

## A NEW KIND OF CRIMINAL LAW FOR “BAD HOMBRES”: THE ORGANISED CRIME ACT 2015

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### I. INTRODUCTION

More than three years have elapsed since the Organised Crime Bill was passed by Parliament<sup>1</sup> and entered into law as the Organised Crime Act 2015<sup>2</sup> [*OCA*]. Surprisingly, scant attention has been devoted to the substantive contents of the statute.<sup>3</sup> One might be forgiven for thinking that this is partly due to the fact that the *OCA* has not been extensively employed by the State, thereby precluding any opportunities for a serious scrutiny of the Act’s provisions by the Courts and academics. However, a cursory glance at the *OCA* reveals several areas of concern that do warrant greater attention and analysis on the basis that they have the potential to adversely affect established principles of criminal liability and punishment, while also constituting an evolutionary approach in Singapore’s longstanding crime-control policy.

This article is an attempt to provide a considered discussion on the various offences and penalties that the *OCA* creates, as well as the numerous powers it confers on the Public Prosecutor and other law enforcement agencies to better address the threat of organised crime. My analysis will also draw upon the comparative experiences of other common law countries that have already enacted similar legislation in combating organised crime, such as the United Kingdom and

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<sup>1</sup> The Bill received its Second and Third Readings and was subsequently passed by Parliament with no amendments on 17 August 2015, before obtaining Presidential assent on 21 August 2015.

<sup>2</sup> No 26 of 2015, Sing.

<sup>3</sup> At the date of the writing of this publication, the author could find no academic article or commentary piece dealing with the Organised Crime Act 2015. A reference to the most recent edition of one of the foremost criminal law textbooks in the country revealed only a cursory mention of the statute in a footnote: see Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 3rd ed (Singapore: LexisNexis, 2018) at 1045.

Australia, in order to help formulate a possible approach towards the *OCA* that the courts and law enforcement agencies may wish to consider.

## II. THE ORGANISED CRIME ACT

The *OCA* as a whole comprises ten parts and over eighty sections in total. Part 2 of the Act creates several new offences collectively referred to as ‘Organised Crime Offences’. These offences are meant to cover a whole spectrum of activities that organised criminal groups engage in, such as:

- Membership of a locally-linked organised criminal group;<sup>4</sup>
- The recruitment of members of an organised criminal group;<sup>5</sup>
- The instructing of the commission of an offence at the direction of or in furtherance of the purpose of an organised criminal group;<sup>6</sup>
- Procuring the expenditure or application of property (as well as the actual expenditure or application of property itself) to support, aid or promote the commission of a Part 2 offence or any other offence under any written law;<sup>7</sup>
- Permitting an organised criminal group to use any premise;<sup>8</sup>
- Receiving, retaining, concealing and any other dealing with the property of an organised criminal group;<sup>9</sup> and
- Facilitating the commission of a Part 2 offence or any serious offence<sup>10</sup> at the direction of or in furtherance of the purpose of an organised criminal group.<sup>11</sup>

The Part 2 offences are also noteworthy in that they directly target persons who, though not necessarily members of organised criminal groups themselves, nevertheless may have provided some form of material or financial assistance to organised criminal groups.<sup>12</sup>

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<sup>4</sup> *Supra* note 2 at s 5. See also *Public Prosecutor v Lai Yen San* [2019] SGDC 39 at [6].

<sup>5</sup> *Ibid* at s 6.

<sup>6</sup> *Ibid* at s 7.

<sup>7</sup> *Ibid* at ss 8–9.

<sup>8</sup> *Ibid* at s 10.

<sup>9</sup> *Ibid* at s 11.

<sup>10</sup> ‘Serious offence’ refers to any offence specified in the Schedule to the *OCA*, which in itself consists of offences contained in the *Penal Code* (Cap 224, 2008 Rev Ed Sing) and a whole plethora of other criminal law statutes.

<sup>11</sup> *Supra* note 2 at s 12.

<sup>12</sup> *Parliamentary Debates Singapore: Official Report*, vol 93 at 31 (17 August 2015) (Second Minister for Home Affairs Mr S Iswaran). Although not expressly mentioned by the Minister in the Parliamentary debates, it is arguably reasonable to infer that persons who have provided material or financial assistance to organised criminal groups can include financial institutions and owners of real property. It would surely undermine the purpose of having such provisions in the *OCA* if they could not be taken to apply to the two aforementioned categories of entities.

In addition to the Part 2 offences, the *OCA* also grants several new legal powers which law-enforcement agencies may have recourse to.

Part 3 provides for the creation of Organised Crime Prevention Orders ('OCPO').<sup>13</sup> Part 4 creates Financial Reporting Orders ('FRO')<sup>14</sup> while Part 5 prescribes mechanisms and procedures for the enforcement of OCPOs and FROs as well as avenues for appeals against such orders.<sup>15</sup>

Part 6 establishes Disqualification Orders which may be made against persons who have been convicted of having committed Part 2 offences or serious offences or who have contravened an OCPO or FRO that was made against them upon their conviction for an offence.<sup>16</sup>

Part 9 establishes a civil confiscation regime that is patterned on the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act<sup>17</sup> [*CDSA*] but which allows for confiscation orders to be made against persons who have not been charged or convicted of any offence or who have been acquitted.<sup>18</sup> The remaining Parts of the Act deal with matters pertaining to the powers of investigation by certain government bodies, the protection of informants and other ancillary matters and do not require any great deal of exposition here. Suffice to say, it is the OCPO provisions and the civil confiscation regime which I intend to deal with in further detail.

### III. ORGANISED CRIME PREVENTION ORDERS

#### *A. Prevention Orders: A Targeted Approach Towards Organised Crime*

In addition to expanding the scope of inchoate liability under the Part 2 offences, the *OCA* provides for the use of OCPOs against persons who are proven to have been "involved in a Part 2 offence or a serious offence associated with an organised criminal group"<sup>19</sup> whether inside or outside Singapore. S 15(1) *OCA* prescribes two conditions that must be met before a court can impose an OCPO. The court must firstly be satisfied, on a balance of probabilities, that the affected person must have been "involved" in a Part 2 offence or a serious offence; and secondly,

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<sup>13</sup> *Supra* note 2 at ss 14–20.

<sup>14</sup> *Ibid* at ss 21–23.

<sup>15</sup> *Ibid* at ss 24–38.

<sup>16</sup> *Ibid* at s 39.

<sup>17</sup> Cap 65A, 2000 Rev Ed Sing.

<sup>18</sup> *Supra* note 2 at ss 51 and 53.

<sup>19</sup> *Ibid* at s 15.

the court must have “reasonable grounds to believe that the order would protect the public by preventing, restricting or disrupting an involvement by the person in any Part 2 offence, or any serious offence ...”. The standard of proof is that of the civil standard of the balance of probabilities, as opposed to the criminal standard of proof, beyond reasonable doubt.

Involvement in a Part 2 offence or a serious offence is made out through three possible scenarios as prescribed in s 14 *OCA*. Firstly, the person who is to be subjected to an OCPO must have actually committed the Part 2 or serious offence;<sup>20</sup> secondly, the person must have facilitated<sup>21</sup> the commission of the aforementioned offences<sup>22</sup> or lastly, in the alternative, the person’s conduct must be likely to have facilitated the commissioning of the abovementioned offences<sup>23</sup>. Thus, a person need not necessarily have committed the actual offence itself as long as his conduct renders the commissioning of the offence a possibility, in order to be liable for the imposition of an OCPO against him.

S 16 *OCA* lists the possible types of prohibitions, restrictions or requirements that may be imposed on a person who may either be an individual<sup>24</sup> or a body corporate<sup>25</sup> under an OCPO. Such prohibitions, restrictions and requirements may affect, but are not necessarily limited to, a person’s financial, property or business dealings or holdings,<sup>26</sup> working arrangements,<sup>27</sup> means of communication,<sup>28</sup> agreements to which the person may be a party<sup>29</sup> as well as the use of any premises or item by the person.<sup>30</sup> These provisions are virtually identical to similar legislation in the United Kingdom<sup>31</sup> and New South Wales<sup>32</sup>, albeit referred to as ‘Serious Crime Prevention

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<sup>20</sup> *Ibid* at s 14(3)(a).

<sup>21</sup> Insofar as the author is aware, the term ‘facilitate’ is not actually defined in the *OCA* or any other statute but see s 2(2) *OCA* which attempts to provide some form of statutory guidance as to the prerequisite degree of physical conduct that is required for a person to have facilitated the commission of an offence.

<sup>22</sup> *Supra* note 2 at s 14(3)(b).

<sup>23</sup> *Ibid* at s 14(3)(c). The same three factual conditions apply for offences committed by an offender who is outside Singapore.

<sup>24</sup> *Ibid* at s 16(2).

<sup>25</sup> *Ibid* at s 16(3).

<sup>26</sup> *Ibid* at s 16(2)(a).

<sup>27</sup> *Ibid* at s 16(2)(b).

<sup>28</sup> *Ibid* at s 16(2)(c).

<sup>29</sup> *Ibid* at s 16(3)(b).

<sup>30</sup> *Ibid* at s 16(2)(e).

<sup>31</sup> *Serious Crimes Act 2007* (UK), c 27, s 1.

<sup>32</sup> *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW), s 5.

Orders' ('SCPO'). One can see that, depending on the nature of the serious offence and the extent of the person's involvement, it is possible for the State to tailor each particular OCPO to suit the particular mischief at hand, thereby granting law-enforcement agencies great flexibility and latitude in dealing with persons involved in organised criminality.

The use of OCPOs is noteworthy in that they constitute an increasing willingness on the State's part to resort to preventive measures outside the traditional criminal justice model of prosecuting persons who have already committed the substantive offence and have caused a certain type of harm to another person. This pattern of seeking to criminalise preparatory acts before the substantive offence itself can be committed has been termed by commentators as constituting "the preventive turn in criminal law".<sup>33</sup> The fact that the *OCA* also allows for the imposition of OCPOs against persons who have already been convicted by the courts for having committed either a Part 2 or serious offence only reinforces the increased emphasis on prevention as a guiding principle in terms of criminal punishment.

### *B. Legal Limits on the Use of OCPOs*

Since OCPOs may be made in the absence of any conviction for any offence, there is a greater need to ensure that such legal powers are properly regulated given their propensity to adversely impact the constitutional freedoms and liberties that Singaporeans are entitled to, as well as to alleviate the possibility of state authorities increasingly resorting to the use of OCPOs over the more difficult task securing criminal convictions of suspected organised criminals as a form of *ersatz* prosecution. What then are the legal principles or tests that a court may have recourse to in determining whether the issuance of an OCPO would indeed "protect the public"?

Presently, no local case law has involved the making of an OCPO against a person under the *OCA*. However, given that our provisions concerning OCPOs are virtually *in pari materia* with the UK and New South Wales legislations, it is posited that the existing body of case law in these jurisdictions, while not binding, may provide useful sources of guidance for our courts in determining when an OCPO may be issued. The leading case in the United Kingdom is *R v*

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<sup>33</sup> Heidi Mork Lomell, "Punishing the Uncommitted Crime: Prevention, Pre-emption, Precaution and the Transformation of Criminal Law" in Barbara Hudson & Synnove Ugelvik, eds, *Justice and Security in the 21<sup>st</sup> Century: Risk, Rights and the Rule of Law* (Abingdon, UK: Routledge, 2012) 83 at 86. See also Andrew Ashworth & Lucia Zedner, "Prevention and Criminalization: Justification and Limits" (2012) 15:4 *New Crim L Rev* 542.

*Hancox*<sup>34</sup> [*Hancox*] where the Court of Appeal held that an SCPO could only be issued if the court “has reasonable grounds to believe that an order would protect the public by preventing, restricting or disrupting involvement by the defendant in serious crime”,<sup>35</sup> that is to say, the court must be satisfied that “There must be a real, or significant, risk (not a bare possibility) that the defendant will commit further serious offences ...”<sup>36</sup> to justify the imposition of the prevention order.

The Court further elaborated by holding that:

“[S]uch orders can be made only for the purpose for which the power was given by statute. And they must be proportionate...it is not enough that the order may have some public benefit in preventing, restricting or disrupting involvement by the defendant in serious crime; the interference which it will create with the defendant’s freedom of action must be justified by the benefit; the provisions of the order must be commensurate with the risk.”<sup>37</sup>

The test in *Hancox* has been repeatedly affirmed and cited by subsequent English decisions with approval<sup>38</sup> and its importation into Singapore would arguably pose no great conceptual difficulty. However, one ought to bear in mind that *Hancox* expressly endorsed the test of proportionality where a prevention order is concerned, no doubt due to the need to ensure conformity between English law and the European Convention on Human Rights.<sup>39</sup> It goes without saying that the applicability of proportionality as a legal doctrine was expressly rejected by the High Court in *Chee Siok Chin v Minister for Home Affairs* [*Chee Siok Chin*].<sup>40</sup> Any adoption of the *Hancox* test would require some modification to accommodate the law in *Chee Siok Chin*.<sup>41</sup>

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<sup>34</sup> [2010] EWCA Crim 102.

<sup>35</sup> *Ibid* at para 9.

<sup>36</sup> *Ibid*.

<sup>37</sup> *Ibid* at para 10.

<sup>38</sup> See *R v Mangham* [2012] EWCA Crim 973 and *R v Strong* [2017] EWCA Crim 999; see also David Ormerod et al, *Blackstone’s Criminal Practice 2017*, 27th ed (Oxford, UK: Oxford University Press, 2016) at 2062–2064.

<sup>39</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Eur TS 5.

<sup>40</sup> [2006] 1 SLR(R) 582 (HC) at [87].

<sup>41</sup> In the alternative, the Singapore courts could choose to overrule *Chee Siok Chin* and introduce the doctrine of proportionality into Singapore law but any such decision would have to be founded on very cogent grounds so as to justify the adoption of proportionality in lieu of the existing judicial test of *Wednesbury* unreasonableness. One such argument could be that proportionality functions as a secondary question on the part of the Court that focuses on the legitimacy of the executive or administrative action itself, that is to say, whether the impugned actions were made in accordance with fair procedures and not whether they are ‘right’. In doing so, this obviates the problem of merits review that Rajah J (as His Honour then was)

Ultimately though, regardless of whether the Singapore courts opt to adopt the *Hancox* test or devise their own principles, it is posited that any legal solution formulated by the courts when dealing with the implementation of OCPOs ought to be structured as restrictively as possible, given the broad ambit and scope of such orders and the potentiality for misuse and abuse by the state authorities.

#### IV. THE CIVIL CONFISCATION REGIME

The final significant weapon in the *OCA*'s inventory is the provision of a civil confiscation regime designed to provide for “the confiscation of benefits from organised crime activities”<sup>42</sup> under Part 9 of the Act. The regime allows for the Public Prosecutor to apply to the High Court for three types of orders: (i) restraining orders;<sup>43</sup> (ii) charging orders<sup>44</sup> and (iii) confiscation orders,<sup>45</sup> where the subject of the order has carried out organised crime activity within a statutory period of 7 years<sup>46</sup> and, in the case of the confiscation order, has derived benefits from such activity<sup>47</sup>.

The structure of the civil confiscation process is heavily patterned on the existing regime in the CDSA albeit with a slight twist: proceedings under Part 9 for any of the three orders are civil proceedings that follow the civil standard of proof,<sup>48</sup> much like proceedings for OCPOs. This lowering of the burden of proof on the Public Prosecutor in civil confiscation proceedings is amplified by the statutory presumption that any property or interest in property held by the subject which is “disproportionate to the subject’s known sources of income”<sup>49</sup> is presumed to be a benefit from an organised crime activity, which the subject bears the burden of disproving.<sup>50</sup>

The civil nature of such confiscation proceedings is buttressed by a statutory proviso that any of the three orders can be made in the absence of any criminal proceedings for the impugned

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pointed out in *Chee Siok Chin* at [87]. See also Alan D P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach*, (Cambridge: Cambridge University Press, 2012) at 11–13.

<sup>42</sup> *Supra* note 2 at s 45(1).

<sup>43</sup> *Ibid* at s 57.

<sup>44</sup> *Ibid* at s 58.

<sup>45</sup> *Ibid* at s 61.

<sup>46</sup> *Ibid* at s 46(1).

<sup>47</sup> *Ibid* at s 61(2)(b).

<sup>48</sup> *Ibid* at s 50.

<sup>49</sup> *Ibid* at s 61(3).

<sup>50</sup> *Ibid*.

organised criminal activity.<sup>51</sup> Even more disconcertingly, where criminal proceedings have been instituted against the subject, an order under the civil confiscation regime can still be made even if the criminal proceedings have resulted in an acquittal of the subject.<sup>52</sup> Nor is the civil confiscation order affected by the making of a confiscation order under the *CDSA* in relation to the same person and organised crime activity,<sup>53</sup> raising the spectre of a possible ‘double jeopardy’<sup>54</sup> under both civil and criminal confiscation proceedings.

## V. CONCLUSION

The *OCA* is a considerable supplement to Singapore’s already-sizeable arsenal of legal tools that have already been used in the struggle against organised crime. However, unlike previous legislation which has typically been concerned with combating organised criminal activity within the traditional framework of the criminal justice system, the *OCA* adopts the novel approach of utilising the civil process to tackle organised crime. This obviates the need to navigate the more onerous realm of criminal procedure, and allows for the full powers and resources of the State to be brought to bear upon individuals suspected of having breached the criminal law, but who have otherwise evaded prosecution.

Furthermore, such measures arguably mark a reformulation in the State’s policing style whereby the traditional reactive means of enforcement after the commission of an offence is increasingly displaced by a more proactive policing which seeks to preclude and even deter participation in organised criminal enterprises by denying criminals the necessary capital to develop and maintain

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<sup>51</sup> *Ibid* at s 51.

<sup>52</sup> *Ibid* at s 53.

<sup>53</sup> *Ibid* at s 55.

<sup>54</sup> By ‘double jeopardy’, I refer particularly to the principle of *autrefois convict* as enshrined in Article 11(2) of the *Constitution of the Republic of Singapore* (1999 Rev Ed). Although confiscation proceedings under the *OCA* are expressly treated as civil proceedings and that statute expressly states that *OCA* confiscation proceedings are not affected by the criminal proceedings under the *CDSA*, one could argue that it is possible for a person to be subject to concurrent confiscation order proceedings under both Acts for the same set of facts or offences, which could in turn lead to the imposition of two types of penalties that are in substance, similar to one another, thereby triggering Article 11(2). However, it is very unlikely that the Singapore courts will accept such an argument on the basis of existing case law that adopts a strict definition of the principle of *autrefois convict*. See *Lim Keng Chia v Public Prosecutor* [1998] 1 SLR(R) 1 (HC) at [7]–[14] and *Gunalan s/o Govindarajoo v Public Prosecutor* [2000] 2 SLR(R) 578 (HC) at [19]–[21].



illicit markets, as well as by preventing certain types of behaviour and forms of association that border on criminality.

The end result is a new kind of a criminal law whose focus is not so much identifying and apportioning criminal liability on an individual case-by-case basis as targeting and neutralising certain social threats to public welfare. Suspected organised criminals are the ‘social danger’ in question that must be contained and regulated through robust but civil measures under the *OCA*’s framework in order to best guarantee the effective protection of people and State. Of course, no one disputes the serious threat to public order that organised crime poses but it remains to be seen whether the *OCA* is the most appropriate and effective solution for addressing the problem of organised criminality.