squad, but these had got nowhere. Close, Hamlin and Winston met regularly. Close was regularly sent out to Holland in relation to a planned shipment of two tons of cannabis. There was a communication from the Dutch police pursuing a Class A smuggler referred to as Hamlin that turned out to be the same one.

The NCS were ready to act on the cannabis shipment, having followed it through Germany (where the shipment was), Belgium and Holland to the UK. However, they received information that Hamlin would send Winston to collect '150 kilos', which they presumed to be cocaine. As part of counter-surveillance, Winston cleverly drove his car into a cul-de-sac and surveillance followed him. He abandoned the car and ran away, calling Hamlin who told him to wait at a rendezvous for someone to retrieve drugs and organise transport. He and Hamlin agreed the drugs should be stored in Belgium, and they were duly unloaded from the van and stored in the house. The Belgian police, who were not allowed to do undercover work and presumably were nervous about the political damage if the drugs somehow got on the streets, arrested the drugs 'baby-sitter' and seized the drugs. Belgian law would not allow an undercover officer to replace the Belgian and carry on with the shipment. In consequence, they could not prove that those particular drugs were going to be imported into the UK and there was no hard evidence of importation on the part of Hamlin, though they had enough evidence to charge with trafficking. They arrested another member of Hamlin's family who met Winston at Heathrow, and the others were arrested simultaneously. Notwithstanding changes in the consequences of exercising the right to silence – with the judge being permitted to draw the attention of the jury to the failure to explain a course of conduct reasonably calling for explanation – none of them said anything when questioned by the police.

The police seized all the mobile phones, enabling them to prove that they were under Hamlin's control at the relevant time. The fact that none of the intercepts showed any content of a normal nature, plus the style of the conversation, would have been damning if admissible. However, such material is not currently admissible and the tape recordings have been destroyed. The NCS did, however, get permission from the Director-General to introduce the intercepts from the Dutch police, since this was relevant evidence of preparatory criminal acts. The Dutch transcripts are evidence on the continent, and since the NCS did not know of their existence, they had not listened to them, thereby avoiding some of the problems arising during the Curtis Warren investigation.⁷

Hamlin escaped from Dutch custody without any money, luggage or passport. He rang a friend who brought over his false passport, whereupon the Dutch target took him to Germany and thence home.

NCS did not risk any financial investigation prior to arrest, because all contacts – solicitor, bank manager – were believed to be closely connected. The judge did grant a Restraint Order but required them to appoint a Receiver, since there were real assets to be managed. However, within three weeks, the entire business became insolvent and had to be sold because there was so little real business being done that it could not pay its way. Hamlin claims to be the director of a Dubai company, which certified that he had a large income when the mortgage was arranged. He had a holding company in the Isle of Man, the apparent beneficial owner of which was a couple living in Nova Scotia.

He could not get Legal Aid, so the sports facilities were sold to fund his defence (at the expense of the government in the long run, as in the El Kurd Customs case in which a *bureaux de change* money-launderer spent almost all of the £2 million frozen in an account on his defence). In the light of this, Hamlin has made two unsuccessful bail applications direct to a High Court judge, presumably in the hope of getting a civil judge who might be more sympathetic.

The current husband of Hamlin's ex-wife was arrested and convicted in Spain for a large cannabis load. Prior to his arrest, he had been seen with Winston. Spain also seeks extradition of Hamlin, on the basis that he has been named in many phone books and mobile phone logs. In a 'bust' of a lorry driver for a cannabis load, Hamlin was shown to have called him and he called Hamlin. There is evidence of planned future diversification, as Hamlin was associated with a Scottish gang involved heavily in excise evasion with tobacco and alcohol.

The key problems in this case do not appear to be obvious ones in which RICO legislation is *necessary*, though it might be useful. In order to establish the links between Hamlin and the others, who clearly were carrying on a continuing criminal enterprise sufficient to base a RICO case, they would need the phone logs and evidence of system (though the content of the phone calls, with their absence of any normal discourse whatever, would doubtless strengthen the case if admissible, which currently they are not). *Prima facie*, there would be a RICO prosecution against Hamlin on the evidence, but by this stage, there is sufficient evidence to justify a prosecution for conspiracy to traffic (albeit with a lower sentence than importation). So in a sense, sentence maxima excepted, there is no need for RICO legislation *here*. The case does highlight the difficulties arising from multiple defendants being investigated and tried differently according to different rules in different European countries, and pending measures to ease transfer of cases within the European judicial space may not help this because of the refusal of some countries to extradite their nationals. It is not obviously appropriate for the British defendants to be tried elsewhere though in a more flexible world, defendants overseas might be tried here for importation conspiracy (or for RICO conspiracy, if England and Wales had such legislation and if this were an extraditable/mutual legal assistance generating offence). This group alone will be involved in trials in Belgium, France, Holland and Spain, in addition to the UK. Common linkages were eventually thrown up, but they have to be dealt with legally in different ways, e.g. the Dutch trial judge came to the UK to interview the British defendants (who were entitled not to reply, as in England and Wales). Europol co-ordination was excellent, but Dutch surveillance officers had to risk their cover by appearing personally in the English courts (which they would not do at home), though the judge allowed anonymisation and screening. The demands for personal appearance, however, incapacitated their surveillance capability for a week or more and will risk identification by other criminals, as well as causing possible reluctance to reappear in future.

⁷ Where the UK police rendered tapes inadmissible because they helped the Dutch understand the regional accents of the speakers.

At the more domestic level, the case has revealed the problems involved in separation of NCIS from force intelligence bureaux. Of the suspects in this case, only Hamlin was an NCIS core nominal, all the others were scattered in their local forces. Also implicit are arguments about whether the key strategy should be to prevent as many 'up comers' (rising offenders) as possible from becoming the core nominals of the future (though there is always the danger of false positive identification of future nominal risk, leading to excess demand for early intervention).

7.3.2 Cases from a metropolitan constabulary and NCS

There are a number of 'crime family' and 'criminal families' cases that might have generated RICO convictions, but only with admissible evidence from informants, undercover officers and/or bugging/phone taps. RICO legislation cannot magically connect higher level actors to lower level ones and it is not obvious that current conspiracy legislation could not generate convictions if the electronic evidence were useable anyway. This theme will be reviewed later.

The following case example may be appropriate for a RICO-style prosecution;

Glyn has a small business which probably fronts his criminal activity. In the past two years, he moved out of rented council accommodation into an £85,000 house he purchased for himself and bought a £30,000 Range Rover. Intelligence reports paint a picture of violence, intimidation and blackmail along with drug connections through local pubs and clubs.

In this case, it might be possible to demonstrate that there was a RICO conspiracy among the lower level offenders, for the offences themselves were committed as part of a pattern of racketeering. However, there would need to be some linkage between the individual and the members of the criminal enterprise, either through informant or electronic *testimony* in order to make the case. Otherwise, what one might be left with would be a tax demand (or, if the law were changed, a civil recovery order) to deprive the suspect of his *prima facie* unlawful activity unless he were able to justify the funds.

However, while this case shows how RICO legislation could be useful, there are many more examples that present problems both from a 'RICO' and from an ordinary criminal investigation perspective. For example;

Wayne is unemployed and lives in a modest house in Midtown. He drives a new Range Rover, wears a £65,000 Rolex watch, regularly holidays abroad in winter and flies friends out to join him. He has previous convictions for drug dealing but has not been arrested for some years. He exercises regularly and though he seldom drinks, he appears well acquainted with door staff; a common source of drugs profits and extortion (though friendship with door staff is not evidence of criminality of any parties). Investigations have failed to link Wayne to any forms of criminal conduct, let alone any concrete criminal event, though observations exist showing that he received a bag full of cash from someone and immediately made a call on his mobile phone, but what was said or for what reason is unknown.

Although this may be an appropriate arena for a tax demand or civil asset recovery for someone living way beyond his official means, there is no basis upon which even 'RICO' could properly be established.

There are a number of difficulties in establishing RICO enterprise which are fairly characteristic of medium level UK organised crime. Although there may be insufficient genuine business done to sustain surveillable lifestyles, in the absence of reversal of burden of proof on defendants generally – which is inconceivable in a Human Rights Act context – it is doubtful if such cases could be proceeded with. In a number of similar cases the police have been unable to persuade the CPS on evidential grounds that prosecution was merited.

8. RICO policies in England and Wales: the way forward?

Policy always involves making a value judgement over and above any analysis of the data, but even by normal standards, this review has to be somewhat tentative in spelling out policy implications. The data are not readily testable and the cross-cultural differences are very considerable. One can think of no 20th century UK parallels to the levels of corrupt control over city life and aspects of commercial services that have been witnessed in the US. In particular, though there have been instances of entrenched local cultures of corruption in England and Wales, there have been none yet revealed that include large tranches of police as well as elected officials, and no systematically corrupt union domination or pension fund abuses or toxic waste dumping to which RICO legislation has proved such a potent remedy. Although no UK police chiefs are elected directly, appointed politically without tenure or are subject to the sort of political 'accountability' that bedevils some US local forces and permits corruption to become institutionalised there, it is not surprising that some advocate legal tools to be in place to reduce the risk of such (probably local) networks developing.

Conspiracy law and practice may be criticised as a consequence of the following:

1. Conspiracy contemplates an agreement to engage in conduct which relates to one or a series of closely related crimes, it does not contemplate the activities of a multi-faceted criminal enterprise. It can accommodate certain broad conspiracies such as have been employed in terrorist prosecutions such as 'conspiracy to cause explosions on the United Kingdom mainland', but that is a single form of offence.
2. Each defendant in single conspiracy indictment has to be shown to be party to the same agreement. Proof of the agreement and its terms is usually indirect. It is thus often difficult to distinguish related or sub-conspiracies.
3. Agreement, in the sense of a meeting of two or more minds, does not accord with the common experience and how people actually associate in criminal endeavour.
4. Strict rules of evidence dislocate and obscure the presentation to the court of a full or clear picture.

Rules of procedure militate against an indictment where a conspiracy is charged along with other counts which represent overt acts carried out in the conspiracy's execution.⁸ The prosecutor may be required to elect between the conspiracy and the overt acts despite the obvious link between the counts. Thus, by a practice direction, the 'enterprise' is cut away from the 'predicates'.

Some senior police officers consider the criminal justice system to be poor at protecting sensitive information and sensitive techniques. With ever-growing pressure on judges to disclose information there are significant areas of organised and determined criminality that are effectively immune from prosecution. Once criminals have moved beyond the front-line operational stage and have acquired substantial business interests through which they can front activities, infiltration and other undercover tactics may prove too difficult. Some interviewees referred to the inhibitions on potential informants (and victims) arising from fear of the principals. However, it is not clear that RICO legislation would provide a solution to this, for the prosecution must prove a connection between the accused and the set of people performing the predicate acts, and this requires either live witnesses or surveillance from which plausible inferences can be made (or both). If the police or other investigative agencies are not prepared to reveal their 'product' because they do not wish to reveal their methods, and/or if the audio product is not admissible under current evidential rules, then RICO legislation or any other conspiracy law would add little. One might note the *pentiti* strategy in the Italian struggle against organised crime, but Italy (and England and Wales, in its own 'supergrass' strategy) has not found it easy to produce cases that would survive appellate processes, especially those involving economic and political élites, none of whom have served a day in prison post-conviction in Italy. RICO prosecutions (and the chances of a guilty plea) are made a great deal easier where there are co-operating witnesses to back up any electronic evidence. This is buttressed by a formal and informal plea and charge bargaining process, in which 'substantial assistance to the prosecutor' is the *only* grounds for reduction below the sentencing guideline range. (Though it may be that what the US saves on criminal trials, it spends on witness protection.)

⁸ See the Practice Direction (Conspiracy), 64 Cr. App. R. 258.

There are undoubtedly some cases investigated by NCS and some of the larger police forces where the evidence available against criminal enterprise organisers is not strong enough to merit prosecution for conspiracy to commit offences of high specificity, but where a vaguer indictment for acts akin to RICO s.1962 (c) might produce a result. For example, it has become common to seize quantities of heroin up to 100 kilos, but there may be difficulty in linking a particular organiser defendant to a particular shipment in a conspiracy case, perhaps especially where criminal organisations are more like investment syndicates, lacking an overall hierarchy. (Though RICO legislation, like conspiracy law, allows for joining and leaving groups without evading liability.) Even there, however, it may be difficult for the case against the alleged organisers to pass the evidential burden in the Code for Crown Prosecutors, and there is no burden on the accused to provide a convincing explanation for his or her contacts with other accused persons unless there is something glaring about the number and context of the contacts.⁹

The problem of incapacitating persons suspected of making large profits from crime is acute because of the conviction-based nature of UK confiscation procedures. If civil forfeiture were introduced which required proof (albeit to a civil standard) of some sort of criminal offence to activate the procedure, both the incentive and the capacity to become 'organised' might be lessened, though it would still leave the alleged organiser at liberty. Such measures have been examined in detail by a recent Home Office Working Group and by the Cabinet Office Performance and Innovation Unit. In theory, even if some overseas assets remained unconfiscated because of intelligence or mutual legal assistance 'failures' (or differences of principle over the propriety of such a proceeds of crime process), this national confiscation should have some incapacitation effect on the 'Kingpins' at the national and local level. If it did not, then the theory of financial strategy against organised crime might be viewed as a theory failure, not just an implementation failure. Whether such forfeitures would affect the general *level* of crime or simply reduce social threats by making a similar level of crime less well organised remains uncertain.

In the context of the crime reduction strategy, RICO legislation has had a demonstrable effect on reducing labour union racketeering, some forms of toxic waste dumping and extortionate service contracts in the US. The difficulty is that these are crimes that do not present particular problems in England and Wales. The key policy question then is whether the (numerically small but perhaps strategically important) cases in which RICO legislation might lead to conviction are outweighed by the costs (including the trouble of framing legislation).

The view expressed by several people interviewed in the current study was that RICO legislation would be pointless without the ability to use the *content* of telephone taps in evidence, which currently is not allowed in England and Wales. It is too large a question for this review whether the balance between intelligence and evidence *overall* would be adversely affected, given the slippery slope nature of the disclosure system in which information about police tactics leads to further enquiries and to information transmitted to other offenders. Currently, the results of probes may be used in evidence (though no data are available on how often this actually happens), but the telephone taps that sometimes guide the location of intrusive devices are not admissible or even acknowledged.

What should be appreciated, however, is the drastic financial impact that use or even disclosure might have on transcription budgets, although some sources claimed that with modern automated transcription methods and their placement onto CD-ROMs, the technical difficulties and expense was far lower than is generally claimed, and would continue to fall over time. Admissibility might have the counter-intuitive consequence of producing *less* telephone tapping, for some large cases might generate thousands of hours of transcripts in a foreign language and a requirement of far greater transcription accuracy than at present. US law enforcement budgets – supported by asset forfeiture funds – are reportedly far less constrained than they are in England and Wales. This cost-benefit analysis lies outside the current terms of reference, but it is a factor to be taken into account when assessing the potential impact of US-style RICO legislation in England and Wales.

⁹ The trial of three prominent footballers and a businessman accused of being a conspiracy to rig soccer results for betting syndicates led to total acquittals after a retrial: the jury rejected the proposition that a highly unusual pattern of telephone calls inferred a criminal conspiracy.

The US authorities did have retrospective application difficulties relating to arguments that predicates had occurred prior to RICO legislation coming into force – a difficulty that affects all proceeds of crime confiscation cases in which the 'back tracking' period for assets runs before the date at which the legislation was passed – and this must be borne in mind if implementation in England and Wales is seriously considered. Also to be borne in mind are the mutual legal assistance implications of introducing RICO legislation, in terms of establishing substantive and/or formal dual criminality, i.e. both countries must have criminalised the behaviour in order for mutual legal assistance to be possible (though this rule is being eroded gradually in the interests of international enforcement harmony and respect).

There are some initiatives that fall short of RICO legislation that might also be worth considering. In addition to the Canadian legislation, a simpler still model is offered by the Customs & Excise Management Act 1979, section 50(3) offence of 'being knowingly concerned' (for example, in the importation of drugs). This could be extended as a simplified form of statutory conspiracy, provided it were considered politically, morally and legally appropriate to put up with a higher level of prejudicial risk to defendants than has normally been accepted. Provided that there is equality of arms in the ability to defend oneself and that the presumption of innocence is maintained, the human rights aspect would not appear to be violated by this.

The more general relationship between surveillance and privacy will doubtless be a deeply contested terrain for years to come. How far and under what conditions the right to privacy may be infringed subject to the Human Rights Act is unresolved at a general level. The conventional way in which this might be dealt with would be by distinguishing – as the more defence-minded New York legislation does – between surveillance for intelligence purposes and surveillance for evidential purposes. Whether or not this applies to intelligence collection, it seems clear that for evidential purposes, judicial approval must be sought prior to the use of the device, and that unless it is so granted, the information is not admissible. Put another way, if the legislation on telephone intercept admissibility were to be altered, arguably it would make sense mainly within the context of a wider ranging series of anti-organised crime laws of which some RICO-like instrument might be a part but would be unlikely to be either necessary or sufficient. The introduction of RICO legislation or some simplified statutory conspiracy would be worthwhile from a policing perspective only if it led to the incrimination of those 'actually guilty' crime organisers/important contributors to continuing criminal enterprises who currently would not meet the current Crown Prosecution Service thresholds for prosecution for conspiracy to commit substantive offences.

There is no research evidence or even serious policy discussion from the US about the effects of RICO legislation on general levels of drug-taking, drugs trafficking, toxic waste dumping and fraud (other than pension fund embezzlement by corrupt union officials), though there has been some criticism of the effects of asset forfeiture on fuelling the 'organised crime control industry'. This points up to more general problems in what we seek in the way of impact from anti-organised crime measures. Do we want to reduce the level of organisation, possibly irrespective of any effect on crime levels, to reduce the economic, political and social danger from powerful individuals and groups? Or do we intend actually to reduce levels of criminal behaviour, including consensual crimes such as drug-taking and vice? The answer may be 'both' but they are separable. RICO legislation was aimed more at breaking the political and economic stranglehold of organised crime in some areas, and at reducing organised crime takeover of legitimate business than at some of the more fundamental issues such as reducing crime levels. Those introducing it may have taken for granted that this would generate crime reduction also, but contemporary evidence and observations give grounds to doubt this simple relationship between levels of crime and levels of criminal organisation.

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