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**FIGHTING A PROBLEM WITH THE PROBLEMATIC:  
SECTION 98A AND ITS USE AGAINST ORGANISED  
CRIME IN NEW ZEALAND**

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## Abstract

Since its conception in 1998, an average of just 21% of offenders charged under s 98A have been convicted. This is much lower than the average for all criminal charges (78%). This paper firstly focuses on the difficulties of defining 'organised crime' before examining the context in which s 98A was created in 1998 and later amended. This examination highlights that s 98A has mixed conceptual origins.

The paper then identifies two factors which may be contributing to s 98A's low conviction rate. 1) the burden on the prosecution to establish the criminal group's common prohibited objective is difficult to satisfy, and often requires the prosecution to establish another substantive offence; and 2) s 98A is regarded as a subsidiary offence which is often withdrawn. A number of factors which increase the likelihood of the charges being withdrawn are submitted. The paper concludes that any benefits stemming from s 98A in an evidence gathering and efficiency enhancing capacity do not quell the perception that s 98A is a problematic provision.

### Key words:

Organised crime, gangs, criminal group, group liability, section 98A.

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## I Introduction

How do we measure the “success” of a provision of the criminal law? Does the conviction rate directly translate to a provision’s efficacy? Does a low conviction rate automatically mean a provision is problematic? This paper explores these questions in the context of evaluating s 98A of the Crimes Act 1961.

Section 98A is New Zealand’s only substantive offence which penalises participation in an organised criminal group.<sup>1</sup> As such, s 98A ostensibly holds an important role in dismantling and disrupting organised crime in New Zealand.<sup>2</sup> Information obtained from the Ministry of Justice reveals the use and success of prosecution under s 98A.<sup>3</sup> The information is detailed in Appendix 1 and illustrates that the rate of conviction under s 98A is far lower than the national average. Since its enactment only 21% of offenders charged under s 98A have been convicted. This is compared to a conviction rate of 78.31% in respect of all criminal charges over the same period (1999-2014). Immediately, this low rate suggests that there is something problematic with s 98A. Although this paper cannot prove why this rate is so low, it identifies three factors which may lead to the low rate:

- a) the genesis of s 98A has meant it has mixed conceptual origins;
- b) the burden on the prosecution to establish the group’s prohibited objective is difficult to satisfy; and
- c) s 98A is often regarded in practice as a subsidiary offence whereby the practicalities of prosecuting under the provision frequently require withdrawal of the charges.

This paper suggests that although s 98A may be useful in the fight against organised crime as an evidence gathering and efficiency enhancing tool it is nonetheless problematic and unprincipled.

However, in order to give context to this analysis, an understanding of what is meant by organised crime must first be established. It is to this definition the paper first turns.

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<sup>1</sup> Crimes Act 1961, s 98A.

<sup>2</sup> Organised and Financial Crime Agency New Zealand *Organised Crime in New Zealand 2010* (New Zealand Police September 2010) at 4.

<sup>3</sup> Ministry of Justice “Official Information Act 1982 Request” (4 May 2015) 52815 (Obtained under Official Information Act 1982 Request to the District Courts, Ministry of Justice); Ministry of Justice “Official Information Act 1982 Request” (25 June 2015) 53443 (Obtained under Official Information Act 1982 Request to the District Courts, Ministry of Justice)

## A *Defining organised crime*

There is no agreed-upon definition of ‘organised crime’<sup>4</sup> or its key features,<sup>5</sup> yet the term has widespread popular and political use.<sup>6</sup> Despite a lack of definition, two approaches exist through which ‘organised crime’ is targeted by legislation. These are:<sup>7</sup>

- a) the functional approach which targets specific criminal activities of a certain gravity or type. The particular activities, ‘the what’, are considered ‘organised crime’; or
- b) the organisational approach which targets actors within a particular group structure involved in criminal activities. Conviction is dependent on ‘who’ the offending occurred with.

Due to a combination of functional and organisational approaches the New Zealand government has no less than 16 agencies involved in preventing and detecting ‘organised crime.’<sup>8</sup> The term ‘organised crime’ also justifies the introduction of legal provisions<sup>9</sup> bringing “an emotional kick which makes it easier to get resources and powers”.<sup>10</sup>

Campbell observes that phrases such as ‘organised crime’ in a legal and popular context “impart a certain moral opprobrium” useful for creating momentum that justifies legislative solutions to the alleged or perceived harms posed by ‘organised crime’.<sup>11</sup> Accordingly, an understanding of organised crime is linked with the harms implied by it. However, it is difficult to elucidate the specific harms meant by the term ‘organised crime’ as perceptions of it change in time and place depending on social context.

This difficulty is compounded by a tension between the local and international dimensions of organised crime. On one hand the General Assembly of the United Nations (UN) is “deeply concerned by the negative... implications related to organized criminal activities” on a

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<sup>4</sup> Petrus van Duyne “The phantom and threat of organized crime” (1995) 24(4) *Crime, Law and Social Change* 341 at 343.

<sup>5</sup> Zhivan Alach “An incipient taxonomy of organised crime” (2011) 14(56) *Trends Organ Crim* 56 at 59.

<sup>6</sup> James Finckenaue “Problems of definition: What is organized crime?” (2005) 8(3) *Trends Organ Crim* 63 at 63.

<sup>7</sup> Liz Campbell *Organised Crime and the Law: A Comparative Analysis* (Oxford, Portland, 2013) at 13; Alach, above n 5, at 60.

<sup>8</sup> Ministry of Justice *Strengthening New Zealand’s Resistance to Organised Crime: an all-of-Government Response* (August 2011) at 14.

<sup>9</sup> Campbell, above n 7, at 12.

<sup>10</sup> Michael Levi “Perspectives on Organised Crime: An overview” in Howard *Journal Reflections on Organised Crime: patterns and control* (Blackwell Publishers, Oxford, 1998) at 336.

<sup>11</sup> Campbell, above n 7, at 16.

transnational or international level.<sup>12</sup> However, in contrast there is an understanding that the harms of organised crime are best assessed in a specific local context because the fluidity of organised crime means “its profile may differ from one part of the world to another.”<sup>13</sup> Attempts to address the harms of organised crime must be expressed in a local context within the scope of international understanding, objectives and agreements. In the case of s 98A and this paper, New Zealand is the specific local context.

## *B Section 98A*

Section 98A was introduced into the Crimes Act 1961 in 1998<sup>14</sup> and has been amended in 2002<sup>15</sup> and 2009. It currently reads:<sup>16</sup>

### **98A Participation in organised criminal group**

- (1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
- (a) knowing that 3 or more people share any 1 or more of the objectives (the **particular objective or particular objectives**) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
  - (b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and
  - (c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.
- (2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—
- (a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
  - (b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
  - (c) the commission of serious violent offences; or
  - (d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the

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<sup>12</sup> *United Nations Office on Crime and Drugs, United Nations Convention Against Transnational Organized Crime And The Protocols Thereto* GA Res 55/25, A/Res/55/25 (2000).

<sup>13</sup> David McClean *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, New York, 2007) at 1.

<sup>14</sup> Crimes Act 1961(repealed June 18 2002), s 98A.

<sup>15</sup> Crimes Act 1961(repealed 1 December 2009), s 98A.

<sup>16</sup> Crimes Act 1961, s 98A.

commission of serious violent offences.

- (3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—
- (a) some of them are subordinates or employees of others; or
  - (b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
  - (c) its membership changes from time to time.

### *1 Summary of the elements*

#### a) Organised criminal group

An organised criminal group is defined as three or more people sharing a common objective which is prohibited (“prohibited objective”). These are:

- (a) obtaining material benefits from the commission of offences punishable by four years imprisonment;<sup>17</sup> or
- (b) the commission of serious violent offences.<sup>18</sup> A serious violent offence is defined as an offence punishable by 7 years imprisonment which involves either: loss of person’s life; serious risk of loss of life; serious injury; risk of serious injury; serious damage to property endangering the physical safety of a person or a perversion of the course of justice by violent means;<sup>19</sup> or
- (c) activities amounting to either (a) or (b) committed outside New Zealand.<sup>20</sup>

The 2009 amendment altered the threshold for violent offences, reducing it from 10 years to seven making s 98A applicable to more offences.

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<sup>17</sup> Section 98A(2)(a).  
<sup>18</sup> Section 98A(2)(c).  
<sup>19</sup> Crimes Act, s 2.  
<sup>20</sup> Sections 98A(2)(b) and (c).

b) Actus reus

Section 98A is a conduct crime that requires participation in the organised criminal group.<sup>21</sup> ‘Participate’ is not defined in the legislation but carries its ordinary meaning, requiring some overt conduct that will or may contribute to criminal activity that in turn will or may advance the prohibited objective of the group.<sup>22</sup>

c) Mens rea

There are three cumulative *mens rea* elements which must be satisfied in order for conviction under s 98A.<sup>23</sup> An offender must participate with:

- (a) knowledge of the group’s prohibited objective;<sup>24</sup>
- (b) knowledge that, or be reckless as to whether, their conduct contributes to any criminal activity;<sup>25</sup>
- (c) knowledge that, or be reckless as to whether, their conduct contributes to achieving the prohibited objective of the group.<sup>26</sup>

(i) Clarification of mens rea

These three elements were introduced in 2009 and clarified the two *mens rea* elements previously required. Between 2002 and 2009 an offender under s 98A must have had:

- (a) knowledge that the group was an organised criminal group;<sup>27</sup> and
- (b) knowledge or recklessness as to whether their conduct contributes to the occurrence of criminal activity.<sup>28</sup>

The 2009 amendment made it explicit that the offender does not have to share the prohibited objective of the group, merely know of it and that offenders can contribute to any criminal activity, not necessarily that which renders the group an organised criminal group under subs (2). The only way in which an offender’s own criminal offending must relate to the group is that it contributes to achieving the group’s prohibited objective.

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<sup>21</sup> Section 98A(1).  
<sup>22</sup> *R v Ngaheu* HC Rotorua CRI-2009-063-102, 1 April 2010 at [27].  
<sup>23</sup> *Te Kahu v R* [2012] NZCA 473 at [14].  
<sup>24</sup> Section 98A(1)(a).  
<sup>25</sup> Section 98A(1)(b).  
<sup>26</sup> Section 98A(1)(c).  
<sup>27</sup> Crimes Act 1961(repealed 1 December 2009), s 98A(1).  
<sup>28</sup> Crimes Act 1961(repealed 1 December 2009), ss 98A(1)(a) and 98A(1)(b).

#### d) Punishment

The original penalty set in 1998 was a maximum of three years imprisonment. This was increased to five years in 2002 and 10 in 2009, marking a shift in Parliament's view of the severity of organised crime.<sup>29</sup>

Despite the increasing severity and intention of Parliament, the conviction rate under s 98A remained low, only increasing to an average of 25% between 2009 and 2014.

## II Genesis of s 98A

In order to appreciate the factors which could potentially lead to s 98A's low conviction rate one must first gain a sense of the character of the provision and establish the context in which s 98A developed. Section 98A is a product of two distinct influences. On one hand, the section was created in 1998 as a specific mechanism to address New Zealand gangs and accordingly criminalised "participation in a criminal gang". On the other hand, it was amended in 2002 due to New Zealand's obligation to ratify the United Nations Convention on Transnational Organised Crime (UNTOC). These two influences take different approaches to address organised crime, one functional (where particular actions are criminalised) and the other organisational (where particular members or actors are criminalised).

### A 1998 enactment

Section 98A was first introduced on August 20 1996 as part of the Criminal Associations and Harassment Bill (HCA Bill). The HCA Bill was seen as "the most wide-ranging legislative thrust at gangs the country had ever attempted"<sup>30</sup> however, it was not the first legislative attempt to crack-down on gang activity and offending.

#### 1 Previous measures to address gangs

During the 1970s legislative and policy measures aimed at addressing the "gang problem" in New Zealand were first introduced.<sup>31</sup> There were suppressive legislative amendments such as the Police Offences Amendment Act 1979 which gave the police extensive powers to search vehicles under "reasonable suspicion" they were carrying firearms<sup>32</sup>, and the Sale of Liquor

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<sup>29</sup> See Sentencing Act 2002, s 7.

<sup>30</sup> Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013) at 220.

<sup>31</sup> Rawiri Taonui and Greg Newbold "Staunch: Māori Gangs in Urban New Zealand" in Joseph Lewandowski and Gregory Streich *Urban Social Capital: Civil Society and City Life* (Ashgate Pub Co, Surrey, 2012) at 171.

<sup>32</sup> Police Offences Amendment Act 1979 (No 133).

Amendment Act 1979 which gave pub owners the ability to ban gang patches from their drinking establishments.<sup>33</sup> Other, more social approaches included the Group Employment Liaison Scheme ('GELS') established in 1982 which sought to target "hard-to-reach groups" suffering from unemployment, including gangs.<sup>34</sup> Prime Minister Robert Muldoon said that as a result of GELS the gangs had calmed down and gang conflict was reducing.<sup>35</sup>

Thus, gangs have continually been in Parliament's focus since the 1970s, where it has sought to implement an organisational approach to address organised crime. This organisational approach led to the creation of s 98A.

## 2 Social context for s 98A

Conflict between 'Bikie gangs' in the South Island during the mid-1990's gained nation-wide media attention. Tensions between two Christchurch gangs erupted into the public arena in 1996. Between March and April, three public shootings<sup>36</sup> "upset the gang-community balance."<sup>37</sup> Similar violence was also occurring in Invercargill as the 'Black Power' gang clashed with the 'Road Knights' as Black Power attempted to establish a chapter in the city.<sup>38</sup> The attempted bombing of the Black Power headquarters<sup>39</sup> and multiple shootings<sup>40</sup> ensured the issue of gangs was squarely in the public eye.

Using the terminology of Ronald Huff, this violence in Invercargill and Christchurch acted as a series of "catalytic events" that helped gain political attention.<sup>41</sup> In April 1996 Invercargill mayor David Harrington petitioned Parliament calling for more police power to "prevent further clashes occurring".<sup>42</sup> Mike Moore MP called for legal measures "at a level of intensity and vigour so that it's just not worth being associated with these kinds of people".<sup>43</sup> In response

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<sup>33</sup> Sale of Liquor Amendment Act 1979 (No 67).

<sup>34</sup> P Plunkett P, J Hynes, D Crossan *Review of The Employment Liaison Service (GELS)* (Department of Labour, 1986) at 14.

<sup>35</sup> Karen Brown "Gang strife down as work skills on the rise" *The Evening Post* (Wellington, 11 May 1986) at 22.

<sup>36</sup> "Four in court after shot fired at car" *New Zealand Herald* (Auckland 20 March 1996) at 4; "Police keep pressure on gangs to maintain peace" *New Zealand Herald* (Auckland 18 March 1996) at 16; "Police union demands more anti-gang power" *New Zealand Herald* (Auckland, 30 April 1996) at 4.

<sup>37</sup> Gilbert, above n 30, at 208.

<sup>38</sup> Gilbert, above n 30, at 209.

<sup>39</sup> "Armed police keeping Invercargill peaceful" *New Zealand Herald* (Auckland, 7 March 1996) at 15.

<sup>40</sup> "Gangs 'making life untenable'" *New Zealand Herald* (Auckland 18 April 1996) at 17.

<sup>41</sup> C. Ronald Huff *Gangs in America* (1<sup>st</sup> ed, Thousand Oaks: Sage Publications, 1996) at 312.

<sup>42</sup> *New Zealand Herald*, above n 43.

<sup>43</sup> "Moore wants tough new laws to smash gangs" *New Zealand Herald* (Auckland, 1 May 1996) at 2.

to sustained pressure, the government announced a Justice and Law Reform Select Committee investigation of gangs.<sup>44</sup>

This extended focus on gangs in the media and public sphere is an example of “moral panic” where:<sup>45</sup>

‘[a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion...’

The Labour Party used a leaked police report on an alleged merger of gangs to establish the gang issue as a “definite matter of urgent public importance.”<sup>46</sup> Drawing on comments made by the New Zealand Police Commissioner stating that “we [New Zealand] have just five years to get on top of this problem or it will become unbeatable and ungovernable”<sup>47</sup> the Labour Party and the media established the gangs as ‘folk devils’ – those whose nature is cast as entirely negative or harmful.<sup>48</sup> The HCA Bill was the National Government’s response to this moral panic in the lead up the 1996 General Election, ensuring they were not seen as “soft on law and order” and the country’s folk devils.<sup>49</sup> The HCA Bill received bipartisan support through parliament with only the Alliance Party opposing the measure.<sup>50</sup>

### 3 *The model*

Section 98A was originally modelled on the Californian State Terrorism Enforcement and Prevention Act (STEP) 1988.<sup>51</sup> STEP took an organisational approach to address “the state of crisis” and identified gangs based on who the members were, rather than the activities the gang carried out.<sup>52</sup> STEP’s purpose was to eradicate the “clear and present danger to public order and safety” as well as the “terror created by street gangs”.<sup>53</sup> The Legislature recognised that “in Los Angeles County alone there were 328 gang-related murders in 1986, and that gang homicides in 1987 have increased 80 percent over 1986.”<sup>54</sup> By comparison, empirical evidence of harm, let alone evidence as confronting as California’s, was missing from discussion in New

<sup>44</sup> “MPs to focus on gang activities” *New Zealand Herald* (Auckland, 9 May 1996) at 5.

<sup>45</sup> Stanley Cohen *Folk Devils and Moral Panics* (St Martin’s Press, New York, 1980) at 9.  
<sup>46</sup> (25 June 1996) 556 NZPD 13351.

<sup>47</sup> *Ibid.*

<sup>48</sup> Cohen, above n 45, at 17.

<sup>49</sup> (25 June 1996) 556 NZPD 13361.

<sup>50</sup> (27 November 1997) 565 NZPD 5729.

<sup>51</sup> (20 November 1997) 565 NZPD 5532; Timothy Mullins “Broader Liability for Gang Accomplices: Participating in a Criminal Gang” (1998) 8 *Auckland U L Rev* 832.

<sup>52</sup> State Terrorism Enforcement and Prevention Act Cal Pen Code § 186.21.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

Zealand. Instead of statistical evidence, it was moral panic which ensured New Zealand's gang issue was of "urgent public importance".<sup>55</sup>

#### 4 *The harms addressed*

A theme emerged during each of the HCA Bill's readings that "the time has come to get tough"<sup>56</sup> on gang activity because they had become "increasingly sophisticated and organised".<sup>57</sup> MPs justified all provisions of the Bill, in particular s 98A, on the basis that gangs were "becoming incredibly business-like"<sup>58</sup> even comprising "sophisticated illegal business"<sup>59</sup> around the "Business Roundtable of the underworld."<sup>60</sup> Labour MP Phil Goff utilised the quintessential words: "we are talking about organised crime."<sup>61</sup>

Despite comments on gangs' "business-like" qualities, repeated discussion of drug-dealing marked the only substantive description of such activities carried out by gangs.<sup>62</sup> Any other indication of gangs' "sophistication" as profit-driven enterprises was missing suggesting this tone was political rhetoric designed to provide an "emotive kick".<sup>63</sup>

Instead, violent behaviour, such as the public shootings in Christchurch and Invercargill, more accurately comprised the fundamental features of 'organised crime' in the context of the HCA Bill. Violence and intimidation meant gangs were portrayed as 'folk devils' in the public arena and were the primary catalysts behind the HCA Bill's introduction. A statement submitted at the HCA Bill's third reading that much of New Zealand's violent crime stems from the gangs, a statement supported by the media's portrayal of them, attests to the central role violence played in the passage of the HCA Bill and its conceptualisation of organised crime.<sup>64</sup>

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<sup>55</sup> (25 June 1996) 556 NZPD 13351.

<sup>56</sup> (20 November 1997) 565 NZPD 5532.

<sup>57</sup> Ibid.

<sup>58</sup> (20 November 1997) 565 NZPD 5536

<sup>59</sup> (20 November 1997) 565 NZPD 5542.

<sup>60</sup> (20 November 1997) 565 NZPD 5549.

<sup>61</sup> (20 November 1997) 565 NZPD 5534.

<sup>62</sup> (20 November 1997) 565 NZPD 5536; (27 November 1997) 565 NZPD 5730, 5742, 5744; (25 June 1996) 556 NZPD 13357.

<sup>63</sup> See Levi, above n 10.

<sup>64</sup> (27 November 1997) 565 NZPD 5732.

## 5 Structure

Originally s 98A criminalised participation in a “criminal gang”, a group of three or more people, at least three of whom had been convicted on separate occasions for offences punishable by 10 years or more imprisonment or of offences<sup>65</sup> that were listed in the section.<sup>66</sup>

Section 98A originally applied an organisational approach where liability was dependent ‘who’ the gang members carrying out the offending were. An organisational approach targets particular groups rather than a type of offending. With this target in mind, s 98A enabled gang membership to be criminalised as far as possible without patently impeaching freedom of association and other civil rights.<sup>67</sup>

Accordingly, the *mens rea* elements of the offence required knowledge about the group’s members rather than knowledge of a prohibited objective as is required under the current provision. In order to be liable under the original s 98A an offender must have:

- (a) participated in the gang, knowing it was a criminal gang,<sup>68</sup> or
- (b) intentionally promoted or furthered any offence by a member of a criminal gang.<sup>69</sup>

A warning mechanism was included in s 98A(5), enabling police to issue warnings to potential offenders that their conduct was considered part of a criminal gang, thus ensuring the prosecution could establish the required knowledge of group membership at trial.<sup>70</sup>

## 6 Purpose

The dominant purpose of the original s 98A offence was to prevent recruits from joining gangs and becoming folk devils in the community.<sup>71</sup> Section 98A would act as a “preventative mechanism” not allowing gangs “to take advantage of alienated youth.”<sup>72</sup> Although it remained unclear how recruitment in gangs was specifically targeted by s 98A, numerous advocates

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<sup>65</sup> The listed offences were: conspiring to defeat justice, corrupting juries and witnesses, wounding or injuring with intent, aggravated injury, theft, money laundering, receiving property dishonestly obtained, dealing in controlled drugs prohibited by the Misuse of Drugs Act 1975; or using or carrying a weapon prohibited by the Arms Act 1983

<sup>66</sup> Crimes Act 1961(Repealed June 18 2002), s 98A(1).

<sup>67</sup> Mullins, above n 51, at 853.

<sup>68</sup> Crimes Act 1961(Repealed June 18 2002), s 98A(2)(a).

<sup>69</sup> Ibid, s 98A(2)(b).

<sup>70</sup> Ibid, s 98A(5).

<sup>71</sup> (20 November 1997) 565 NZPD 5532.

<sup>72</sup> (20 November 1997) 565 NZPD 5535.

stated that s 98A's emphasis on recruitment would address the gang problem in New Zealand by stopping individuals becoming "lifelong criminals."<sup>73</sup>

Alongside the already mentioned warning mechanism under s 98A(5), a deterrent purpose could only be realised if s 98A was enforced with some regularity, illustrating to potential gang members they ran a real risk of imprisonment.<sup>74</sup>

In addition, because Parliament took an organisational rather than functional approach in creating s 98A, it was a substantive offence which did not require proof of liability for another criminal offence. This would help the police prosecute more gang members. In particular, it could be used to convict those who were seen as leaders within the gang but did not specifically carry out the criminal tasks.<sup>75</sup>

However, the original offence under s 98A was rarely used to prosecute any gang members. From its conception in 1998 until 2002 there were just 15 people charged with only two of those resulting in successful conviction.<sup>76</sup>

### *B 2002 Amendment*

After the UN Commission on Crime Prevention and Criminal Justice recommended discussion about "organised transitional crime" in 1993, the World Ministerial Conference adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime in November 1994.<sup>77</sup>

The Action Plan established that organised crime is a "highly destabilising and corrupting influence on fundamental social, economic and political institutions".<sup>78</sup> The profit motive was seen by the Conference to be "at the heart of organized crime."<sup>79</sup> The UN Secretary-General noted that the destabilising power of organised crime stemmed from this profit motive and the corresponding ability of criminal organisations to penetrate national economies "poisoning the

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<sup>73</sup> (27 November 1997) 565 NZPD 5730. See also (20 November 1997) 565 NZPD 5532, 5545, 5555; (27 November 1997) 565 NZPD 5738.

<sup>74</sup> Andrew Ashworth *Principles of Criminal Law* (6<sup>th</sup> ed, Oxford University Press, Oxford, 2009) at 16.

<sup>75</sup> (20 November 1997) 565 NZPD 5559.

<sup>76</sup> "Official Information Act 1982 Request", above n 3.

<sup>77</sup> The recommendation was approved by *Crime Prevention and Criminal Justice* GA Res 48/103 A/Res/48/103 (1993).

<sup>78</sup> *World Ministerial Conference on Organized Transnational Crime: Naples Political Declaration and Global Action Plan against Organized Transnational Crime* GA Res 49/748, A/49/748 (1994) at 5.

<sup>79</sup> *World Ministerial Conference on Organized Transnational Crime: Organization of the World Ministerial Conference* GA Res 49/748, A/49/748 (1994) at 22.

business climate, corrupting political leaders and undermining human rights”.<sup>80</sup> The Declaration held the fight against organised crime needed to focus on defeating the economic power of criminal organizations.<sup>81</sup> The Conference thus promoted “substantive legislation penalizing participation in criminal associations”,<sup>82</sup> and discussed the definition of organized transnational crime. The Declaration listed six characteristics of organised crime including group organisation and violence or corruption used to earn profits or control markets.<sup>83</sup>

### 1 UNTOC

As signed by New Zealand in 2002,<sup>84</sup> UNTOC did not contain any definition of organised crime or list the types of crimes which it might constitute. Instead it defined an “Organised criminal group” as:<sup>85</sup>

a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes [offences punishable by a maximum deprivation of liberty of at least four years<sup>86</sup>] or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

The absence of a definition illustrates the difficulties in such an exercise and also allows UNTOC to apply to new types of offending as they emerge. Such flexibility recognises that organised criminals will engage in varying activities according to where the opportunities to gain financial benefits are available.<sup>87</sup> The UN is clearly taking a functional approach to organised crime whereby criminalisation is contingent on particular criminal activities as opposed to the original s 98A which criminalised using the organisational approach, contingent on who carried out the offending.

The requirement for the offences to be committed for profit “proved controversial” as some delegations thought this element was too limiting.<sup>88</sup> The Interpretive Notes to the Convention respond to this criticism by holding this requirement should be understood broadly. It can include crimes where the predominant motive may be sexual gratification, for example, the

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<sup>80</sup> Ibid, at 18.

<sup>81</sup> *Naples Political Declaration*, above n 78, at [35].

<sup>82</sup> At [15].

<sup>83</sup> At [12].

<sup>84</sup> *Convention against Transnational Organized Crime*, above n 12.

<sup>85</sup> Ibid, art 2(a).

<sup>86</sup> Ibid, art 2(b).

<sup>87</sup> *Naples Political Declaration*, above n 78, at [39].

<sup>88</sup> McCLean, above n 13, at 40.

trade of material by members of a child pornography ring.<sup>89</sup> Nonetheless, the inclusion of this element is a clear reflection of the UN's understanding that a profit motive is at the heart of organised crime.<sup>90</sup>

a) Article 5

Article 5 requires state parties to:<sup>91</sup>

1. ...establish as criminal offences, when committed intentionally:

... (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

(a) Criminal activities of the organized criminal group;

(b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

As elaborated below, UNTOC requires criminalisation of conduct which, "committed intentionally", comprises "an active part" in the activities of the organised criminal group.<sup>92</sup> UNTOC therefore envisages liability with a *mens rea* threshold of intention.

## 2 *Incorporation into New Zealand law*

UNTOC's provisions were incorporated into New Zealand legislation by the Transnational Organised Crime Bill 2002 (TOC Bill).<sup>93</sup> The TOC Bill formulated a range of new offences, particularly in respect of people smuggling and trafficking, the subject of the two protocols to UNTOC. Most discussion of the TOC Bill focussed on these provisions. The 'Tampa Incident' of August 2001 in which 130 asylum seekers were granted refugee status in New Zealand after they were denied asylum in Australia may have been a catalyst for this focus.<sup>94</sup> However the TOC Bill also extended the existing offence in s 98A to criminalise participation in an

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<sup>89</sup> *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, A/55/383/Add. 1 (2000) at [3].*

<sup>90</sup> *World Ministerial Conference*, above n 79, at 22.

<sup>91</sup> *Convention against Transnational Organized Crime*, above n 12, art 5.

<sup>92</sup> *Convention against Transnational Organized Crime*, above n 12, art 5(1).

<sup>93</sup> This Bill was later split into multiple Amendment Acts amending the Crimes Act 1961 and other pieces of legislation.

<sup>94</sup> See Mary Crock "In the wake of the Tampa: Conflicting visions of International Refugee Law in the management of refugee flows" (2003) 12 Pac Rim L & Pol'y J 49.

organised criminal group. Section 98A was altered by largely transposing Article 2 and Article 5 of UNTOC into the Crimes Act 1961.

The significance of the change made to s 98A in 2002 was downplayed in Parliament. During the TOC Bill's second reading the Minister of Justice wrongfully stated that the TOC Bill "extends the existing offence of *participation in a criminal group* [rather than "criminal gang"] to cover international criminal groups" (emphasis added).<sup>95</sup> This statement tactfully avoided highlighting that s 98A was previously a mechanism particular to New Zealand's gang situation. Only the Green Party's Keith Locke identified that "the thrust of the bill is much broader than people-smuggling... [it] drastically changes all our domestic law on criminal association".<sup>96</sup>

### 3 *Adoption of the functional approach*

The fact that s 98A was altered without much scrutiny in Parliament does not necessarily mean it was an ill-conceived amendment. Ratification of UNTOC specifically required New Zealand to criminalise participation in a criminal group.<sup>97</sup> Section 98A defined and criminalised participation in an 'organised criminal group', following the definitions of 'serious offence'<sup>98</sup> and 'organised criminal group' contained in UNTOC.<sup>99</sup>

The introduction of the "organised criminal group" removed the concept of "criminal gang", dramatically changing the way in which organised crime was criminalised in the local context. The organisational approach previously adopted against organised crime was replaced by UNTOC's functional approach whereby criminalisation was contingent on the commission of offences of a certain gravity.

By removing the "criminal gang" it was no longer required for at least three members of the criminalised group to have committed previous qualifying offences.<sup>100</sup> Thus an organised criminal group is broader than a criminal gang which required members to be convicted criminals. The warning mechanism in s 98A(5) was also removed.

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<sup>95</sup> (30 May 2002) 601 NZPD 16727.

<sup>96</sup> (30 May 2002) 601 NZPD 16735.

<sup>97</sup> *Convention against Transnational Organized Crime*, above n 12, art 5.

<sup>98</sup> The threshold for 'serious offence' was the same in both instruments - four years imprisonment.

<sup>99</sup> *Convention against Transnational Organized Crime*, above n 12, art 2.

<sup>100</sup> Crimes Act 1961(repealed June 18 2002), s 98A(1).

#### 4 *An accurate ratification?*

On first appraisal, the new look s 98A appeared a reasonable incorporation of UNTOC; those who would have been caught participating in a criminal gang could still be criminalised as part of an organised criminal group. However in amending s 98A, Parliament surpassed the obligations imposed by UNTOC in two ways:

- a) As mentioned above, UNTOC envisages liability with a *mens rea* threshold of intention. Liability under s 98A is much broader than this and can be found if an offender is “reckless”.<sup>101</sup> Although a *mens rea* threshold of recklessness is not prohibited by UNTOC, it does constitute a considerable extension to the grounds on which liability can be found.

Justification for this extension was not provided by Parliament nor the Select Committee. However the widening of s 98A could “expand the ability of police to smash” criminal organisations<sup>102</sup> and by lowering the threshold thus increasing the scope of s 98A, it could also be presumed successful convictions under the section would become more frequent, improving the conviction rate from a lowly 13.3%.<sup>103</sup>

- b) Under UNTOC, the objectives or aims of an organised criminal group are limited to obtaining a “financial or other material benefit”.<sup>104</sup> Under s 98A, the objectives of an organised criminal group can be much more diverse. Instead of requiring them to seek financial or other material benefits, s 98A enables criminalisation of the group if one of their objectives is “the commission of serious violent offences that are punishable by imprisonment for a term of 10 years or more”.<sup>105</sup>

The inclusion of the violent offences objective manifestly extends the ambit of s 98A beyond that intended by UNTOC. It allows a group to be criminalised for reasons disparate from those in UNTOC, no matter how broadly ‘material benefit’ is

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<sup>101</sup> Crimes Act 1961(repealed 1 December 2009), s 98A(1)(b).

<sup>102</sup> (30 May 2002) 601 NZPD 16737.

<sup>103</sup> Rate of conviction under s 98A from 1998-2002, Appendix 1.

<sup>104</sup> *Convention against Transnational Organized Crime*, above n 12, art 2(a).

<sup>105</sup> Crimes Act 1961(repealed 1 December 2009), s 98A(2)(c); note, this threshold is currently offences punishable by seven years imprisonment.

interpreted.<sup>106</sup> It also retains some of the original thinking behind s 98A – that organised crime is perpetrated by violent gangs.

Parliament clearly intended this extension as New Zealand’s obligations under UNTOC were satisfied by s 98A(2)(a) and it nonetheless proceeded to include the objective of serious violent offences under s 98A(2)(c). The extension ignores not only the specific definition of ‘organised criminal group’ in UNTOC but also the UN’s perception that the profit motive would always be “at the heart of organized crime.”<sup>107</sup>

### *C A tension in approach*

It is apparent that the HCA Bill and TOC Bill were products of very different circumstances and accordingly tension is present between them. Central to this tension is their conflicting vision of what constitutes ‘organised crime’ stemming from their respective organisational and functional approaches. The Bills also diverge in their perception of what harm organised crime poses to society. As a product of a moral panic which stressed the violent nature of gangs, the HCA Bill’s conceptualisation of organised crime is inherently linked to violence and adopts a purely organisational approach. Alternatively, the TOC Bill clearly emphasises profit driven enterprise as crucial in its conceptualisation of organised crime and criminalises under a functional approach. This conflict highlights the difficulties absence of a definition of organised crime can create; although both bills seek to address organised crime, the two target distinct types of offending.

This conflict manifests in s 98A. A group can be deemed an organised criminal group if the members share a prohibited objective of either maintaining benefits from the commission of offences or committing serious violent offences.<sup>108</sup> The later prohibited objective “marks a sharp departure from general concepts of organised crime... It encompasses situations that may be purely emotional or spontaneous”.<sup>109</sup> The inclusion of this objective in s 98A is a consequence of perceiving organised crime as necessarily involving violence. This inclusion is in spite of the s 98A’s primary influence, UNTOC, being only concerned with profit-driven crime in its functional approach. Thus, the influence of the HCA Bill’s moral panic and its

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<sup>106</sup> *Report of the Ad Hoc Committee*, above n 89, at [3].

<sup>107</sup> *World Ministerial Conference*, above n 79, at 22.

<sup>108</sup> Section 98A(2).

<sup>109</sup> Andreas Schloenhardt “Mafias and Motorbikes: New Organised Crime Offences in Australia” (2007) 19 *CICJ* 259 at 264.

organisational approach where violent gang members perpetrate organised crime has been incorporated into s 98A.

### III Problems of principle

The tension stemming from s 98A's mixed conceptual origins are compounded when s 98A is evaluated against some commonly held principles of criminalisation. Concerns that s 98A may not always provide principled outcomes may influence the provision's rate of successful conviction: prosecutors may be less willing to execute charges under s 98A or decision makers in the form of judges and juries may be reluctant to impose unprincipled criminal liability.

#### A *Minimalism and certainty*

The scope of s 98A is wide as it seeks to capture as much offending as possible in order to address two distinct harms – violent offending and profit-driven offending. This breadth acknowledges that organised crime is by nature variable<sup>110</sup> and is justified by claims of 'social defence'; the law responds to a social concern about which "something must be done".<sup>111</sup> In s 98A's case, "the threats against New Zealand's communities, borders, and economy" stemming from organised crime.<sup>112</sup>

However, such breadth does not sit comfortably with the principles of minimal criminalisation and maximum certainty which view the criminal law as last resort<sup>113</sup> and something that should not be given wide or vague scope in the face of indefinite harms.<sup>114</sup> The woolliness of s 98A leaves law enforcement agents considerable discretion to use and apply it as they wish and on this basis the provision appears apparently unprincipled.

#### B *Fair Labelling*

Conviction under s 98A does not identify offenders on the basis of their group's objective; there is no distinction between violent and profit-seeking offenders. This is despite the courts viewing "offending under s 98A with the objective of committing serious violent offences... more seriously than offending with the objective of obtaining material benefits".<sup>115</sup> Similarly, s 98A does not distinguish between different levels of involvement within the criminal group, leaving this instead to the sentencing judge.

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<sup>110</sup> Ministry of Justice, above n 8, at 7.

<sup>111</sup> Ashworth, above n 74, at 53.

<sup>112</sup> Ministry of Justice, above n 8, at 6.

<sup>113</sup> Ashworth, above n 74, at 31-33.

<sup>114</sup> Ibid, at 65.

<sup>115</sup> *R v Mitford* [2005] 1 NZLR 753 at [61].

Consequently, conviction for participating in an organised criminal group can misrepresent the offender's level of participation in the criminal offending and the offending itself. Conviction under s 98A does not fairly reflect the precise nature, magnitude and moral wrongfulness of the actions of a specific offender.<sup>116</sup> In this sense s 98A is unprincipled and could be said to have a "major weakness".<sup>117</sup>

## IV Factors contributing to s 98A's low conviction rate

### A *Burden to establish group objective*

Although s 98A creates a substantive offence that arises out of a group structure it no longer criminalises individuals based on the membership of the group they were participating in; participation under s 98A is not synonymous with association.<sup>118</sup> If s 98A's application extended to mere membership, a group member's right to freedom of association would be severely infringed.<sup>119</sup> This means that members of groups ostensibly most likely to comprise organised criminal groups (for example prominent gangs like the Mongrel Mob or Black Power) due to their public nature and perception are not penalised merely for their membership. It has been realised that "a high degree of protection of civil liberties" is needed to ensure group membership itself is not criminalised.<sup>120</sup>

Civil liberties are protected by the burden on the prosecution to establish the group had a common prohibited objective under s 98A(2). Two of the three *mens rea* elements of the offence relate to this objective: an offender under s 98A must have knowledge of the group's prohibited objective;<sup>121</sup> and that offender must have knowledge that or be reckless as to whether their criminal activity contributes to the group's prohibited objective.<sup>122</sup> The difficulty of satisfying this burden may contribute to s 98A's low conviction rate.

### 1 *Inference of objective*

An objective is to be assessed prospectively, before the events take place.<sup>123</sup> Interception of communication is therefore a powerful tool used to establish this knowledge, however its use

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<sup>116</sup> Barry Mitchell "Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling" (2001) 63(3) MLR 393 at 398.

<sup>117</sup> Schloenhardt, above n 109, at 266.

<sup>118</sup> *Quin v R* HC Auckland CRI-2004-044-7103, 13 March 2006 at [13].

<sup>119</sup> Bill of Rights Act 1990, s 17.

<sup>120</sup> (30 June 1996) 556 NZPD 5732.

<sup>121</sup> Section 98A(1)(a).

<sup>122</sup> Section 98A(1)(c).

<sup>123</sup> *Tamati v R* [2013] NZCA 535 at [28].

is constrained by the limited availability of interception resources; “interception operations are resource-intensive”.<sup>124</sup> It is also improbable that evidence specifically documenting the group’s objectives is obtainable. Accordingly, evidence which establishes this knowledge can be difficult to produce.<sup>125</sup> Without such evidence, a prosecution will have to infer the group’s objective from their conduct.<sup>126</sup> The need for inference was acknowledged by Hammond J who held:<sup>127</sup>

“it is difficult to see how the Crown can get a conviction under the s 98A charge without traversing the alleged criminal activity of the individuals who were part of the group.”

At times a whole Crown case can rest on inferences drawn from the conduct of the accused.<sup>128</sup>

Knowledge of the prohibited objective must be specific: it “must include knowledge that the group’s objective involves the commission of relevant offences.”<sup>129</sup> Therefore, “traversing the criminal activity” of the group’s members enables the Crown to establish knowledge of the specific acts or offences that were carried out as part of the prohibited objective. This means that in many cases some other form of substantive offending will necessarily be established as part of the *de facto* prosecutorial approach to s 98A, despite not being required. The charge under s 98A could be described as predicated on these other substantive offences. Indeed, the Court of Appeal held substantive offending “will often be powerful evidence of breach of s 98A” similar to overt acts in a conspiracy.<sup>130</sup>

The difficulties of establishing knowledge of the prohibited objective were captured in *R v Tamati*.<sup>131</sup> The case concerned a shootout between members of the Mongrel Mob gang in Wairoa. After Tamati had his patch forcefully removed he vowed to return to the gang’s clubhouse where the ‘de-patching incident’ took place.<sup>132</sup> When Tamati and his supporters returned the following morning with firearms a gun fight broke out where at least 25 shots were fired.<sup>133</sup> Arnold J held the Crown was unable to prove beyond reasonable doubt that Tamati’s

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<sup>124</sup> New Zealand Police Association “Submission to the Law and Order Committee on the Gangs and Organised Crime Bill at [19].

<sup>125</sup> Interview with Alistair Murray, ex-Taskforce Leader Detective Inspector, Organised Financial Crime Agency New Zealand (the author, telephone, 4 July 2015).

<sup>126</sup> *Tamati v R*, above n 123, at [28].

<sup>127</sup> *R v Toman* HC Wellington CRI-2002-032-278481, 18 December at [71].

<sup>128</sup> At [35]. See also *S v R* HC Gisborne T032566, 13 May 2004.

<sup>129</sup> Bruce Robertson (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Reuters) at [CA98A.04].

<sup>130</sup> *R v Mitford*, above n 115, at [50].

<sup>131</sup> *Tamati v R*, above n 123.

<sup>132</sup> At [6].

<sup>133</sup> At [9].

group's objective was the commission of a serious violent offence at the clubhouse which were punishable by seven years imprisonment.<sup>134</sup> This was despite the fact that Tamati's group was armed, arrived simultaneously at the clubhouse provoked by a humiliating event<sup>135</sup> and Tamati had unsuccessfully attempted to arrange an alibi.<sup>136</sup> Thus, the requirement for knowledge of the group's objective leaves room for an accused to escape liability; the circumstantial evidence upon which knowledge of the group's objective can be inferred must leave no room for "a reasonable possibility" of a different, non-prohibited (albeit criminal) objective.<sup>137</sup>

## 2 *Nexus of participation and objective*

The requirement for the prosecution to establish an offender's knowledge or recklessness that their conduct contributes to any criminal activity,<sup>138</sup> and knowledge or recklessness that such criminal activity contributes to the group's prohibited objective<sup>139</sup> creates, in effect, a practical requirement to find a nexus between the specific participation of the offender and the group's prohibited objective.

In order to establish this nexus the prosecution may seek to phrase the alleged objective of the group broadly, particularly if the prosecution is inferring the group's objective from past activities. This is because a broad objective appears to engender successful conviction as it captures various criminal activities. However, the need for the objective to be specific in order to gain conviction conflicts with positing a broad objective.<sup>140</sup> Thus the ease of showing contribution to the group objective is relative to how that objective is framed.

The difficulty of establishing this nexus marred the prosecution in *S v R*<sup>141</sup> where evidence was submitted by a District Gang Intelligence Officer to establish the group's objective. Utilising his past experience, the Officer held the alleged organised criminal group, the Mongrel Mob, are:<sup>142</sup>

'actively involved in offending such as burglary, theft, receiving stolen property, cultivation of cannabis, dealing and selling cannabis and other drugs, as well as violence offences such as

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<sup>134</sup> At [33].

<sup>135</sup> At [6].

<sup>136</sup> At [27].

<sup>137</sup> At [33].

<sup>138</sup> Section 98A(1)(b).

<sup>139</sup> Section 98A(1)(c).

<sup>140</sup> Robertson, above n 129, at [CA98A.04].

<sup>141</sup> *S v R*, above n 128.

<sup>142</sup> At [16].

assault, robbery, extortion, and firearms offences... The objectives of the Mongrel Mob include the commission of these offences.'

The court found such evidence did not establish an objective from which a jury could draw the inference that when other offences were committed, they were committed on behalf of the Mongrel Mob – i.e. contributed to the prohibited objective of that group.<sup>143</sup> Proving previous convictions of gang members similarly did not establish the objectives of the group or that their subsequent offending was committed on behalf of the group.<sup>144</sup> In order to establish the nexus between participation and the objective necessarily means the objective posited by the prosecution must be specific.

### 3 *Translating to a low conviction rate*

As seen in *Tamati* and *S v R*, the burden of establishing knowledge of the group's objective or how the accused's conduct contributed to achieving the prohibited objective can prove insurmountable with the evidence available to the prosecution. Prosecution in these cases is unsuccessful despite the likelihood that there was actually an organised criminal group partaking in criminal offending.

Extending this argument further, the difficulty of establishing s 98A evidence could lead police to gather evidence through techniques with unsound legal basis. This would later render the evidence inadmissible or able to be excluded under the Evidence Act 2006, again resulting in unsuccessful prosecutions under s 98A.<sup>145</sup> Two high profile examples of such behaviour include *R v Hamed* where video surveillance footage proved inadmissible evidence to support a s 98A charge,<sup>146</sup> and *R v Antonievic* where a "false warrant and prosecution scenario" amounted to a misconduct necessitating a stay of proceedings against 10 people charged under s 98A.<sup>147</sup> If s 98A charges are based on inadmissible evidence they will be withdrawn or conviction will be unsuccessful, worsening s 98A's conviction rate.

### B *Subsidiary offence*

Section 98A's low conviction rate highlights that the provision is an ineffective means of prosecuting organised criminals. However, it has been stressed that against such a variable, diverse and adaptable threat such as organised crime, "a coordinated, multi-layered approach"

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<sup>143</sup> At [23].

<sup>144</sup> Ibid.

<sup>145</sup> Evidence Act 2006, s 30.

<sup>146</sup> *Hamed v R*, [2011] NZSC 101, [2012] 2 NZLR 305.

<sup>147</sup> *R v Antonievic* [2015] NZHC 1096.

is required.<sup>148</sup> As such, s 98A could be understood as just one “layer” in the fight against organised crime. With its low conviction rate, s 98A could be regarded as a subsidiary layer to the other criminalisation mechanisms targeting organised criminals. This suggestion that s 98A is a subsidiary offence is reinforced by the fact that a large proportion of s 98A charges are withdrawn: since 1999 over 72% charges under s 98A that did not result in conviction were withdrawn and nearly 57% of all charges under s 98A were withdrawn.

Furthermore, other substantive offences required to establish the objective of the organised criminal group will often involve serious and multiple offending.<sup>149</sup> This is particularly likely if the alleged criminal group is a gang.<sup>150</sup> A prominent example would be the manufacture and supply of controlled drugs, for example Methamphetamine.<sup>151</sup> Accordingly, although offending under s 98A is “serious offending” it can often be regarded as secondary to or less serious than the other offending.<sup>152</sup> The Police themselves have indicated that s 98A charges are usually pursued “as adjuncts” or considered subsidiary to these other substantive charges.<sup>153</sup>

### *1 Withdrawal*

As another substantive offence is most often made out against an accused, prosecutors may readily withdraw charges under s 98A, especially if conviction is highly likely under these other substantive charges. This willingness is clearly reflected in the data in Appendix 1. As stressed above, nearly 57% of all charges under s 98A have been withdrawn since 1999.

Withdrawal may be due to an issue arising under the s 98A charge. For example the members of the alleged group may attest to the group having different objectives, thus making establishment of the prohibited objective difficult, or the individuals plead guilty to the substantive charges but not to the s 98A charge. In such circumstances, withdrawal reflects a perception that pursuit of conviction under s 98A is an unjustified use of scarce resources if it extends the time and costs of trial when a similar conviction could be obtained under the substantive charge(s).

Accordingly, a large factor in s 98A's low the conviction rate is a tendency of prosecutors to withdraw charges, perhaps as a matter of pragmatic policing. The prevalence of withdrawal of

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<sup>148</sup> New Zealand Police Association, above n 124, at [3].

<sup>149</sup> Alistair Murray, above n 125.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid; manufacture and supply of methamphetamine is punishable by life imprisonment under the Misuse of Drugs Act 1975, s 6(2)(a).

<sup>152</sup> *R v Teddy* HC Rotorua CRI 2009-063-000697, 18 March 2011 at [41]; *R v Tamati* [2012] NZHC 221 at [17].

<sup>153</sup> New Zealand Police Association, above n 124, at [32].

s 98A frustrates the intent of Parliament which seeks to criminalise participation in the organised criminal group. Similarly, if a provision's 'success' is determined solely on the basis of its conviction rate, s 98A will never be 'successful' as a majority of charges are withdrawn. However, if organised criminals are being prosecuted, albeit under a different label or substantive offence, the problem of s 98A's low conviction rate and the frustration of Parliament's intent is more theoretical than actual.

## 2 *Reasons for withdrawal*

Below are factors which increase the likelihood of charges under s 98A being withdrawn.

### a) Sentences under s 98A

Despite the 'seriousness' of a s 98A offence,<sup>154</sup> conviction under s 98A is unlikely to materially increase an offender's sentence if they are also convicted under another substantive criminal offence. The offence under s 98A and the other substantive offence(s) will only be regarded as separate "within the limits of totality"<sup>155</sup> whereby sentences must proportionally reflect the seriousness of all offending.<sup>156</sup> Accordingly, the judiciary has shown a willingness to issue sentences under s 98A concurrently. This is because factors relating to the s 98A charge are reflected in the substantive charge (for example the material gain punished in s 98A is also reflected in drug charges<sup>157</sup>) or conviction under s 98A has been regarded as "co-extensive" with the substantive offending.<sup>158</sup>

This means the prosecution may lack incentive to pursue charges under s 98A and a large amount of police resources will be focussed on the other substantive charges, prompting the withdrawal of s 98A charges.

### b) Overcharging

Overcharging is described as a tactic used by prosecutors enabling them to facilitate plea bargains with an accused.<sup>159</sup> Overcharging entails charging the defendant excessively, either in number<sup>160</sup> or severity, thereby inducing a defendant to plead guilty to some of or less severe versions of the original charges.<sup>161</sup>

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<sup>154</sup> *R v Teddy*, above n 152, at [41]; *R v Tamati*, above n 152, at [17].

<sup>155</sup> *R v Mitford*, above n 115, at [50].

<sup>156</sup> The Sentencing Act 2002, s 85.

<sup>157</sup> *R v Toman* HC Wellington T025588, 18 December 2003 at [35].

<sup>158</sup> *R v Whitehead* [2013] NZHC 2017 at [23].

<sup>159</sup> See Albert Alschuler "The Prosecutor's Role in Plea Bargaining" (1968) 36 U Chi L Rev 50.

<sup>160</sup> At 85.

<sup>161</sup> At 87.

Although not classic overcharging in the sense that prosecutors charge notwithstanding their knowledge that there is insufficient evidence to prove the offence,<sup>162</sup> charges under s 98A could be akin to an inadvertent form of overcharging as such charges may work to facilitate guilty pleas to other substantive charges. As such s 98A charges may be brought against a defendant in the knowledge that conviction is relatively inconsequential: a charge under s 98A may be able to act as a “bargaining-chip” where the possibility of withdrawal of that charge procures a guilty plea to other charges.<sup>163</sup>

This is especially so under the Criminal Procedure Act 2011 where an open and transparent case review is required if a defendant pleads not-guilty to a s 98A charge.<sup>164</sup> During the review, case management discussions between the prosecution and the defendant gives s 98A further scope to act as a “bargaining-chip”.<sup>165</sup> If a s 98A charge is “traded-off” (i.e. withdrawn) in return for a guilty plea to another offence it reflects that a modern criminal justice system’s “primary goal is processing”.<sup>166</sup> Similarly, the risks of unsuccessful prosecution under s 98A are offset by the likelihood of conviction under the other substantive offence, meaning the prosecution could be apathetic about a s 98A charge’s likely success and lay it notwithstanding apparent flaws or issues.<sup>167</sup>

c) Evidence gathering tool

Section 98A plays an important role in gathering evidence.<sup>168</sup> Previously police were given a warrant to intercept private communications where there were reasonable grounds for believing a person had committed, or was committing an offence under s 98A(1).<sup>169</sup> Such a warrant is now granted under the Search and Surveillance Act 2012.<sup>170</sup> An interception warrant will only be granted if there are reasonable grounds:

- a) to suspect a person had committed, or was committing an offence;<sup>171</sup> and
- b) to believe information material to that offending will be obtained.<sup>172</sup>

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<sup>162</sup> Donald Gifford “Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion” (1983) 47 U Ill L Rev 37.

<sup>163</sup> Kyle Graham, “Overcharging” (2014) 11 Ohio St J Crim L 701 at 712.

<sup>164</sup> Criminal Procedure Act 2011, s 54.

<sup>165</sup> Criminal Procedure Act 2011, s 55.

<sup>166</sup> Ronald Wright & Marc Miller “The Screening/Bargaining Tradeoff” (2002) 55 Stan L Rev 29 at 33.

<sup>167</sup> Graham, above 163, at 709.

<sup>168</sup> Alistair Murray, above n 125.

<sup>169</sup> Crimes Act 1961 (repealed 18 April 2012), s 312B.

<sup>170</sup> Ibid, ss 49 and s 51.

<sup>171</sup> Search and Surveillance Act 2012, s 51(a)(i).

<sup>172</sup> Search and Surveillance Act 2012, s 51(a)(ii).

In order to reasonably suspect an offence against s 98A, an applicant must apprehend, with some evidential basis, that the state of affairs (i.e. that there is a group of three or more people are acting with a prohibited objective) may exist.<sup>173</sup> There is no need for the applicant to prove any substantive offence. Therefore, the threshold for obtaining a warrant under s 98A is relatively low compared to other substantive offences.<sup>174</sup>

Procurement of warrants in pursuit of s 98A offending can be an important mechanism through which Police gather evidence in order to combat organised crime. As s 98A is designed to criminalise a criminal group's diverse range of activities,<sup>175</sup> the ability to obtain a warrant under the provision is also available in a variety of circumstances.

However, due to the nature of s 98A and the evidence usually required to establish the offence, a warrant under pursuit of a s 98A offence will often uncover evidence of other substantive offending. This may result in a charge under s 98A as the warrant enabling the evidence to be gathered was granted on this basis, but the other substantive charge(s) also made out by the evidence collected comprise the primary focus of the prosecution. Section 98A therefore may act as a gateway for gathering evidence necessary to convict under other substantive offences, consequentially meaning there is no need to proceed with, or focus resources on, the s 98A charge, resulting in its withdrawal.

### 3 *Efficiency tool*

Although a s 98A charge may not result in successful conviction and is regularly withdrawn, it can prove useful as a tool through which multiple offenders and/or multiple offences can be prosecuted together.<sup>176</sup> Charges under s 98A are readily able to justify a joinder of offenders or charges as the prosecution can establish that a joinder will prevent "duplication of time and effort for witnesses and the Court system" as well avoid any "risk of inconsistent verdicts".<sup>177</sup> Thus s 98A is a mechanism through which the court's efficiency is improved; the costs of holding different trials, potentially in multiple locations, for offenders facing multiple criminal offences can be streamlined into one trial. An example of this is *R v Robinson* where s 98A was used to bring a group of offenders together despite the fact that "the large majority of the counts involve one accused only" to reduce the time and costs of prosecution.<sup>178</sup>

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<sup>173</sup> Robertson, above n 129, at [SS48.03].

<sup>174</sup> Alistair Murray, above n 125.

<sup>175</sup> Organised and Financial Crime Agency New Zealand, above n 2, at 5.

<sup>176</sup> Criminal Procedure Act 2011, s 138.

<sup>177</sup> *R v Fenton* CA223/00; CA299/00, 14 September 2000 at [25].

<sup>178</sup> *R v Robinson* HC AucklandCRI-2004-004-10413, 23 June 2006 at [3].

## V Conclusion

Measuring the success of s 98A is always going to be a difficult task as the provision seeks to address a concept which has been and remains undefined – ‘organised crime’. If success is determined by a provision’s conviction rate, s 98A is inefficacious. Traversing some possible explanations for this low rate and apparent lack of success has formed a compelling argument in this author’s mind that s 98A is a problematic provision.

The difficulties of s 98A stem from its mixed conceptual origins. The evolution of s 98A has seen its approach in criminalising ‘organised crime’ transition from organisational to functional; instead of targeting organised crime based on who is engaging in criminal activity, s 98A now criminalises based on what the criminal activities are. Nonetheless, the remnants of an organisational approach influence s 98A, and thus liability under s 98A extends beyond New Zealand’s international obligations. Section 98A is a broad provision.

To combat this broadness s 98A protects civil liberties by placing a burden on the prosecution to establish the group’s prohibited objective and an offender’s knowledge of it. To discharge this burden, the *de facto* approach of the prosecution is to establish another substantive offence, rendering the s 98A subsidiary to, or predicated upon, this other charge(s). The need to establish another substantive offence makes s 98A problematic: police resources are focussed on the other substantive charges at the expense of those under s 98A. This reality fosters the withdrawal of s 98A charges, particularly as conviction under s 98A is unlikely to materially increase an offender’s sentence. Being subsidiary may also make s 98A charges akin to inadvertent overcharging where they facilitate conviction under other substantive charges. Such conduct is problematic as overcharging has been regarded as “socially undesirable, immoral, and even corrupt.”<sup>179</sup> The use of s 98A as an evidence gathering tool may further increase the prevalence of withdrawal.

The benefits s 98A provides as an efficiency enhancing tool fail, in this author’s opinion, to quell the overriding perception that s 98A is a problematic provision which requires reevaluation. Section 98A’s use appears utilitarian and in frustration of Parliament’s intent; it acts as a means-to-an-end rather than a substantive offence imposing group liability as Parliament intended.

7,980 words (not including footnotes, table in Appendix 1 and bibliography).

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<sup>179</sup> Graham, above 163, at 701.

## VI Appendix 1

This data shows the number of people charged and convicted under s 98A and the number of charges withdrawn. The total number of charges may be greater than this. The data proved was based on disposed charges. Although s 98A first came into force in 1998, the first charges disposed under the section occurred in 1999.

Outcome	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	TOTAL/ AVERAGE %
Convicted	0	1	1	0	10	19	5	11	2	6	15	21	19	49	37	19	215
Not Convicted (‘unsuccessful charges’)	8	2	1	2	60	137	37	44	31	19	34	27	45	118	116	129	810
Total Charges	8	3	2	2	70	156	42	55	33	25	49	48	64	167	153	148	1025
Withdrawn Charges	8	2	1	1	50	96	36	21	33	15	36	23	31	53	80	98	584
Conviction %	0.00	33.33	50.00	0.00	14.29	12.18	11.90	20.00	6.06	24.00	30.61	43.75	29.69	29.34	31.90	24.18	21.00%
National conviction % <sup>180</sup>	76.88	75.64	76.09	75.90	75.76	75.1	76.9	77.76	77.92	78.02	78.5	79.85	81.74	81.83	82.68	83.51	78.31%
% of unsuccessful s 98A charges withdrawn	100	100	100	50	83.33	70.07	97.30	47.73	100 <sub>181</sub>	78.95	100 <sub>182</sub>	85.19	68.89	44.92	68.97	75.97	72.10%
% of total s 98A charges withdrawn	100	66.66	50.00	50.00	71.43	61.54	85.71	38.18	100 <sub>183</sub>	60.00	73.47	47.92	48.44	31.74	52.29	66.22	56.98%

<sup>180</sup> Statistics New Zealand “Statistics for Adults prosecuted in court - most serious offence calendar year” (30 May 2015) NZ.Stat Table Builder <www.stats.govt.nz>.

<sup>181</sup> Note that information obtained under the two Official Information Act 1982 Requests, above n 3, are inconsistent.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

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