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Regulating Bkie Gangs

Since what has become known as the 'Milperra Massacre' in the New South Wales town of Milperra in 1984, there have been newsworthy spates of violence and fatalities involving bkie gang members, particularly over the past few years. A fatal brawl at Sydney Airport in March 2009 involving members of rival motorcycle gangs (the Hell's Angels and Comancheros), during which a man was bashed to death, again refocused the community's and governments' concerns about these organisations.

This Research Brief will begin with a brief discussion of bkie 'culture', the apparent involvement of bkie gang members in serious and organised criminal activities, and the background to the recent outbreaks of violence between rival gangs, particularly in NSW.

The Brief will then turn to a detailed discussion of South Australia's Serious and Organised Crime (Control) Act 2008, enacted to effectively restrict the activities of bkie gangs in that State, and the recent legislative measures taken in NSW with the passage of the Crimes (Criminal Organisations Control) Act 2009 (NSW). A short comparison of the SA and NSW laws then follows. Brief mention will be made of the Northern Territory's Serious Crime Control Bill 2009, introduced in recent weeks.

Legislative measures and law enforcement action in Queensland and in other Australian and overseas jurisdictions in response to the bkie gang issue are touched on, including a discussion of a proposed national approach to bkie gang issues.

Nicolee Dixon

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**Queensland Parliamentary Library
General Distribution Research Team
Research and Information Service**

Ms Karen Sampford, Team Leader	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Mrs Renee Gastaldon, Parliamentary Research Officer	(07) 3406 7241
Ms Mary Westcott, Parliamentary Research Officer	(07) 3406 7372
Mrs Xanthe Paltridge, Parliamentary Research Officer	(07) 3406 7468

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Inquiries should be addressed to:
Team Leader, General Distribution Research Team
Research and Information Service
Queensland Parliamentary Library
Parliament House
George Street, Brisbane QLD 4000
Ms Karen Sampford. (Tel: 07 3406 7116)
Email: Karen.Sampford@parliament.qld.gov.au

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EXECUTIVE SUMMARY

Since what has become known as the ‘Milperra Massacre’ in the New South Wales town of Milperra in 1984, there have been newsworthy spates of violence and fatalities involving bkie gang members, particularly over the past few years. A fatal brawl at Sydney Airport in March 2009 involving members of rival motorcycle gangs (the Hell’s Angels and Comancheros), during which a man was bashed to death, again refocused the community’s and governments’ concerns about these organisations.

This Research Brief begins, in **section 2**, with a discussion of the background to the emergence of bkie gangs in Australia and a brief overview of bkie gang ‘culture’, the apparent involvement of bkie gang members in serious and organised criminal activities, and the lead up to the recent outbreaks of violence between rival gangs, particularly in NSW.

Section 3 turns to consider the various legislative and law enforcement measures in Australia to deal with organised crime and organised criminal groups. At the Commonwealth level, these include provisions of the Criminal Code targeting terrorist organisations; confiscation of proceeds of crime laws under the *Proceeds of Crime Act 2002* (Cth); and provisions of the *Crimes Act 1914* (Cth) and other legislation giving various investigative powers to law enforcement agencies, such as the Australian Federal Police and the Australian Crime Commission. The work of the Commonwealth Parliament’s Joint Committee Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups is briefly outlined (**section 3(1)**).

South Australia was the first jurisdiction in Australia to enact legislation, the *Serious and Organised Crime (Control Act) 2008* (SA), potentially allowing a bkie gang to be made a ‘declared organisation’ which can form the basis of a control order. **Section 3.2** provides a detailed discussion of the main provisions of the Act, including how a declaration is made by the Attorney-General; how control orders are made by the Magistrates Court and what they restrict (e.g. persons under a control order who are members of a declared organisation from associating with other organisation members); the making of public safety orders by senior police officers; and the various safeguards and limitations on the various powers regarding declarations, control orders and public safety orders.

New South Wales introduced the *Crimes (Criminal Organisation Control) Act 2009* (NSW) in April 2009 which has a number of similarities to the South Australian Act in providing for declarations and control orders but also has some differences (e.g. who can make declarations and control orders), all of which are discussed in **section 3.3**. This legislation was followed by the *Criminal Organisation Legislation Amendment Act 2009* (NSW), passed in May 2009, to give police further powers to deal with criminal organisations and to set out further offences under the *Crimes (Criminal Organisation Control) Act*.

The remainder of section 3 considers the new Serious Crime Control Bill 2009 (NT) recently introduced into the Northern Territory Legislative Assembly (**section 3.5**) that has similarities to both the South Australian and the New South

Wales legislation; proposals by the Western Australian Government to introduce new legislation targeted at organised criminal groups (**section 3.6**); and the current approach of the Victorian Government not to introduce specific ‘anti-gang’ laws in Victoria. In addition to a discussion of the legislative measures undertaken in the various states and territories, some consideration is given to law enforcement activities and police operations aimed at serious criminal activity and criminal organisations. Queensland’s response to recent bikie gang violence and the Queensland Government’s intention to introduce legislation similar to that in South Australia and New South Wales is discussed in **section 3.8**.

Section 4 of the Brief considers efforts made towards a national approach to organised crime, as agreed to at the meeting of the Standing Committee of Attorneys-General (SCAG) in April 2009. SCAG regarded a nationally coordinated response by all jurisdictions as important and a range of legislative and other measures to be undertaken by all Australian jurisdictions was agreed upon. A short overview of recent legislation before the Commonwealth Parliament to fulfil its obligations under the SCAG agreement is provided.

A short discussion of legislation to target organised crime and criminal organisations in selected overseas jurisdictions is provided in **section 5**. The countries considered are Canada, the United Kingdom, New Zealand and the United States of America.

Finally, **section 6** sets out the arguments that have been raised by academics, law enforcement agencies, lawyers, commentators and others in relation to ‘anti-gang’ legislation.

This Research Brief reflects the law as of 1 August 2009.

1 INTRODUCTION

An event that awakened many Australians to the presence of outlaw motorcycle gangs (bkie gangs)¹ in our midst occurred in September 1984. A shootout in Milperra, New South Wales among members of two bkie gangs resulted in the death of 7 people, including a teenage girl caught in the crossfire. This became known as the ‘Milperra Massacre’.² There have been other newsworthy spates of violence and fatal incidents involving bkie gang members since that time, particularly over the past few years. In June 2007, Melbourne witnessed another manifestation of bkie gang violence when shootings in the busy central business district by a Hell’s Angels gang member left one person dead and 2 people badly injured.³ A fatal brawl at Sydney Airport in March 2009 between members of rival motorcycle gangs (the Hell’s Angels and Comancheros), during which a 29 year old man was bashed to death, again refocused the community’s and governments’ concerns about these organisations.

Queensland and other jurisdictions, such as South Australia, New South Wales and the Northern Territory, have, or are, considering legislative measures to restrict, and even ban, the operation of bkie gangs. The April 2009 meeting of the Standing Committee of Attorneys-General (SCAG) agreed on a national approach to legislative and operational measures aimed at addressing organised criminal activities and violence among bkie gangs.⁴

This Research Brief will begin with a background discussion to the emergence of bkie gangs in Australia and a brief overview of bkie gang ‘culture’, the apparent involvement of bkie gang members in serious and organised criminal activities, and the lead up to the recent outbreaks of violence between rival gangs, particularly in NSW. The Brief will then turn to a detailed discussion of South

¹ This Research Brief will use the term ‘bkie gang’ in preference to ‘outlaw motorcycle gang’ (unless specifically quoted in another source) as the latter term may create confusion. This is because, until steps are taken under the various new laws discussed in this Brief to have a particular motorcycle club effectively declared to be unlawful, the motorcycle club is not actually ‘outlawed’. It may, however, be perceived as being an ‘outlaw bkie club’ by its own members (as is discussed briefly below), an example of this is depicted on the [Rebels’ Motorcycle Club – Australian Outlaws Elite](#) website.

² ‘Secret papers reveal blatant lack of respect for society: bkie gang lives, dies for loyalty’, *Gold Coast Bulletin*, 23 July 2007, p 3.

³ Gary Hughes, ‘Bikies code makes them hard to crack’, *Australian*, 23 June 2007, p 5.

⁴ State Committee of Attorneys-General (SCAG), *Communiqué April 2009*, pp 8-9.

Australia's *Serious and Organised Crime (Control) Act 2008*, enacted to effectively restrict the activities of bikie gangs in that State and the recent legislative measures taken in NSW with the swift passage through Parliament of the *Crimes (Criminal Organisations Control) Act 2009* (NSW). A short comparison of the SA and NSW laws then follows. Brief mention will be made of the Northern Territory's Serious Crime Control Bill 2009, introduced in recent weeks.

Legislative measures and law enforcement action in Queensland and in other jurisdictions in response to the bikie gang issue are touched on, including a discussion of a proposed national approach. Laws dealing with bikie gangs in other countries are also briefly discussed.

This Research Brief reflects the law as of 1 August 2009.

2 BIKIE GANGS: THE CULTURE AND THE ISSUES

'Bikie gangs' have been described by researchers, as, among other things, a subculture or a tribe.⁵ Bikie gangs:⁶

...reject the value set of middle Australia and are governed by their own codes of behaviour. Recent research ... report [bikie gangs] have patriotic ideologies and are defined in terms of extreme masculine concepts such as brotherhood, loyalty and an enforced code of silence.

Bikie gangs differ from other types of motorcyclist associations, such as recreational motorcyclists,⁷ in that they are often characterised by violence and other elements, as will be outlined below.⁸

⁵ J van den Eynde & A Venno, 'Depicting outlaw motorcycle club women using anchored and unanchored research methodologies', *The Australian Community Psychologist*, 19(1), May 2007, pp 96-111, p 96, citing other research.

⁶ J van den Eynde & A Venno', p 96.

⁷ See further: Hon Judy Spence MP, Minister for Police, Corrective Services and Sport, '[Outlaw bikie gangs not welcome in Qld](#)', *Ministerial Media Statement*, 23 November 2007.

⁸ Examples of the latter type of motorcyclist organisations are the [God's Squad Christian Motorcycle Club](#), providing outreach services to the 'outlaw biker fraternity', and the [Brisbane Harley Owners Group](#), aiming to 'share the joy of riding Harley Davidson motorcycles'.

2.1 BACKGROUND

One of the largest bkie gangs in Australia is the Hell's Angels (possibly, the oldest) which was formed in the United States in 1948 and founded an Australian chapter in the late 1960s.⁹ Other motorcycle clubs include the Gypsy Jokers,¹⁰ the Rebels¹¹ and the Coffin Cheaters. Later on the scene were the Comancheros, the Nomads, the Bandidos,¹² and, very recently, Notorious.¹³

Many bkie gangs in the US were formed by World War II returned servicemen looking for the sort of camaraderie they had experienced in the services.¹⁴ The legacies of this origin are bkie gangs' hierarchical structures, their constitutions and their rules. It is said that these aspects not only make police investigations problematic but also attract large criminal organisations, which apparently use 'massive illicit resources' to buy votes to elect gang leaders and, eventually, to control the clubs themselves.¹⁵

It has been reported that the Australian Crime Commission (ACC) estimates that there are 39 active bkie gangs around Australia.¹⁶

⁹ Malcolm Knox & Dylan Welch, 'Secret men's business', *Sydney Morning Herald Online*, 28 March 2009.

¹⁰ An Australian formed club, said to be most infamous for the 2001 car-bomb murders of WA Police senior investigators: Dylan Welch, 'Bkie Gangs behind spate of shootings', *Sydney Morning Herald Online*, 14 December 2008.

¹¹ An Australian formed club and said to be the largest bkie gang in Australia with 29 chapters. Seen as a more traditional club: Dylan Welch, 'Bkie Gangs behind spate of shootings'.

¹² The Bandidos is said to be one of the 'big four' gangs identified by the FBI in the United States. It apparently has 19 chapters across Australia and has actively recruited from ethnic groups in recent years: Dylan Welch, 'Bkie Gangs behind spate of shootings'.

¹³ Malcolm Knox & Dylan Welch, 'Secret men's business'.

¹⁴ Gary Hughes, "'Bikies' code makes them hard to crack', *Australian*, 23 June 2007.

¹⁵ Gary Hughes, "'Bikies' code makes them hard to crack', referring to comments by Dr Arthur Veno, a Monash University Professor in the School of Social and Political Sciences and author of several books on bkie culture.

¹⁶ Geesche Jacobsen, 'Powers of coercion no match for code of silence: commission chief', *Sydney Morning Herald Online*, 28 March 2009, referring to comments by John Lawler, ACC chief executive.

2.2 BIKIE GANG CULTURE

Dr Arthur Veno, a Monash University Professor in the School of Social and Political Sciences and author of several books on bikie culture, has commented that the 'rules of engagement' in bikie wars have changed considerably since around 1972. Prior to that time, bikie wars tended to be settled away from public view. Dr Veno observes things changed:¹⁷

...with the arrival of a criminal element in the clubs [when] the rules about riding motorcycles were dropped for a select few clubs so that criminals who were non-riders could join. ... This led to a further erosion of the long established bikie rules of engagement for wars. So, now, there is a real risk to public safety as witnessed by recent events'.

Dr Veno comments that most of the members of Australian motorcycle clubs are not criminals. He said that many are victims of child abuse or come from dysfunctional families who are drawn to such clubs with their clear sets of rules and rapid punishment for breaking them. He said that, while these people might not respect society's authority, they do respond to peer authority.¹⁸ A former Queensland bikie gang member told a *Sunday Mail* reporter that that he had joined the Bandidos because he '*liked the men and the whole brotherhood thing, the loyalty and respect*'.¹⁹

It appears to be a part of the ethos of many bikie gangs that to become a member of a bikie gang, a person has to be invited to do so by existing members. The person then becomes a 'nominee'. The nominee participates in some of the club rides and helps with matters such as clubhouse maintenance to build up trust from the group. After a time, a vote is held and the person becomes a 'patched' member of the club.²⁰

Possibly attributable to the military origins of some bikie gangs, Duncan McNab, co-author of a book about the Bandidos, observes that members depend on '*strong bonds of internal trust and honour, which is what makes them so hard for police to counter While they're cooperating, they're absolutely loyal; otherwise they're brawling*'.²¹ Major aspects of bikie gang culture appear to be obedience to hierarchy, rules and

¹⁷ Arthur Veno, 'Putting the wild ones off the road', *Age Online*, 26 March 2009.

¹⁸ Arthur Veno, 'Putting the wild ones off the road'.

¹⁹ Paula Doneman, 'Outlaws', *Sunday Mail*, 15 June 2008, p 51.

²⁰ Marissa Calligeros, 'Bikies throw open their doors', *brisbanetimes.com.au*, 24 April 2008 (interview with a former Rebels' Brisbane chapter gang member).

²¹ Malcolm Knox & Dylan Welch, 'Secret men's business', quoting Duncan McNab, co-author with Ross Coulthart of the book *Dead Man Running*.

rituals in return for the sense of belonging provided through uniforms and dress codes, initiations and exclusions.²² Club patches or ‘colours’ bearing the gang insignia are a highly prized aspect of the culture. Some bikie gangs have a trademark over their name and such trademarks have come under threat of seizure by authorities from time to time.²³

The Bandidos, like most bikie clubs, have a strict code of conduct and its members pay a monthly fee to assist with maintenance, rent and to help other members falling into financial hardship.²⁴ Members face ‘penalties’, ranging from fines to demotion within the club and being assaulted, for breaking club rules.²⁵

It has also been reported that financial rewards depend on the protection and expansion of criminal enterprise.²⁶ Previous criminal connections and past dealings with the club can also assist a member’s rise within the ranks of that club. A former bikie gang member told the media that while there is an outlaw culture ‘you’ve got crime ... even if you have never done a crime before in your life, you soon will’.²⁷

A ‘Bandidos’ credo’, reportedly leaked to the media in 2007, is said to show that its members consider themselves to be the ‘one-percenters’ who live outside the law (the idea being that the other 99% of motorcyclists were law abiding) and it is expected that members will defend each other without question (*‘all members are your brothers and your family’*).²⁸

Defection between clubs is taken particularly seriously by bikie gangs. It is apparently feared that members will betray the former club’s secrets and leave it vulnerable to attack.²⁹ Moreover, a defection is regarded as a breach of loyalty, as manifested in the shootings and stabbings of Finks and Hell’s Angels gang members at a kickboxing event at the Gold Coast’s Royal Pines Resort in March

²² Malcolm Knox & Dylan Welch, ‘Secret men’s business’.

²³ Paula Doneman, ‘Bikies face a ban on identity’, *Sunday Mail*, 2 November 2008, p 36.

²⁴ Paula Doneman, ‘Outlaws’.

²⁵ Paula Doneman, ‘Outlaws’.

²⁶ Paula Doneman, ‘Outlaws’.

²⁷ Paula Doneman, ‘Outlaws’, quoting former Rebels’ Brisbane chapter gang member.

²⁸ ‘Secret papers reveal blatant lack of respect for society: bikie gang lives, dies for loyalty’.

²⁹ Paula Doneman, ‘Outlaws’, referring to comments by Rebels’ Brisbane chapter gang member.

2006 when a defecting former Finks member turned up to the event.³⁰ A recent escalation of violence between the Bandidos and the Rebels was apparently ignited by the defection of several Rebels members to the Bandidos.³¹ This has reportedly resulted in bashings and revenge attacks, including the torching of the Rebel's head clubhouse at Albion, a suburb of Brisbane. Bandidos members were apparently coerced into taking part in the arson attack by fear of being ejected from the club and open to attack by the Rebels who would soon be informed that they were involved in the torching.³² Homes of members were also attacked, with many fearing for their families inside, and cars were shot at while being driven in public streets.³³

2.3 RECENT RIVAL BIKIE GANG WARS

On Sunday 22 March 2009, travellers at Sydney Airport witnessed a dreadful clash between members of rival motorcycle gangs (the Hell's Angels and Comancheros), during which a 29 year old man was bashed to death. During the week following, there were shootings in and around Sydney streets, resulting in the arrest of around a dozen bikie gang members. Some members of the Comancheros bikie gang have been charged with affray and similar offences. Its national president, Mahmoud Hawi, has been charged with murder.³⁴ It was reported that, earlier on the day of the airport brawl, houses in Sydney's south west were sprayed with bullets in 2 separate drive-by shootings and, some weeks before that, a bomb blew up the Hell's Angels clubhouse in Sydney's inner west.³⁵

It has been reported that three developments seem responsible for the increasing violence among rival bikie gangs, particularly in and around Sydney: the rapid growth of Hell's Angels membership in Australia; the worsening relations between the Rebels and Bandidos clubs; and the emergence in Sydney of a 'pseudo-bikie gang', Notorious.³⁶ It is said that the inter-gang feuds are underlined by the fact

³⁰ 'Secret papers reveal blatant lack of respect for society: bikie gang lives, dies for loyalty'.

³¹ Paula Doneman, 'Outlaws'.

³² Paula Doneman, 'Outlaws', referring to comments by former Rebels' gang member.

³³ Paula Doneman, 'Outlaws', referring to comments by former Rebels' gang member.

³⁴ Dylan Welch & Geesche Jacobsen 'Comanchero boss charged with murder', *Sydney Morning Herald*, 1 July 2009.

³⁵ Jane Margetts, 'New anti-bikie laws creating a stir', *7.30 Report*, ABC Online, 31 March 2009.

³⁶ Malcolm Knox & Dylan Welch, 'Secret men's business'.

that the 'old order' does not like to be upset and the bkie culture militates against peaceful settlement of disputes.³⁷

A recent article in the *Sydney Morning Herald* reports that the background to the most recent bkie gang violence in Sydney is thought to have stemmed from an agreement between a Kings Cross nightclub identity, Hassan 'Sam' Ibrahim (in whose nightclubs it was alleged that illicit drug dealings occurred), and the Nomads' then national president, Greg Craig. In 1997 the two men made an agreement in which control of a Nomads' chapter was handed to Ibrahim.³⁸

It has been observed that Ibrahim's takeover and immediate elevation to presidency struck at bkie gang culture's 'very ethos' where it was the norm for new members to go through years of probation and initiation rituals to embed trust. In addition, Ibrahim started to admit men from various ethnic groups, particularly young Lebanese, Turkish, Egyptian and Islander men who previously had limited access to the clubs. According to a *Sydney Morning Herald* source, Ibrahim allowed unemployed teenagers from ethnic groups to hold presidential and senior 'officer' positions in bkie clubs instead of these youths being mere members.³⁹ It seems, according to a NSW police source, that many of the 'old bikies' did not like the infiltration of Lebanese bikers and went elsewhere. It appears that after Ibrahim took over the Nomads' chapter, many Nomads became Bandidos while another group formed Notorious in mid 2007.⁴⁰

According to the *Sydney Morning Herald* article, in contrast to the 'traditional' membership of mainly 'denim-wearing, working-class Anglo-Saxons who live to ride and love to brawl', the new Lebanese leaders of some of the NSW bkie gangs, like Ibrahim and Hawi, are younger, drive large black 4-wheel drive (often bulletproof) vehicles, and wear expensive clothes.⁴¹ It has been reported that the newer club, Notorious, comprises many of so-called 'Nike bikies' who shun much of the paraphernalia of traditional bikies and may not have strict 'riding rules' (that require members to ride a set amount of kilometres each year). Dr Venio argues that the loss of the riding rules has made it easier for the criminals to enter.⁴²

³⁷ Malcolm Knox & Dylan Welch, 'Secret men's business'.

³⁸ Malcolm Knox & Dylan Welch, 'Secret men's business'

³⁹ Malcolm Knox & Dylan Welch, 'Secret men's business', quoting a source who was reported to have been part of the scene in the late 1990s.

⁴⁰ Malcolm Knox & Dylan Welch, 'Secret men's business'.

⁴¹ Malcolm Knox & Dylan Welch, 'Secret men's business'.

⁴² Edmund Tadros, 'Police told: take their bikes and badges to halt cycle of violence', *Sydney Morning Herald Online*, 22 February 2009.

Duncan McNab has noted that Notorious members are *'only bikies insofar as it suits them, but what they're really after [are] the rivers of gold – the billion dollar drug trade.'*⁴³

Over the past few years, tensions between bikie gangs have worsened, particularly with the formation of Notorious and, according to NSW police sources, the defection of bikies from one club to another.⁴⁴ Violence among rival clubs has intensified and reprisal shootings have resulted in gang member deaths and injuries. The feud between the Comancheros and Hell's Angels (members of both being embroiled in the Sydney Airport brawl) surfaced in mid 2008 and it appears that the incident at Sydney Airport may have marked the culmination of months of pent up hostility.⁴⁵

2.4 ORGANISED CRIME LINKS

Apart from concerns about extreme inter-gang violence and consequent threat to public safety, there have been media reports of alleged links between bikie gangs and the illicit drug trade and organised crime in general. There is also a suggestion of connections with ethnic gangs and international organisations.⁴⁶ It has been reported that the perception of bikie gangs as a serious organised crime threat by Australian law enforcement agencies has escalated over the past two decades, significantly fuelled by gang wars over control of the amphetamines market in Australia.⁴⁷

The Australian Crime Commission (ACC) believes that:⁴⁸

[Bikie gangs] represent a real and present danger to the Australian community. There are approximately 39 active outlaw motorcycle gangs in Australia with more than 3,300 "patched" members. ...[Bikie gangs] remain a visible criminal threat ... [and] ...have developed a strong presence in many illicit markets throughout Australia, maintain strong and complex criminal networks and remain highly functional despite ongoing targeting'.

⁴³ Malcolm Knox & Dylan Welch, 'Secret men's business', quoting Duncan McNab.

⁴⁴ Edmund Tadros, 'Police told: take their bikes and badges to halt cycle of violence'.

⁴⁵ Malcolm Knox & Dylan Welch, 'Secret men's business'.

⁴⁶ Geesche Jacobsen, 'Powers of coercion no match for code of silence: commission chief'.

⁴⁷ John Silvester, 'Riding low: the world of Bikie Inc', *Age Online*, 23 June 2007, referring to a book by Canadian experts in the field, W Marsden and J Sher, *Angels of Death: Inside the Bikers Global Crime Empire*.

⁴⁸ ACC Website, <http://www.crimecommission.gov.au>, Frequently Asked Questions, 23 March 2009.

The gangs have grown in size, profile, geographic spread and level of sophistication.⁴⁹ ACC chief executive, John Lawler, has warned that the gangs are becoming increasingly sophisticated, '*using complicated financial structures to launder illicit funds and forming alliances with organised crime networks overseas*'.⁵⁰ The ACC appears to see 'outlaw motorcycle gangs' as part of organised criminal activity in Australia and is taking various initiatives to address the issue.⁵¹ The ACC conservatively estimates that, in 2008, organised crime as a whole cost Australia at least \$10 billion.⁵²

Technical sophistication within bikie gangs has also grown. The more technically able have managed to penetrate government computer records. Following police raids on a bikie gang clubhouse, electronic 'sweeping' of the clubhouse is often undertaken in order to detect listening devices.⁵³

A significant concern is that many bikie gangs have infiltrated legitimate and not-so-legitimate businesses. The nightclub business, especially nightclub ownership, the security industry and prostitution, are ripe for penetration by gang members with battles to control the nightclub drug scene – particularly in Sydney and on the Gold Coast.⁵⁴ The idea, according to police, is that if a gang can control who may enter a nightclub, it can control the distribution of drugs.⁵⁵ A 2 year investigation of the security industry by the ACC has, according to chief executive, John Lawler, uncovered a range of criminal practices and infiltration of the industry by organised crime groups, including bikie gangs.⁵⁶

Other industries of choice for infiltration by bikie gangs include finance, transport, natural resources and construction. The financial investments and wealth of some

⁴⁹ John Silvester, 'Riding low: the world of Bikie Inc'.

⁵⁰ Paul Maley & Michael Owen, 'Drugs, defections driving gang war', *Australian*, 9 April 2009, p 7, quoting ACC chief executive, John Lawler.

⁵¹ Australian Crime Commission (ACC), [Organised Crime in Australia 2009 Report](#), p 15.

⁵² ACC, [Organised Crime in Australia 2009 Report](#), p 5.

⁵³ John Silvester, 'Riding low: the world of Bikie Inc'.

⁵⁴ John Silvester, 'Riding low: the world of Bikie Inc', referring to comments by police in Sydney.

⁵⁵ John Silvester, 'Riding low: the world of Bikie Inc', interviewing a senior Victorian police officer.

⁵⁶ Paul Maley, 'Criminal groups infiltrate security', *Australian*, 6 July 2009, p 3.

gangs are significant, with some having invested in mining industries and oil rigs.⁵⁷ In addition, some bikies have engaged in debt collection and use their reputations to instil fear during disputes.⁵⁸ The ACC's chief executive, John Lawler noted that the gangs were using professional financial advisers and use corrupted financial associations in the finance sector to conceal money laundering activities.⁵⁹

Mr Lawler suggests that the current gang war is being driven by disputes over access to drug markets, clashes over control of particular criminal activities that derive flows of illicit funds, and fights about defections between clubs.⁶⁰

The Queensland's Crime and Misconduct Commission's (CMC's) director of intelligence, Christopher Keen, recently told the media that importing and manufacturing illicit drugs, particularly ecstasy, provides a primary source of income for Queensland's bokie gangs.⁶¹ It is reported that around one fifth of criminal proceeds restrained by the CMC in recent years has been linked to bokie gangs and as much as 90% of the gang-related money is connected to illicit drugs. Mr Keen said that the '*illicit drug trade is an incredibly lucrative area that can be very easy pickings*'.⁶²

In May 2008, during an interview on *The Law Report* on ABC Radio National regarding the then imminent South Australian [*Serious and Organised Crime \(Control\) Act 2008*](#), the SA Shadow Attorney-General, Ms Isobel Redmond MP, told the program's reporters that she had managed to have a 'secret meeting' with a former member of an outlaw bokie gang, organised through a network of people. Ms Redmond MP said that the contact had described:⁶³

[H]ow certain groups within Adelaide controlled prostitution, certain groups controlled the drug scene, certain groups controlled the standover tactics, certain groups controlled the security areas for bouncers and so on. So there were a range

⁵⁷ John Silvester, 'Riding low: the world of Bokie Inc'.

⁵⁸ John Silvester, 'Riding low: the world of Bokie Inc'.

⁵⁹ Paul Maley & Michael Owen, 'Drugs, defections driving gang war'. See also: ACC, [*Organised Crime in Australia 2009 Report*](#), p 13.

⁶⁰ Paul Maley & Michael Owen, 'Drugs, defections driving gang war'.

⁶¹ Matthew Fynes-Clinton & Greg Stolz, 'Wheelers and dealers – Gangs ready to indulge in joint ventures', *Courier Mail*, 28 March 2009, p 4.

⁶² Matthew Fynes-Clinton & Greg Stolz.

⁶³ Damien Carrick, 'South Australia's plans to obliterate outlaw bokie gangs', *The Law Report – ABC Radio National*, 6 May 2008, interviewing Ms Isobel Redmond MP, SA Shadow Attorney-General.

of areas and each bikie club had its own geographical area, often its own ethnic background and also its own area of illegal activity.

The growing wealth, organisation, and technical sophistication of the larger bikie gangs have made law enforcement increasingly problematic. Prosecutions are often thwarted by witnesses ‘going cold’ after suffering harm or threats from gang members.⁶⁴

Dr Arthur Veno, a professor with expertise in bikie gang culture, believes that the most effective means of punishing gangs for violent and criminal acts is for police to confiscate the clubhouses, bikes and badges of the club members. As noted earlier, such items go to the very heart of gang culture and would, Dr Veno believes, be a better deterrent to crime than the anti-bikie legislation in South Australia and New South Wales.⁶⁵

3 AUSTRALIAN MEASURES AGAINST BIKIE GANGS

All Australian jurisdictions already have anti-terrorism legislation governing the issue of control orders proscribing certain organisations. However, only South Australia and New South Wales currently have legislation attempting to target bikie gangs in specified circumstances. The Northern Territory Parliament has a Bill before it seeking to pursue similar ends.

As noted by Dr Andreas Schloenhardt, a legal academic at the University of Queensland, the criminal law traditionally focuses on punishing crimes perpetrated by individuals. Therefore, the operation and structure of criminal organisations do not fit well within the accepted concepts of criminal liability. In addition, it is difficult to make directors and financiers of organised crime responsible if they have no actual physical involvement in the criminal activities of the organisation.⁶⁶

New South Wales was the first Australian jurisdiction to, in late 2006, enact legislation amending the *Crimes Act 1900* (NSW)⁶⁷ to target participation in a criminal organisation. The laws are, as will be seen later, similar to offence provisions under the Canadian *Criminal Code* (ss 467.11-467.13) and the New

⁶⁴ John Silvester, ‘Riding low: the world of Bikie Inc’.

⁶⁵ Edmund Tadros, ‘Police told: take their bikes and badges to halt cycle of violence’, referring to comments by Dr Arthur Veno.

⁶⁶ A Schloenhardt, ‘Mafias and Motorbikes: New Organised Crime Offences in Australia’, *Current Issues in Criminal Justice*, 19(3), March 2008, pp 259-282, p 260.

⁶⁷ The *Crimes Legislation Amendment (Gangs) Act 2006* (NSW).

Zealand *Crimes Act 1961* (s 98A), and echo some parts of the definition of 'organised crime group' in the United Nations [Convention Against Transnational Organised Crime](#).⁶⁸ Australia signed the UN Convention in December 2000, which came into force in September 2003. Article 5 relates to participation offences.

3.1 COMMONWEALTH

The Commonwealth's legislative power to deal with organised criminal groups is limited by the Commonwealth Constitution. However, a number of laws touching on the criminal activities of such groups have been made under the Commonwealth's power to legislate with respect to matters such as taxation, banking, national security, telecommunications, and border control.⁶⁹ In particular, the Commonwealth has legislation dealing with money laundering, financial transactions reporting obligations; confiscation of proceeds of crime laws and telecommunications interception legislation.

Within the Commonwealth's legislative power, a range of laws provide Commonwealth law enforcement agencies, such as the Australian Federal Police (AFP) and the ACC, with various powers to investigate serious and organised criminal activity.⁷⁰ For instance, powers of search and seizure under warrant assist in the investigation all Commonwealth offences (Parts IAA [Crimes Act 1914](#)) and covert measures, such as controlled operations and assumed identities, can be undertaken in relation to a number of more serious offences (which attract at least 3 years imprisonment) such as money laundering and drug offences (Parts IAB [Crimes Act 1914](#)). In addition, telecommunications interception powers and surveillance devices can be used for investigating certain serious offences.⁷¹

An effective asset forfeiture scheme to target the profits of organised crime has been seen as an important combative measure as it removes the primary motive for

⁶⁸ A Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia'.

⁶⁹ Commonwealth Attorney-General's Department (AGD), Submission to the Parliamentary Joint Committee Inquiry Into the Legislative Arrangements To Outlaw Serious And Organised Crime Groups ([Submission to the Parliamentary Joint Committee Inquiry](#)), August 2008, paras 19-20.

⁷⁰ AGD, [Submission to the Parliamentary Joint Committee Inquiry](#), paras 58ff.

⁷¹ See [Telecommunications Interception and Access Act 1979 \(Cth\)](#); [Surveillance Devices Act 2004 \(Cth\)](#).

engaging in organised crime.⁷² The Commonwealth's legislation in this area is the [Proceeds of Crime Act 2002 \(Cth\)](#) and most other Australian jurisdictions have similar confiscation regimes. As part of an agreed national approach to fighting organised crime, the Commonwealth Government has introduced legislation to, among other things, amend the [Crimes Act 1914](#) and the [Proceeds of Crime Act 2002 \(Cth\)](#) to enable a more coordinated approach among law enforcement officers working across state and territory borders and to target people with 'unexplained wealth'. These measures will be discussed later in this Brief.

The Commonwealth also has legislation aimed at associations with a terrorist organisation. The Commonwealth [Criminal Code](#) (Div 102) makes directing, being a member of, recruiting for, supporting and associating with etc. a terrorist organisation an offence. Division 104 enables the court to make a control order placing obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act. A regulation can also be made specifying that an organisation is a terrorist organisation.⁷³

The [Australian Crime Commission Act 2002 \(Cth\)](#) gives the ACC various powers regarding intelligence operations and investigations into serious and organised crime. The Act defines this as an offence involving 2 or more offenders; having substantial planning and organisation; ordinarily involving the use of sophisticated methods and techniques; ordinarily committed in conjunction with other like offences; and is a serious offence involving acts specified in s 4. At an operational level, the ACC's Serious and Organised Crime National Intelligence Task Force was established in June 2008 to replace an earlier similar task force.⁷⁴ The Task Force intends to initially retain the previous task force's focus on bkie gangs but it will also look at organised crime in general. The ACC is involved in joint operations with state and territory law enforcement agencies. More than 1,500 intelligence disseminations relating to bkie gang activities were provided to partner agencies between January 2007 and the end of February 2009.⁷⁵

⁷² AGD, [Submission to the Parliamentary Joint Committee Inquiry](#), para 68.

⁷³ See also, Part IIA of the [Crimes Act 1914 \(Cth\)](#) which proscribes membership of, and provision of support to, or dealing in publications of, unlawful associations (in relation to overthrow of government).

⁷⁴ ACC Website, Frequently Asked Questions. Further, in June 2007, the Ministerial Council for Police and Emergency Management – Police established a working group to examine bkie gang issues and its final report was completed in October 2007 making a number of recommendations regarding the national approach to combating bkie gangs.

⁷⁵ ACC Website, Frequently Asked Questions.

In 2008, the Commonwealth's Parliamentary Joint Committee on the Australian Crime Commission began an 'Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups' ([Parliamentary Joint Committee Inquiry](#)). This follows upon the Joint Committee's 2007 'Inquiry into the Future Impact of Serious and Organised Crime on Australian Society' which recommended greater harmonisation between Commonwealth, state and territory legislation.⁷⁶ The 2008 [Parliamentary Joint Committee Inquiry](#) also had impetus from the new legislation in South Australia, discussed below.

Under its [Terms of Reference](#) the Parliamentary Joint Committee is to, among many other matters, consider international legislative arrangements to outlaw serious and organised crime groups and association with such groups, as well as the effectiveness of such arrangements. It will also examine the need for Australia to have legislation to outlaw specific groups known to undertake criminal activities, and the membership of and association with such groups. The Joint Committee is also examining legislative arrangements targeting consorting for criminal activity and outlawing serious and organised crime groups (and membership of and association with those groups), and the effectiveness of these arrangements. It will also consider the impact and effect of such legislation on society, criminal groups and networks, law enforcement agencies and the judicial/legal system.⁷⁷

3.2 SOUTH AUSTRALIA

In 2003, South Australia enacted the *Statutes Amendment (Anti-Fortification) Act 2003* (SA) which allows the removal of fortifications around motorcycle gang clubhouses in certain circumstances. In 2005 laws were passed amending the [Security and Investigation Agents Act 1995 \(SA\)](#) to prevent persons involved in nightclub security, and in the gaming and liquor industries, from having criminal associations. The South Australian Attorney-General indicated that the 2005 amendments were particularly aimed at those having connections with outlaw motorcycle gangs.⁷⁸

South Australia was the first Australian state to enact legislation – the [Serious and Organised Crime \(Control\) Act 2008](#) – potentially allowing a bikie gang to be

⁷⁶ Australia, Parliamentary Joint Committee on the Australian Crime Commission, 'Inquiry into the Future Impact of Serious and Organised Crime on Australian Society', 2007, para 6.101.

⁷⁷ [Parliamentary Joint Committee Inquiry](#), Terms of Reference.

⁷⁸ See Hon MJ Atkinson MP, Attorney-General, Second Reading Speech, Statutes Amendment (Liquor, Gambling and Security Industries) Bill 2004 (SA), *SA House of Assembly Hansard Online*, 9 December 2004.

declared to be an outlawed organisation. Such declaration may form the basis of a 'control order' that may ban individuals or members of the gang from associating with each other. The Act commenced on 4 September 2008.

3.2.1 *Serious and Organised Crime (Control) Act 2008 (SA)*

When introducing the [*Serious and Organised Crime \(Control\) Act 2008*](#) (the SA Act) into the South Australian Legislative Assembly, the Attorney-General, the Hon MJ Atkinson MP, said that the Government was 'unrepentant' about giving unprecedented powers to the police and the Attorney-General to combat serious and organised crime. He noted, however, that the legislation would make it clear that *'it is not the intention of parliament that the powers of the legislation be used in a manner that would diminish the freedom of people ... to participate in advocacy, protest, dissent or industrial action'*, and that it contained measures to ensure that the powers are used *'appropriately, responsibly and only to target criminal organisations, their members and associates...'*⁷⁹

Declarations

Section 8 enables the Police Commissioner to make an application to the Attorney-General for a **declaration**, setting out the grounds for such, in relation to an organisation. 'Organisation' is defined in s 3 as *'any incorporated body or unincorporated group (however structured), whether or not the body or group is based outside South Australia, consists of persons who are not ordinarily resident in South Australia or is part of a larger organisation'*. The application must also set out supporting information and be accompanied by a statutory declaration. **Section 9** specifies publication requirements for application notices and for the inviting of public submissions.

After the 28 day deadline for the making of public submissions, **s 10** allows the Attorney-General to make a declaration in respect of the organisation if satisfied that:

- members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in 'serious criminal activity' (defined in s 3 to mean the commission of indictable offences or prescribed summary offences); and
- the organisation represents a risk to public safety and order.

⁷⁹ Hon MJ Atkinson MP, Attorney-General, Minister for Justice and Minister for Multicultural Affairs, Second Reading Speech, Serious and Organised Crime (Control) Bill 2007 (SA), *SA House of Assembly Hansard Online*, 21 November 2007.

In considering whether or not to make a declaration, the Attorney-General may have regard to any of the following (s 10(3)):

- any information suggesting a link between the organisation and serious criminal activity;
- any criminal convictions in relation to current or former members of the organisation, or persons who associate, or have associated, with members of the organisation;
- any information suggesting that current or former members of the organisation, or persons who associate, or have associated, with members of the organisation have been, or are, involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions);
- any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity;⁸⁰
- submissions received from members of the public; and
- any other matter the Attorney-General considers relevant.

Section 13 provides that the Attorney-General is not required to provide any grounds or reasons for the declaration or decision (except in limited circumstances). In addition, any information supplied by the Police Commissioner to the Attorney-General for the purposes of the declaration is not to be disclosed (except in limited circumstances) if the information is classified by the Commissioner as **criminal intelligence**. Information constitutes ‘criminal intelligence’ if it relates to actual or suspected criminal activity and its disclosure could reasonably be expected to prejudice criminal investigations; enable the discovery of the existence/identity of a confidential source of information; or endanger someone’s life or physical safety (see s 3).⁸¹

When introducing the legislation, the Attorney-General, the Hon MJ Atkinson MP, said that the declaration process would be aimed primarily at bikie gangs but had the potential for application to any organisation meeting the s 10 criteria. A ‘*declaration will, of itself, impose no direct punishment on an organisation or its members ... [but] membership of a declared organisation will be a ground on which a control order will be*

⁸⁰ For the purposes of making a declaration, the Attorney-General may be satisfied that members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity (the relevant purpose) – whether or not all the members associate for that relevant purpose or only some; and whether or not members associate for the relevant purpose or for different serious criminal activities; and whether or not they also associate for other purposes: see s 10(4).

⁸¹ The *Freedom of Information Act 1991* (SA), [Sch 1](#), was amended to ensure that criminal intelligence information is exempt from disclosure under the FOI Act.

able to be issued and the new consorting offence will prohibit a person associating or communicating with a member of a declared organisation'.⁸²

Dr Andreas Schloenhardt, notes that the scope of the SA Act is such that it would apply to all organisations involved in serious crime, not just bikie gangs, and could potentially apply to ban any organisation that the Attorney-General believes to be a 'risk to public safety and order'.⁸³ Schloenhardt considers that the legislation has many similarities with the Commonwealth's terrorist organisation laws. As noted above, the Commonwealth [Criminal Code](#) (Div 102) provides a process for listing terrorist organisations and creates offences relating to membership of, and other associations with, those organisations. While the SA Act establishes procedures to ban certain organisations and then makes associating with them an offence, it is broader than the Commonwealth laws by allowing the banning of any organisation seeking to engage in serious criminal activity.⁸⁴ Schloenhardt also points out that the Commonwealth provisions for declaring a terrorist organisation have greater inbuilt safeguards, such as the need for parliamentary approval for certain matters, whereas the SA Act gives power to declare an organisation to the Attorney-General on 'loose criteria'.⁸⁵

Control Orders

A **control order** may prohibit a person from (s 14(5)(a)):

- associating or communicating with specified persons or persons of a specified class; or
- entering or being in the vicinity of specified premises or premises of a specified class; or
- possessing specified articles or articles of a specified class.

In addition, if the person is a *member of a declared organisation*, the control order *must* prohibit the person from associating with other members of declared organisations; and possessing a dangerous article or prohibited weapon (within the meaning of s 15 of the *Summary Offences Act 1953* (SA)), except as may be specified in the order: s 14(5)(b).

⁸² Notice of the declaration must be published in accordance with s 11 and a declaration may be revoked at any time pursuant to the s 12 notice requirements.

⁸³ A Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia', p 277.

⁸⁴ A Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia', p 277.

⁸⁵ A Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia', p 277.

Thus, in effect, control orders can prevent a person (meeting the requirements mentioned below) from associating or communicating with specified persons; visiting certain premises (e.g. bikie gang clubhouses); and must prevent a person who is a member of a declared organisation from associating with other members. Possession of specified articles and/or weapons can also be banned. Also, as discussed later, s 35 makes it an offence for persons to associate with a person under a control order.⁸⁶

Section 14(1) states that the Magistrates Court, on application by the Police Commissioner, *must* make a **control order** against a person (the defendant) if the Court is satisfied (on the balance of probabilities (see s 5)) that the defendant is a member of a declared organisation.

In addition, the Court *may* (pursuant to **s 14(2)**) make a control order against a defendant if it is appropriate in the circumstances and the Court is satisfied that the defendant:

- has been a member of an organisation that is currently a declared organisation and regularly associates with members of a declared organisation; or
- engages (or has engaged) in serious criminal activity and regularly associates with members of a declared organisation; or
- engages (or has engaged) in serious criminal activity and regularly associates with others engaging (or have engaged) in serious criminal activity.⁸⁷

The control order can be issued on an application made without notice (*ex parte*) (**s 14(3)**).

In considering whether or not to make a control order under s 14(2), or in considering the prohibitions that may be included in a control order, under s 14(5), the Court must have regard to the following (**s 14(6)**):

- whether the defendant's behavioural history suggests a risk of him or her engaging in serious criminal activity;
- the extent to which the order might assist in preventing the defendant from engaging in serious criminal activity;
- the prior criminal record of the defendant and any persons specified in the application as persons with whom the defendant regularly associates;
- any legitimate reasons why the defendant may be associating with any person specified in the application; and
- other relevant matters.

⁸⁶ A Schloenhardt, 'Mafias and Motorbikes: New Organised Crime Offences in Australia', p 276.

⁸⁷ The grounds of an application for a control order must be verified by affidavit: s 14(4).

Because control orders may be issued *ex parte*, the order must comply with **s 15** (e.g. it must be directed at the defendant; must include the grounds upon which it is made and must attach a copy of the affidavit supporting the application (unless it contains/comprises criminal intelligence); must be served personally on the defendant;⁸⁸ and it must explain that there is a right of objection).

A person on whom the control order is served has the right to lodge a notice of **objection** within 14 days (**s 17**). In determining the notice of objection, the Court considers whether, in the light of the evidence presented by both the Commissioner and the objector, sufficient grounds existed for the making of the control order. The Court can then confirm, vary (e.g. allow the defendant to associate with a particular member of a declared organisation), or revoke the control order and make any necessary ancillary orders (**s 18**). A right of appeal lies to the Supreme Court (see **s 19**).⁸⁹

It is an **offence** to knowingly or recklessly contravene or fail to comply with a control order and the maximum penalty is imprisonment for 5 years (**s 22**).

As is the case in relation to declarations, **s 21** prohibits disclosure of information properly categorised by the Police Commissioner as **criminal intelligence** provided by the Commissioner to the Court in proceedings relating to control orders (except in limited situations). The Court must, on the Commissioner's application, take steps (e.g. hear evidence in private) to maintain the confidentiality of such criminal intelligence. This effectively means that criminal intelligence provided by the Commissioner in applications for a control order or in notice of objection proceedings can be considered by the Court but will not be disclosed to the defendant, his or her legal representatives, or to anyone else.⁹⁰

Public Safety Orders

Pursuant to **s 23**, a senior police officer (of or above the rank of inspector) may make an order (***public safety order***) in respect of a person or a class of persons if satisfied that:

- the presence of the person, or of persons of that class, at any premises or event, or within an area, poses a serious risk to public safety or security; and

⁸⁸ The control order must (unless it is not possible – s 16(3)) be served personally on the defendant in accordance with **s 16** and police officers can require the defendant to do certain things to enable service to be effected on him or her.

⁸⁹ Section 20 enables variation or revocation of a control order (e.g. to cater for substantial change in relevant circumstances).

⁹⁰ Hon MJ Atkinson MP, Second Reading Speech.

- the making of the order is appropriate in the circumstances (s **23(1)**).

The presence of a person(s) at a premises or an event or within an area poses ‘a serious risk to public safety or security’ if there is a serious risk that the presence of the person(s) might result in the death of, or serious physical harm to, a person; or serious damage to property (s **23(8)**).

The effect of a public safety order is that it can prohibit a specified person or a specified class of persons from entering or being on specified premises; or attending a specified event (see requirements in s 23(4)); or entering or being within a specified area (s **23(3)**).

As a limitation on such power, in considering whether or not to make such an order, the senior police officer *must* have regard to (s **23(2)**):

- whether the person (or members of the class of persons) have previously behaved in a way posing a serious risk to public safety or security or have a history of serious criminal activity;
- whether the person (or members of the class of persons) have been or are members of a declared organisation, or subject to control orders, or associate or have associated with members of a declared organisation or persons subject to control orders;
- if advocacy, protest, dissent or industrial action is the likely reason for the person (or members of the class of persons) being present at the relevant premises or event, or within the relevant area – the public interest in maintaining freedom to participate in such activities;
- whether the degree of risk involved justifies the imposition of the order’s prohibitions having regard, in particular, to any legitimate reason for being present at the relevant premises or event, or within the relevant area;
- the extent to which the making of the order will mitigate any risk to public safety or security in light of other measures reasonably available to mitigate the risk; and
- any other matters the officer thinks fit.

Other controls on public safety orders are that:

- such an order must not be made that would prohibit a person or class of persons from being present at any premises or event, or within an area, if those persons are members of an organisation formed for, or whose primary purpose is, non-violent advocacy, protest, dissent or industrial action; and the police officer believes that advocacy, protest, dissent or industrial action is the likely reason for those persons to be present (s **23(5)**);
- while such an order may prohibit a person from entering or being on a premises regardless of his or legal or equitable interest therein, the order must not prohibit a person from entering or being on his or her principal place of residence (s **23(7)**);

- although an order may be varied or revoked at any time by the officer, it must be revoked if the Police Commissioner is satisfied that the grounds for making it no longer exist (s 24); and
- the order must not last for longer than 72 hours (or, if it relates to an event over a longer period, then for the total duration of the event)⁹¹ unless authorised by an order of the Court (see the application process for such authorisation order in s 25(4)-(7)).⁹²

The requirements for personal service and notification of public safety orders (or variations of orders) are specified in s 30. Among other things, the order must set out the grounds upon which the order or any variations to it were made (unless it contains criminal intelligence) and an explanation of the right to object to an order lasting more than 7 days.⁹³

If a public safety order operates for more than 7 days, a person bound it may lodge a notice of **objection** with the Court within the timeframe specified in s 26. The process adopted by the Court in determining the notice of objection is similar to that in determining an objection to a control order (i.e. it determines whether, in light of the evidence, sufficient grounds existed for the making or variation of the order, and any relevant authorisation order pursuant to s 25). The Court can confirm, vary or rescind the public safety order and make consequential or ancillary orders (s 27). A right of appeal lies to the Supreme Court (s 28).

Senior police officers are not required to provide grounds or reasons for their decisions regarding public safety orders to the person affected by it. Criminal intelligence information forming the basis for making, varying or revoking public safety orders and criminal intelligence information provided by a senior police officer to a Court for proceedings regarding public safety orders are not to be disclosed other than in the limited circumstances provided for in s 29. Moreover, the Court must preserve the confidentiality of criminal intelligence information in a similar way to how it must do so in control order proceedings.

⁹¹ Nor must an order be made that relates to a person (other than a member of a declared organisation) who has been subject to another public safety order within the immediately preceding period of 72 hours (s 25(1)).

⁹² Section 25(5)-(6) set out the circumstances in which an urgent application for an authorisation order can be made and dealt with by a magistrate by telephone (and the constraints thereon).

⁹³ The public safety order must (unless it is not possible – s 30(5)) be served personally on the defendant and police officers can require the defendant to do certain things in order for service to be effected. Section 31 enables a police officer to verbally communicate the contents of the order to a person whom the police officer is satisfied should be bound by the order as a matter of urgency.

It is an **offence** to knowingly or recklessly contravene or fail to comply with a public safety order. The maximum penalty is 5 years imprisonment. However, if the order bans a person from entering or being within a specified area, it is a defence to prove that the defendant had a reasonable excuse for entering or being within the specified area (s 32).

Police officers have powers to search premises and vehicles specified in a public safety order if the officer suspects on reasonable grounds that a person to whom the order relates is within the premises or vehicle. A person who (without reasonable excuse) does not comply with a requirement of a police officer during the search process may face up to 5 years imprisonment (s 33).

General Offences

An offence of '**criminal association**' is specified in s 35 as follows:

- a person who associates,⁹⁴ on not less than 6 occasions during a period of 12 months, with a person who is a member of a declared organisation or is the subject of a control order is guilty of an offence and liable to imprisonment for up to 5 years. The person must, on each occasion of association, know or be reckless about the fact that the other person is a member of a declared organisation or the subject of a control order;
- a person who has a prescribed criminal conviction and associates, on not less than 6 occasions during a period of 12 months, with another person who has such a conviction is guilty of an offence and liable to imprisonment for up to 5 years. The person must, on each occasion of association, know or be reckless about the fact that the other person had the relevant conviction.⁹⁵

However, certain forms of association will not amount to an offence unless the prosecution proves that the association was not reasonable in the circumstances (s 35(6)). These are associations:

- between close family members;⁹⁶
- occurring in the course of a lawful occupation, business or profession;
- occurring at prescribed courses of training or education;
- occurring at prescribed kinds of rehabilitation, counselling or therapy;

⁹⁴ 'Associate with another person' is broadly defined to include communication by letter, telephone or facsimile or by email or other electronic means: s 35(11).

⁹⁵ A person may be guilty of an offence against s 35 (1) or (3) in respect of associations with the same person or with different people (s 35(5)).

⁹⁶ Which means a spouse or former spouse; parent or grandparent; sibling; guardian or carer (s 35(11)-(12)).

- occurring in lawful custody or in the course of complying with a court order;
- of certain prescribed kinds; or
- where, under s 35(7), a Court disregards the association if the defendant can prove there is a reasonable excuse for the association, provided the defendant was not a member of a declared organisation, or subject to a control order, or had a prescribed criminal conviction at the time of the association.

The prosecution need not prove that the association was for any particular purpose or would have led to an offence being committed (s 35(9)). The central focus is on associations with particular persons.⁹⁷

If there is reasonable cause to suspect that 1 of the 2 people associating is a member of a declared organisation; or is the subject of a control order; or has a prescribed criminal conviction, the police officer may require a statement of personal details to be given. It is an offence (see s 36) for a person not to comply (without reasonable excuse) or to give false details, attracting a maximum penalty of 5 years imprisonment.

Section 35 was included in the SA Act to replace an older ‘consorting’ offence provision which the Government considered not broad enough to deal with the issue of bikie gang members recruiting lesser known street gang members to do high risk crimes (e.g. selling and producing drugs). Nor was it seen to impose a sufficiently stringent penalty.⁹⁸

The offences discussed in this section as well as other indictable offences against the SA Act can be prosecuted as a summary offence before the Magistrates Court, except as provided by s 42.

Judicial Review

Apart from limited situations, decisions, proceedings, acts or omissions under the SA Act are not susceptible to judicial review. The validity of declarations of organisations cannot be challenged or questioned in any proceedings (s 41).

Reviews and Expiry of the Act

The SA Act provides (see s 37) for a retired judicial officer to be appointed each year to conduct a review of, and report on, whether the powers under the Act have been used appropriately and the report must be tabled in Parliament. Further, s 38

⁹⁷ A Schloenhardt, ‘[Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region](#)’, Submission to the Parliamentary Joint Committee Inquiry, January 2009, pp 95-96.

⁹⁸ Hon MJ Atkinson MP, Second Reading Speech.

requires the Attorney-General to review and report on the operation and effectiveness of the SA Act within 5 years of its commencement, which report must also be tabled in Parliament. Pursuant to s 39 the SA Act will expire in September 2013.

Amendment of Other Acts

Schedule 1 of the SA Act amended the [Criminal Law Consolidation Act 1935 \(SA\)](#) so that a person who causes or threatens etc. physical injury or engages in conduct amounting to stalking (including, more subtle forms of intimidation such as following someone or loitering outside their workplace or home) with the intention of inducing a person involved in a criminal investigation or judicial proceedings (e.g. a witness, lawyer, victim, juror, judicial officer etc.) to do or not do something that might influence the outcome can be imprisoned for up to 7 years. The same penalty applies to a person who engages in the same conduct directed at someone assisting a criminal investigation or judicial proceedings (new s 248). Amendments are also made to address the same offending conduct against public officers discharging their duties or functions (new s 250).

Schedule 1 also amended the [Bail Act 1985 \(SA\)](#) so that there will be a presumption against the granting of bail applying to a broader category of 'prescribed applicants'. The phrase now includes persons in custody for control order and public safety order offences; blackmail and the offences under the *Criminal Law Consolidation Act 1935* discussed in the previous paragraph.

Of particular interest, is that the [Summary Offences Act 1953 \(SA\)](#) was amended to add a ground (to s 74BB) on which the Magistrates Court may, on application of the Police Commissioner, issue a fortification removal order. Such order may be issued if the Court is satisfied that the fortifications have been created contrary to development legislation; or there are reasonable grounds to believe that the premises are, have, or are likely to be, used for or in connection with the commission of a serious criminal offence, to conceal evidence of such, or to keep the proceeds of such offence. The added ground enables an order to be issued where the premises are owned by a declared organisation or a member of such an organisation; or is occupied or habitually used by members of such an organisation.

3.2.2 Action under the Serious and Organised Crime (Control) Act

The first bikie gang to become a 'declared organisation' in South Australia is the Finks Motorcycle Club. This occurred on 14 March 2009.⁹⁹ The application for

⁹⁹ Hon Michael Atkinson MP, Attorney-General, 'Serious and Organised Crime (Control) Act 2008', [Ministerial Statement](#), 14 March 2009.

the declaration was received by the SA Attorney-General in December 2008. The Attorney-General, Hon Michael Atkinson MP, advised Parliament that he had published a notice and invited public submissions about the application. He also said that he had written to Finks members and former members giving them further opportunity to make submissions and for their solicitors to read the statutory declaration supporting the application.¹⁰⁰ The submissions and police information, among other things, were considered by the Attorney-General in deciding whether to make the Finks a 'declared organisation'. The Attorney-General said that the police had provided evidence that Finks members are involved in serious and organised crime, including drug offence convictions, shootings and the commission of violent offences, rape charges, as well as having many convictions for firearms and weapons offences. The Hon Michael Atkinson MP said he was also satisfied that the Finks Motorcycle Club was a risk to public safety and order in South Australia.¹⁰¹

It is now possible for a Magistrate to make a control order against the Finks which could effectively restrict its members from meeting and a person could be charged under s 35 of the SA Act for associating with its members.¹⁰² On 26 May 2009, the SA Government issued a media release welcoming an application by the SA Police for a control order to be issued against a member of the Finks.¹⁰³

Cabinet has approved the introduction of legislation to target the unexplained wealth of members of serious organised crime organisations and to enable the confiscation of wealth that cannot be explained as being lawfully acquired.¹⁰⁴

¹⁰⁰ Hon MJ Atkinson MP, Attorney-General, 'Finks Motorcycle Club', Ministerial Statement, *House of Assembly Hansard*, 24 March 2009, pp 1986-1987, p 1986.

¹⁰¹ Hon MJ Atkinson MP, *Ministerial Statement*, 14 March 2009.

¹⁰² Hon MJ Atkinson MP, *Ministerial Statement*, 14 March 2009.

¹⁰³ SA Government, 'Police seek to slap first control order on Finks member', *Media Release*, 26 May 2009. It appears, however, that the Magistrates Court is awaiting the outcome of a challenge to the validity of the SA Act: see L Bartels, Australian Institute of Criminology, 'The status of laws on outlaw motorcycle gangs in Australia', *Research in Practice*, 12 June 2009, p 5.

¹⁰⁴ SA Government, 'New laws target bikies' hip pocket', *Media Release*, 16 July 2009.

3.3 NEW SOUTH WALES

In April 2009, in the wake of inter-gang brawling at Sydney Airport on 22 March 2009 and the subsequent outbreaks of violence and shootings in public areas, the NSW Parliament passed its own ‘anti-bikie gang’ laws.

3.3.1 *Crimes (Criminal Organisations Control) Act 2009* (NSW)

The Bill which became the [*Crimes \(Criminal Organisations Control\) Act 2009 \(NSW\)*](#) (the NSW Act) was introduced into the NSW Legislative Assembly on 2 April 2009 and passed both Houses of Parliament on the same day. It took effect on 3 April 2009.

When introducing the legislation into the Legislative Assembly, the NSW Premier, the Hon Nathan Rees MP, said:¹⁰⁵

... [T]he Commissioner of Police will be able to seek a declaration from a Supreme Court judge that a bikie gang is a declared criminal organisation. An eligible judge may make a declaration if they are satisfied that an organisation's members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represents a risk to public safety and order in New South Wales. Once the organisation is declared, the commissioner may then seek control orders from the Supreme Court in respect of one or more persons on the basis that those persons are members of a declared criminal organisation and there are sufficient grounds for making the order. The controlled member will not be able to associate with another controlled member of that gang. If they do, they will risk two years jail for the first offence. Do it again and they will risk five years in jail.

Declarations

The NSW Police Commissioner may, under **s 6**, apply to an eligible Judge for a **declaration** that a particular organisation is a declared organisation (under the SA Act, application is made to the Attorney-General). An ‘eligible Judge’ is a Supreme Court Judge acting as *persona designate* who has consented to the Attorney-General’s declaration of him or her as an ‘eligible Judge’ (**s 5**). The information to be included in the application for a declaration is similar to that required by the SA Act but also must include the nature of the organisation and its distinguishing characteristics, as well as the names of any persons believed to be members of it (s 6(2)(c),(d)).

¹⁰⁵ Hon N Rees MP, Premier of NSW and Minister for the Arts, [Agreement in Principle](#), Crimes (Criminal Organisations Control) Bill 2009 (NSW), *NSW Legislative Assembly Hansard Online*, 2 April 2009.

There are publication requirements under s 7 and members of the organisation and others who may be directly affected by the outcome of the declaration application must be invited to make submissions to the eligible Judge at the hearing of the application, in accordance with s 8 (under the SA Act, submissions are made to the Attorney-General rather than to an 'eligible Judge').

If the eligible Judge is satisfied¹⁰⁶ that members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in 'serious criminal activity';¹⁰⁷ and the organisation represents a risk to public safety and order, the eligible Judge may make a declaration that the organisation is a 'declared organisation' (s 9(1)).¹⁰⁸

In considering whether or not to make the declaration, the eligible Judge may have regard to any of the matters in s 9(2) (similar to those matters the Attorney-General considers in making a declaration under s 10(3) of the SA Act). These are, in brief: information suggesting a link between the organisation and serious criminal activity; any criminal convictions of current or former members; information suggesting current or former members are/have been involved in serious criminal activity; information suggesting that members of a chapter or branch in another jurisdiction associate for organising, planning, facilitating, supporting or engaging in serious criminal activity; any submissions received; and other relevant matters.¹⁰⁹

A member of the organisation at whom the application is directed may appear and make submissions (and, with leave of the Court, other persons who may be directly affected). Persons who do not wish to be present may ask to make a protected submission to the eligible Judge in private.¹¹⁰ The Police Commissioner may

¹⁰⁶ Questions of fact in proceedings for declarations or control orders are decided on the balance of probabilities (s 32).

¹⁰⁷ Defined, in s 3, as obtaining material benefits from conduct constituting a serious indictable offence; or committing a 'serious violence offence' (also defined in s 3 as including, for example, loss of life or serious injury, and which carries a penalty of a prison sentence for life or for 10 years or more). 'Serious criminal activity' can also take place outside of NSW.

¹⁰⁸ See also, s 9(4) which is similar to s 10(4) of the SA Act regarding satisfaction about some members being involved in serious criminal activity provided those members constitute a significant group within the organisation etc.

¹⁰⁹ The declaration must be published in accordance with s 10.

¹¹⁰ A 'protected submission' is made by a person who has reasonable grounds to believe he or she may be subject to reprisal action of the sort (including injury, harassment) mentioned in s 8(7) for making the submission. The eligible Judge must maintain its confidentiality such as taking evidence and receiving the submission with just the Commissioner and Attorney-General present (see s 29).

object to the presence of any of the foregoing persons during parts of the hearing in which information classified by the Commissioner as **criminal intelligence** is disclosed (s 8).¹¹¹

Section 28 provides that the eligible Judge must take steps to maintain the confidentiality of information during the hearing (e.g. receiving evidence in private in absence of the parties and their representatives) that the Judge considers to be properly classified by the Police Commissioner as criminal intelligence. The difference under the NSW Act is that it is for the eligible Judge and the Court (as the case may be) to determine whether the information is properly classified as criminal intelligence whereas, under s 21 of the SA Act, it is for the Police Commissioner to properly classify it as criminal intelligence information.

The rules of evidence do not apply to the declaration hearing and, like with the SA Act, the eligible Judge is not required to provide any grounds or reasons for the declaration or decision (apart from as required under s 39)¹¹²(s 13).

The declaration generally takes effect on the date of publication in the Gazette and remains in force for a period of 3 years, unless it is sooner revoked under s 12 or is renewed (s 11).

Under s 12 of the NSW Act, the eligible Judge can revoke the declaration at the written request of the Commissioner or on written application by a member of the declared organisation (setting out grounds, supporting information and verifying affidavit). In the case where the organisation applies for revocation, the eligible Judge can only revoke the declaration if satisfied there has been such a substantial change in the nature of the organisation's membership that the members no longer associate for purposes relating to serious criminal activity and the organisation no longer represents a risk to public safety and order.¹¹³

Interim Control Orders and Control Orders

The NSW Act, under s 14, enables the NSW Police Commissioner to apply to the Supreme Court to obtain an **interim control order** relating to one or more

¹¹¹ 'Criminal intelligence' is defined in s 3 and is identical to the definition of 'criminal intelligence' in s 3 of the SA Act.

¹¹² Section 39 states that for 2 years from the date of commencement of the NSW Act, the Police Commissioner must provide the Ombudsman with certain information about declarations and prosecutions for the purposes of the Ombudsman's scrutiny of the exercise of powers conferred on police officers under the NSW Act and the Ombudsman's report to the Attorney-General.

¹¹³ Compare s 12 of the NSW Act with s 20 of the SA Act (Attorney-General can revoke a declaration in his or her discretion and no grounds are provided for doing so).

members of a declared organisation, pending the hearing and final determination of an application for a control order confirming the interim control order. Under the SA Act, application is made to the Magistrates Court. The grounds of the application must be verified by the NSW Police Commissioner's affidavit (or affidavits from other senior police officers). The Court must make the interim control order (and it can be made *ex parte*) if it is satisfied that the application and information supplied by the Commissioner satisfy the requirements for making a control order (i.e. that the person is a member of a particular declared organisation and sufficient grounds exist for making the order: see s 19(1), discussed below).

Once an interim control order is made, the Court must fix a time for the hearing of the application for an order confirming the interim control order (the confirming control order). The interim order takes effect on the day on which notice of the order is served personally on the person to whom it relates by the Commissioner (which service must be effected within 28 days) (s 15).¹¹⁴ It remains in force until revoked; or until a confirming control order is made or served on the person to whom it relates; or until an application for the confirming control order is dismissed or withdrawn (s 17).

The person on whom notice is served has a right to **object** at the hearing of the application for the confirming control order and to make submissions(s 20).¹¹⁵

The Court may make a confirming **control order** in relation to a person on whom the notice of the interim control order has been served if it is satisfied that the person is a member of a particular declared organisation and sufficient grounds exist for making the confirming control order (s 19(1)). The Court may make a confirming control order (with or without variations to the interim order) or it may revoke the interim control order (s 19(2)).¹¹⁶

The matters the Court must take into account in determining if there are sufficient grounds to make the confirming control order are: the Police Commissioner's or senior police officers' affidavit verifying the application for the interim order; the affidavit provided by the person to whom the order relates along with the notice of

¹¹⁴ Section 16 sets out what the notice of the interim control order must contain, such as an explanation of the effect of a control order.

¹¹⁵ A person on whom the interim control order notice is served can request the Court to expedite the hearing for the confirming control order on the grounds of undue hardship (s 18).

¹¹⁶ The confirming control order may be made in absence of the person concerned but a copy of the order must be personally served on the person: (19(4),(5)).

objection; and any other information provided by the Commissioner or the person (s 19(3)).¹¹⁷

The **consequences** of interim control orders and control orders are set out in **ss 26** and **27**.

Section 26 makes it an offence for a controlled member¹¹⁸ of a declared organisation to **associate** with another controlled member of the declared organisation. A first offence attracts a maximum 2 years imprisonment and the second and further offences are punishable by up to 5 years imprisonment. This consequence is similar to one of the control order prohibitions under s 14(5) of the SA Act which attracts a maximum of 5 years imprisonment.

Under the NSW Act, it is a defence under s 26(3) if the defendant can show that he or she did not know, and could not reasonably be expected to have known, that the other person was also a controlled member of the declared organisation.¹¹⁹ Further, under s 26(4) it is a defence if the Court has granted an exemption, under s 19(7), on the basis that the defendant had a good reason for associating with the particular controlled member. In addition, certain associations do not amount to an offence if the defendant can prove that the association was reasonable in the circumstances. These ‘exempt’ associations are the same as those under the general offence provisions in s 35 of the SA Act and include associations between close family members; associations in the course of business, profession or occupation etc.

Section 27 provides that once an interim control order is made in relation to a controlled member, any authorisation (e.g. a licence, registration approval, certification) to carry on a **prescribed activity** held by that controlled member is automatically suspended until the interim order is confirmed by a control order. If a confirming control order is then made, the authorisation is revoked. A ‘prescribed activity’ includes operating a casino, pawn broking, being a commercial or private agent, possessing a firearm or firearms dealing, operating a tow truck, supplying or selling liquor, being a dealer under the *Motor Dealers Act 1974* (NSW), bookmaking, and nightclub security etc. (see s 27(6) for full range). Further, a controlled member cannot apply for an authorisation to carry on a prescribed activity while under an interim control order or confirming control order. The Court can exempt the person from the prohibition under s 27 for a specified period to allow the person to organise his or her affairs (s 19(7)).

¹¹⁷ Section 30 provides for the keeping of a register about declarations and orders.

¹¹⁸ That is, a person who is the subject of an interim control order or a confirming control order (s 3).

¹¹⁹ Under s 22 of the SA Act, no offence is committed unless the defendant knew or was reckless as to the fact of the contravention.

A confirming control order takes effect when made or, if the person to whom it relates was not present at the hearing, once the person is served with the copy of the order. It remains in force until revoked (ss 22-23).¹²⁰

A confirming control order must specify the person to whom it relates, include a statement of the grounds on which it was made plus a verifying affidavit (but not so as to disclose criminal intelligence information),¹²¹ and must explain the right of appeal (s 21). An appeal is heard by the NSW Court of Appeal (s 24).

Other Matters

Similarly to s 41 of the SA Act, but with some variations, s 35 of the NSW Act protects declarations, interim control orders and confirming control orders from judicial or administrative review or challenge, apart from the appeal rights provided under s 24.

Proceedings for offences under the NSW Act are to be dealt with summarily before a Local Court but the maximum penalty applicable is a fine of 100 penalty units and/or 2 years imprisonment (s 36). A second or further offence under s 26 is to be prosecuted on indictment.

The NSW Ombudsman is (see s 39) to keep the exercise of powers conferred on police officers under scrutiny for 2 years from the commencement of the NSW Act, and the Police Commissioner must provide the Ombudsman with reports about declarations, orders made, and prosecutions under s 26 so that the Ombudsman can make a report to the Attorney-General and the Commissioner at the end of the 2 year period (which report is tabled in Parliament). After 5 years from the date of assent (after 3 April 2014), the Act must be reviewed (s 40).

Schedule 1 effects amendments to other Acts so that, under the s 9 of the [Bail Act 1978 \(NSW\)](#) there will be a neutral presumption against bail in relation to an association offence under s 26. Amendments are also made to s 6 of the [Criminal Assets Recovery Act 1990 \(NSW\)](#) and of Sch 1 of the [Criminal Procedures Act 1986 \(NSW\)](#) to make a s 26 association offence triable summarily.

¹²⁰ Section 25 relates to variations or revocations of control orders on much the same bases as under s 20 of the SA Act (i.e. substantial change in relevant circumstances).

¹²¹ See s 28 and earlier discussion.

3.3.2 Main Differences between the SA Legislation and the NSW Legislation

Some of the differences between the SA Act and the NSW Act were noted in the context of the above discussion. In essence the main distinguishing features appear to be:

- in SA, applications for ‘declared organisations’ are made by the SA Police Commissioner to the SA Attorney-General. In NSW, such applications are made to an eligible Judge (of the Supreme Court). The grounds for such declarations are similar;
- control orders are made by a Magistrate under the SA Act and by a Supreme Court judge under the NSW Act. Under the SA Act, there is no provision for interim control orders. Under the SA Act, the actual control order is made by the Magistrates Court and is served on the relevant person who has a right to object to the order. The objection is then heard by the Court. Under the NSW Act, notice of the interim control order is served on the relevant person stating that there is a right to object and that person can appear and make submissions at the hearing for the making of the confirming control order;
- the basis of a control order is different under each Act. Under the SA Act, a control order *must* be made against a person who is a member of a declared organisation. Under the NSW Act, interim and confirming control orders *may* be made against a person who is a member of a particular declared organisation and if sufficient grounds exist to do so. In SA, the Magistrates Court *may* make a control order on the grounds listed in s 19(2) of the SA Act;
- the effect of interim and confirming control orders under the NSW Act is to ban a ‘controlled member’ of a declared organisation from associating with another controlled member of a declared organisation (unless it is a form of association that is disregarded e.g. close family members) and prohibit the person from carrying on specified businesses and activities (some exemptions apply). Under the SA Act, the control order *must* ban the person from associating with other members and from possessing dangerous articles or prohibited weapons. Further, a control order *may* ban association with specified persons or those of a specified class; or prohibit entering or being in the vicinity of certain premises; or it may ban possession of certain articles;
- the NSW Act makes no provision for public safety orders. Under the SA Act, a public safety order can be made by senior police officers where the presence of someone at any premises or event poses a serious risk to public safety or security. A public safety order generally lasts up to 72 hours and makes it an offence to enter or be on specified premises or within a specified area or attend a specified event. Police officers have search powers in relation to such orders;
- the NSW Act does not contain specific offence provisions whereas the SA Act does. It is an offence (under s 35 of the SA Act) for a person to associate with a member of a declared organisation or someone subject to a control order on not less than 6 occasions within 12 months. It is also an offence under the SA

Act for a person with a prescribed criminal conviction to associate with someone else with such a criminal conviction on not less than 6 occasions within 12 months. Certain associations are disregarded (e.g. between close family members);

- the NSW Act does not contain an expiry date but the SA Act will expire in September 2013. The report and review provisions regarding exercise of powers under each Act differ to some extent.¹²²

It has been reported that Sydney bikie gangs are considering a challenge to the validity of the NSW Act.¹²³

3.3.3 *Criminal Organisations Legislation Amendment Act 2009 (NSW)*

On 13 May 2009, the [Criminal Organisations Legislation Amendment Act 2009 \(NSW\)](#) (Amending Act) was passed to give the police more powers to deal with criminal organisations. It received assent on 19 May 2009. The Amending Act (in Sch 1, which operates from the date of assent) seeks to amend the NSW Act to, among other things (see the Amending Act for other changes to the NSW Act):

- enable the Supreme Court to make an order for substituted service of notice of an interim control order on the person to whom it relates if it has not been possible to effect personal service (e.g. on his or her legal representatives) and, if substituted service also fails, to order public notification;
- create an offence, punishable by up to 5 years imprisonment, for a member of a declared organisation who is subject to a control order to recruit other persons to be a member of the organisation. The NSW Premier told Parliament that *'some of the most violent inter-club feuds occur when members are induced to "patch over" or transfer to other gangs'. This new offence will help stamp out recruitment and poaching'*,¹²⁴
- enable bodies which have legislative power to issue authorisations for the carrying on of certain 'high risk' occupations and activities to enter into arrangements with the Commissioner of Police for the supply of criminal intelligence and other information concerning declared organisations and their members and associates.

¹²² Conducted by the Ombudsman in NSW and the Attorney-General in SA.

¹²³ Dylan Welch, 'Bikies unite to fight new gang laws', *Sydney Morning Herald Online*, 27 April 2009.

¹²⁴ Hon Nathan Rees MP, Premier, and Minister for the Arts, 'Outlaw Motorcycle Gang Countermeasures', Answer to Question, *NSW Legislative Assembly Hansard Online*, 5 May 2009.

The Amending Act also (in Sch 2 which is not yet in force) seeks to amend the [Law Enforcement \(Powers and Responsibilities\) Act 2002 \(NSW\)](#) to enable an eligible judge¹²⁵ under the NSW Act to issue a criminal organisation search warrant if there are reasonable grounds to suspect (a lower standard than previously i.e. ‘reasonable belief’)¹²⁶ there is, or will be within 7 days, in or on premises, a thing connected with an ‘organised crime offence’.¹²⁷ During his In Reply Speech, the NSW Attorney-General, the Hon J Hatzistergos MLC, noted that police will have to show that the serious indictable offence in question is somehow connected to organised criminal activity meaning that ‘warrants will not be available for everyday offences committed by individuals ... but, rather, restricted to highly planned and structured, serious criminal offences’.¹²⁸ Only an authorised police officer can apply for this new warrant. The warrant generally gives the police essentially the same powers as those exercisable under a normal search warrant but it lasts for up to 7 days rather than the 72 hours as with normal search warrants.¹²⁹

Schedule 3 of the Amending Act amends various Acts to allow regulatory authorities to refuse to grant authorisations and to cancel authorisations (covering industries such as security, firearms, tow-truck and second hand goods) where the authorities have reasonable grounds to believe, from information provided by the Commissioner of Police (discussed above), that:

- the applicants or holders are members of, or regularly associate with one or more members of, a declared organisation; and
- the nature and circumstances of that relationship with the organisation or its members are such that it could reasonably be inferred that improper conduct furthering the criminal activities of the declared organisation is likely to occur if they hold such authorisations.

¹²⁵ As established under the NSW Act, as explained earlier.

¹²⁶ Hon Nathan Rees MP, ‘Outlaw Motorcycle Gang Countermeasures’, 5 May 2009. The Premier noted that the warrants can be obtained 24 hours a day and will enable police to react to fast-moving intelligence and emergencies.

¹²⁷ Defined in the new s 46AA to the [Law Enforcement \(Powers and Responsibilities\) Act 2002 \(NSW\)](#) as a serious indictable offence arising from, or occurring as a result of, organised criminal activity.

¹²⁸ Hon J Hatzistergos MLC, Attorney-General and Minister for Industrial Relations, In Reply, *Legislative Council Hansard Online*, 13 May 2009.

¹²⁹ The new warrant powers are amenable to the Ombudsman’s inspection and report.

3.4 OTHER NEW SOUTH WALES MEASURES

The NSW Act builds upon earlier ‘anti-gang’ legislation. The [Crimes Legislation Amendment \(Gangs\) Act 2006 \(NSW\)](#) amended the [Crimes Act 1900 \(NSW\)](#) and the [Law Enforcement \(Powers and Responsibilities\) Act 2002 \(NSW\)](#) and was passed by the NSW Parliament in 2006 to give police officers powers to tackle crime networks, including outlaw motorcycle gangs.

Amongst other things the ‘anti-gang Act’ inserted a new Part 3E into the [Crimes Act 1900](#) which:

- created new offences against the participation in a criminal group (i.e. 3 or more persons engaging in ‘serious violence offences’ and other specified conduct);¹³⁰
- introduced new aggravated offences relating to participating in a criminal activity of a criminal group: i.e. assaulting another person; destroying or damaging property; assaulting a police officer;¹³¹ and
- made it an offence under s 351A to recruit another person to carry out or assist in a criminal activity; and created new aggravated public disorder offences.

Amendments to the [Law Enforcement \(Powers and Responsibilities\) Act 2002](#) provided more power to police, in a new s 87MA, to disperse groups in areas of public disorder; and inserted new ss 210A-210J to give police further powers relating to removal or modification of fortifications on premises designed to prevent or impede police access (after following a process for obtaining removal orders).

In early 2007, the NSW Police embarked on Operation Ranmore, a targeted operation aimed at outlaw motorcycle gangs, headed by the NSW State Crime Command’s Gang Squad. In answer to a question in the NSW Legislative Assembly on 26 June 2008, the Minister for Police advised that the first year of Operation Ranmore had been successful in its fight against outlaw motorcycle gangs. The Minister said that the Operation had, during this time, laid 1,292 charges for offences including assault, supply and possession of drugs, firearms and weapons offences, and fraud. In addition, motorcycle gang clubhouses had been raided by police and liquor that was being sold without a licence was seized along with any drugs or weapons found there. The Minister also reported that such

¹³⁰ See s 931J. It is required that the defendant knows or is reckless of the criminal nature of the group: s 931K. In addition, s 546A of the *Crimes Act 1900* makes it an offence to habitually consort with persons convicted of indictable offences.

¹³¹ Section 931K of the *Crimes Act 1900* (NSW).

gangs were also feeling the effects of the 'anti-gang Act' as charges had been laid in relation to 163 offences.¹³²

During Easter 2009, Strike Force Raptor, the anti-bikie police operation formed after the Sydney Airport brawl in March 2009, raided a rally of outlaw bikie gang members who apparently met to discuss a challenge to the NSW legislation. It is reported that, since being established, Strike Force Raptor has arrested 69 people and laid 147 charges, as well as seizing 38 firearms and other weapons and hundreds of thousands of dollars in cash. Significant drug seizures have been made. Seized assets include 2 four-wheel drive vehicles, a Bentley, and 2 Harley Davidson motorcycles.¹³³

3.5 NORTHERN TERRITORY

On 30 March 2009, the Northern Territory's Minister for Justice and Attorney-General, the Hon Delia Lawrie MLA, announced that the NT Government would introduce 'tough new laws to prevent illegal bike gangs pushed out of other areas, ending up in the Territory'.¹³⁴ There are reportedly two bikie gangs in the Northern Territory (Hell's Angels and Finks) and, according to the NT Police Commissioner, there is concern about their links to criminal activities and to criminals in other jurisdictions.¹³⁵

On 11 June 2009, the Minister for Justice and Attorney-General, introduced the [Serious Crime Control Bill 2009 \(NT\)](#) into the NT Legislative Assembly which is currently awaiting debate. The NT Attorney-General said that the purpose of the Bill is to restrict and disrupt the activities of persons and organisations engaged in serious criminal activity, inside or outside the Territory. The Attorney-General said that the Bill targets outlaw gangs but the measures can also extend to other

¹³² Mr David Campbell MP, Minister for Police, 'Operation Ranmore', Question Without Notice, *NSW Legislative Assembly Hansard Online*, 26 June 2008, p 9497.

¹³³ Hon Nathan Rees MP, 'Outlaw Motorcycle Gang Countermeasures'.

¹³⁴ Hon Delia Lawrie MLA, Minister for Justice and Attorney-General, 'Tough New Bikie Laws', *NT Government Media Release*, 30 March 2009.

¹³⁵ Melinda James, 'Interview, Police Commissioner Paul White, *Stateline Northern Territory – ABC Online*, 27 March 2009.

criminals who engage in serious criminal activity who are not necessarily members of the outlaw gangs.¹³⁶

The key features of the Bill are:

- any consenting Supreme Court judge can be declared to be an ‘eligible judge’ by the Attorney-General (cl 12). An eligible judge will be able, under Part 3 of the Bill, to declare an organisation to be a ‘declared organisation’ if the eligible judge is satisfied that it meets specified criteria.¹³⁷ Such criteria include that the members of the organisation associate for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity; and the organisation poses a risk to public safety and order. The declaration can be made on the basis of material provided by the Police Commissioner but the eligible judge can also refuse to make it. Again, there will be various confidentiality requirements for information classified as ‘criminal intelligence’ – a matter ultimately up to the eligible judge or the courts (see cl 73), as is the case under the NSW Act. Provision is also made for a hearing of the application for a declaration, allowing for persons affected by it to be heard (cls 14(2)(c), 15);
- a person affected by the declaration and the Police Commissioner can seek a revocation of the declaration in certain circumstances (Part 3, Div 3);
- the Police Commissioner will be able to apply to the Supreme Court, under Part 4, for a control order:
 - against members of a declared organisation, and also against other persons who have had, or have, various kinds of associations with a declared organisation;
 - in relation to a person who is, or has been, a member of a particular declared organisation who engages, or has engaged in, serious criminal activity and regularly associates with members of a particular declared organisation;
 - in respect of a person who engages, or has been engaged in, serious criminal activity and regularly associates with others involved in serious criminal activity;
- a control order is made only if the circumstances are appropriate and various exceptions will apply about the types of associations that are allowed (which particularly applies to vulnerable persons so they can be cared for properly by

¹³⁶ Hon D Lawrie MLA, Minister for Justice and Attorney-General, Second Reading Speech, Serious and Organised Crime Bill 2009 (NT), *NT Legislative Assembly Parliamentary Record No 8*, 11 June 2009.

¹³⁷ Decisions of an eligible judge are not decisions of the Supreme Court. The Bill is designed to avoid potential constitutional issues regarding the exercise of federal judicial power: Hon D Lawrie MLA, Second Reading Speech.

associating with someone who they otherwise would not be able to: see cl 27(4)). Certain other associations are also permissible (e.g. close family members – see cl 36(3));

- a control order takes effect immediately if the person to be controlled is present in the Court. If not, it takes effect when the controlled person is served with a copy of the order and it will remain in force until it is revoked under cl 34.¹³⁸ A right of objection to the control order is provided;
- the control order can prohibit the controlled person from doing or possessing certain things, and from associating with other controlled members or specified persons. It will be an offence to contravene a control order, attracting a maximum penalty of 5 years imprisonment (cl 36);
- a control order will automatically suspend any authorisation, licence, approval etc. to carry on a prescribed activity (which includes activities and occupations such as operating or working in a casino; crowd control; providing security or being a security officer; dealing in firearms; betting activities etc.). Further, such authorisations will not be able to be obtained by a person under a control order (cl 27). An offence is created under cl 38 for a breach of this provision;
- it will be an offence for a controlled member of a declared organisation to recruit new members, attracting up to 5 years in prison (cl 37);
- senior police officers will be able to make public safety orders of limited duration (usually 72 hours), under Part 5 of the Bill, to prevent persons from attending an event or place or being in a specified area if their doing so poses a serious risk to public safety or security and the making of the order is appropriate in all the circumstances. Several matters will have to be considered in deciding if such an order is warranted (e.g. whether the person has a history of serious criminal activity);
- provisions in Part 6 to enable the making of fortification removal orders against premises owned or occupied or habitually used by members of a declared organisation if there are reasonable grounds to believe the premises are, or have been, or are likely to, be used for, or in connection with, the commission of a serious offence;
- provisions for obtaining an order for substituted service of documents in situations where it has been difficult to serve documents personally on members of criminal organisations (cl 79);
- protection of decisions, declarations, orders etc. made under the Bill; and acts or omissions relating to the exercise of functions thereunder from judicial review and other proceedings and remedies (cls 81-82);

¹³⁸ Terms of a control order can be varied by the Court. A right of appeal exists on a question of law or fact.

- an expansion of existing offences to provide for serious penalties (up to 7 years imprisonment) for making threats or reprisals against persons involved in criminal investigations or judicial proceedings or to public officers in performance of their duties (see Part 8);¹³⁹
- the Bill and powers exercised thereunder, will undergo annual review by a retired judicial officer to make sure powers are being properly exercised, and the operation of the legislation will be reviewed after 4 years (cls 85-86).

The Attorney-General said that the Bill complements anti-gang policing measures and existing NT legislation, such as the *Criminal Property Forfeiture Act* which came into effect in June 2003 and, through until June 2008, had enabled over \$11 million to be restrained – much of this being a result of biekie gang related activity.¹⁴⁰

3.6 WESTERN AUSTRALIA

Earlier this decade, the Western Australian Government introduced various laws to counteract gang violence, including that of biekie gangs. Among those are provisions in the [Corruption and Crime Commission Act 2003 \(WA\)](#) (CCC Act) to enable the removal of fortifications around a property in certain circumstances and to enable the Police Commissioner to be granted powers to investigate organised crime. As yet, however, there are no laws specifically directed at outlawing biekie gangs.

The ‘anti-fortification’ laws under the CCC Act were unsuccessfully challenged in the High Court of Australia. The High Court’s February 2008 decision in [Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police \(WA\)](#)¹⁴¹ dismissed an appeal by the Gypsy Jokers Motorcycle Club regarding the judicial review of the issue of a fortification removal notice under the CCC Act. Section 76(2) of the CCC Act allows restrictions to be placed on the disclosure of police information to the Court if it could prejudice police operations. Section 76(2) thus has some similarity to ‘criminal intelligence information’ under the SA and NSW Acts. The issue before the High Court (after having been argued before the WA Supreme Court) was whether s 76(2) was invalid on the basis it interfered with the judicial

¹³⁹ Amendments are also sought to be made to the *Bail Act* to set out a presumption against bail for the offence of contravening a control order, associating with another controlled person, recruiting persons to become members of a declared organisation, and other contraventions of the Bill.

¹⁴⁰ Hon D Lawrie MLA, Second Reading Speech.

¹⁴¹ [2008] HCA 4.

powers of the WA Supreme Court contrary to Chapter 3 of the Commonwealth Constitution.

The High Court dismissed the appeal by a 6 to 1 majority. The majority found that s 76(2) permitted the court reviewing the removal notice – the WA Supreme Court – to decide the extent of the police information that that should remain confidential (and not disclosed to the owner of the fortifications) on the basis it could prejudice police operations. It was not a matter for the Police Commissioner to decide. The leading judgment¹⁴² noted that had the legislation directed the WA Supreme Court (a Chapter 3 court) how to exercise its jurisdiction or its authority to decide, this might impair the character of the Chapter 3 court as an independent tribunal. However, s 76(2) went only to a matter of evidence before the Court, not to its jurisdiction or its authority to decide a matter.

The Hon James McGinty MLA, who was the Attorney-General at the time the laws were introduced, now apparently considers that the best way to punish outlaw motorcycle gangs was to ‘hit ... their hip pockets’ by confiscating proceeds of criminal activity rather than focusing on membership of an organisation.¹⁴³ In November 2008, the WA Government committed \$3.45m over 3 years to target bikie gangs and suspicious people with unexplained wealth under proceeds of crime legislation.¹⁴⁴

On 18 June 2009, the Minister for Police, Emergency Services and Road Safety, the Hon Rob Johnson MLA, told the WA Legislative Assembly that he and the Attorney-General were developing legislation that will be in two or three tranches.¹⁴⁵ The first would provide the Commissioner of Police with the authority to apply for a declaration from a Supreme Court judge to make an organised gang a declared organisation. This would then provide a basis for the Commissioner to put a prohibition order in place to stop declared gang members or the gang from associating with other criminals or others covered by the order. The Minister said

¹⁴² Gummow, Hayne, Haydon, and Kiefel JJ: [2008] HCA 4, para [39].

¹⁴³ Michael Edwards, ‘Hit bikies’ hip pockets in gang crackdown: McGinty’, *ABC News Online*, 1 April 2009.

¹⁴⁴ Hon Christian Porter MLA, Attorney General and Minister for Corrective Services, Hon Rob Johnson MLA, ‘Criminals’ money will target organised crime’, [Ministerial Media Statement](#), 30 November 2008.

¹⁴⁵ Hon RF Johnson MLA, Minister for Police, Emergency Services and Road Safety, ‘Outlaw Motorcycle Gangs and Organised Crime Syndicates’ Ministerial Statement, *Hansard Online*, 18 June 2009, p 267.

that the Bill would seek to take the best from each of the SA and NSW Acts. It is anticipated that the Bill will be introduced later in 2009.¹⁴⁶

3.7 VICTORIA

In an apparent dismissal of Victoria moving to introduce legislation aimed specifically at biekie gangs, the Victorian Government said that Victoria had the ‘*most comprehensive suite of laws and arrangements to tackle organised crime*’ of all the states and territories. The Deputy Premier and Attorney-General, the Hon Robert Hulls MP, said that focusing on membership of biekie gangs rather than criminal behaviour was not enough to address serious and organised crime in the complex and changing environment the country faces.¹⁴⁷ The Attorney-General considered that current laws in Victoria attacked all forms of organised crime, including that perpetrated by biekie gangs, and the range included an assets confiscation scheme aimed at assets used in or derived from crime; legislation to prevent consorting for organised crime; and powers to undertake surveillance, controlled operations and conduct coercive questioning.¹⁴⁸ Mr Hulls MP said that there was ‘*no evidence to suggest that legislation to criminalise outlaw motorcycle gangs, including the laws introduced in South Australia, has been effective in addressing ... organised criminal activities of these groups*’. He said that a considered approach was needed.

It appears that the Victorian Police Union has called on the Victorian Premier to enact anti-biekie gang legislation similar to that in South Australia.¹⁴⁹ However, concern has been expressed, including by the Victorian Police, that the enactment of laws similar to the SA Act might conflict with the Victorian Charter of Human Rights & Responsibilities.¹⁵⁰

¹⁴⁶ Hon RF Johnson MLA, ‘Outlaw Motorcycle Gangs and Organised Crime Syndicates’.

¹⁴⁷ Hon Robert Hulls MP, Deputy Premier and Attorney-General, ‘Victoria’s tough laws best for dealing with biekie gangs’, [Ministerial Media Statement](#), 15 April 2009.

¹⁴⁸ Hon Robert Hulls MP, ‘Victoria’s tough laws best for dealing with biekie gangs’. See, for example: *Crimes (Controlled Operations) Act 2004* (Vic); *Evidence (Witness Identity Protection) Act 2004* (Vic).

¹⁴⁹ ‘Victorian Police Association calls for national ban on biekie gangs’, *Courier Mail Online*, 24 March 2009.

¹⁵⁰ Office of the Chief Commissioner Victoria Police, Submission to the Parliamentary Joint Committee Inquiry.

3.8 QUEENSLAND

It has been reported that bikie gangs have established themselves in Queensland in recent years, particularly on the Gold Coast, coinciding with an increase in violence and drug activity. There are apparently at least 9 bikie gangs on the Gold Coast.¹⁵¹ Law enforcement agencies are reported as saying that the bikies are more active and dangerous than organised criminal gangs from Asia, Russia and interstate.¹⁵² In March 2006, a fight involving guns and knives erupted between members of the Hell's Angels and the Finks in the ballroom of the five-star Royal Pines Resort, apparently sparked by the defection of a Finks member to the Hell's Angels.¹⁵³

A bikie gang source has reportedly said that '*ethnic criminal elements began to infiltrate the clubs. ... The older bikies ... didn't want to be involved in violent crime...*'.¹⁵⁴ The source told the media that the gangs had relaxed their membership rules so that it was no longer necessary for nominees to serve long probations before getting their colours.¹⁵⁵ These reports are somewhat similar to matters raised in the earlier discussion regarding the Sydney bikie gang scene in recent times.

Queensland police officers are reported as saying that bikies are major manufacturers and distributors of amphetamines in the State. It also appears that some of the gangs have become wealthy through their ability to infiltrate businesses, such as nightclub security, to perpetuate the drug trade.¹⁵⁶

The Outlaw Motorcycle Gang Task Force (codenamed Taskforce Hydra) was set up by the Queensland Government in September 2006.¹⁵⁷ The Taskforce works with interstate law enforcement agencies and the ACC's National Intelligence Task Force, discussed earlier. One particular operation targeting the Hell's Angels, Finks and Nomads resulted in the arrest of 16 people on drug related offences and firearm and stolen property offences. Among assets seized were clandestine

¹⁵¹ Robyn Wuth, 'Hell, the Angels on their way', *GoldCoast.com*, 24 March 2009; Greg Stolz, 'Coast exposes it sinister underbelly', *Courier Mail*, 8 March 2008, p 10.

¹⁵² Greg Stolz, 'Coast exposes it sinister underbelly'.

¹⁵³ Greg Stolz, 'Coast exposes it sinister underbelly'.

¹⁵⁴ Greg Stolz, 'Coast exposes it sinister underbelly'.

¹⁵⁵ Greg Stolz, 'Coast exposes it sinister underbelly'.

¹⁵⁶ Greg Stolz, 'Coast exposes it sinister underbelly'.

¹⁵⁷ Hon J Spence MP, Minister for Police, Corrective Services and Sport, [Estimates Committee B](#), *Queensland Parliamentary Debates*, 16 July 2008, p 67.

laboratories, hydroponic houses, assets and money.¹⁵⁸ The Queensland Premier noted, on 30 March 2009, that since the Taskforce's inception, police have made 332 arrests in relation to 931 charges, including attempted murder, arson, extortion, robbery and drug trafficking.¹⁵⁹

For criminologist, Dr Paul Wilson, the fact that there have been so many arrests indicates that existing laws are sufficient without the need to enact laws aimed directly at bkie gangs.¹⁶⁰

In the days following the fatal brawl at Sydney Airport, Gold Coast police expressed concern that the bkie war would spread to the Gold Coast as gang members flee from NSW's new 'anti-bkie' legislation to the 'safe haven' of Queensland. The fears were reportedly exacerbated by rumours that the Hell's Angels were planning to challenge for control of the Gold Coast by opening a chapter there.¹⁶¹

On 30 March 2009, the Queensland Premier announced that Cabinet had approved the preparation of tough new laws to respond to the threat from bkie gangs saying that she had gone '*to the election with a commitment to look at the feasibility of introducing anti-bkie laws*'.¹⁶²

On 23 April 2009, the new Attorney-General and Minister for Industrial Relations, the Hon Cameron Dick MP, told the Queensland Parliament that he had commenced work on the development of laws to protect the community from '*the scourge of organised crime, particularly by members of outlaw motorcycle gangs*'. The Attorney-General said that he and the Police Minister will '*provide Cabinet with legislative options which are both forceful and effective, maintaining a balance between the rights of individuals and the protection of the community*'.¹⁶³ He noted that other legislative measures – tough proceeds of crime laws and the new legislation to

¹⁵⁸ Hon J Spence MP, [Estimates Committee B](#), p 67.

¹⁵⁹ Hon Anna Bligh MP, Queensland Premier & Hon Neil Roberts MP, Minister for Police Corrective Services and Emergency Services, '[Cabinet Approves Tough New Bkie Laws](#)', *Media Statement*, 30 March 2009.

¹⁶⁰ Kathy McLeish, 'Bkie Laws', *Stateline Queensland – ABC Online*, 24 April 2009, interviewing Dr Paul Wilson, Criminologist at Bond University, Queensland.

¹⁶¹ Robyn Wuth, 'Hell, the Angels on their way'.

¹⁶² Hon Anna Bligh MP & Hon Neil Roberts MP, '[Cabinet Approves Tough New Bkie Laws](#)'.

¹⁶³ Hon CR Dick MP, Attorney-General and Minister for Industrial Relations, 'Outlaw Motorcycle Gangs', Ministerial Statement, *Queensland Parliamentary Debates*, 23 April 2009, p 153.

allow telecommunications interception – would enhance the effectiveness of proposed anti-bikie laws.

The Attorney-General stated that the April 2009 meeting of SCAG had agreed to a unified approach to implementing legislation to ensure that there were no loopholes offering safe havens to organised criminals, including bikie gangs. He added that it was ‘*essential that the outcomes of our laws are consistent, regardless of the specific legislative models each jurisdiction implements. ... Our laws are not about targeting people who ride motorcycles; they are about targeting people who are engaged in serious criminal activity*’.¹⁶⁴

In May 2007, a Private Members’ Bill was introduced into the Queensland Parliament by an Opposition member, Mr Rob Messenger MP. The [Criminal Code \(Organised Crime Groups\) Amendment Bill 2007 \(Qld\)](#) sought to insert a new provision – s 545A – into the Queensland Criminal Code to make it an offence to participate as a member of group knowing it is an organised criminal group and that the participation contributes to the occurrence of any criminal activity of the group. An ‘organised criminal group’ was defined as a group of 3 or more persons who have as one of their objectives the obtaining material benefits from committing offences punishable by at least 4 years imprisonment; or committing serious violent offences.¹⁶⁵ A maximum penalty of 5 year imprisonment was provided for. The Bill failed its second reading on 31 October 2007 as the Government considered that:¹⁶⁶

The fundamental right of freedom of association is potentially eroded ... because even innocent participation in an organised criminal group as defined may, in some way, contribute to the occurrence of criminal activity by the group.

...

The bill purports to target outlaw motorcycle gangs and organised criminals. However, if given the interpretation intended, the offence provisions may in fact target persons who are not themselves engaging in any criminal activity Social groups and culturally relevant organisations could be targeted, resulting in prosecution of people based on race, ethnicity or membership of a social group. ...

A one-size-fits-all response is therefore not the answer to the complex problem. In any event, such an approach is unlikely to be effective in targeting organised

¹⁶⁴ Hon CR Dick MP, ‘Outlaw Motorcycle Gangs’, p 154.

¹⁶⁵ Defined in the proposed s 545A(2) to mean an offence carrying at least 5 years imprisonment and involving conduct including loss of a person’s life; serious injury or serious property damage; perverting the course of justice etc.

¹⁶⁶ Hon KG Shine, Attorney-General and Minister for Justice, Criminal Code (Organised Crime Groups) Amendment Bill 2007 (Qld), Second Reading Debate, *Queensland Parliamentary Debates*, 31 October 2007, p 4010.

criminal groups which may operate under the cover of legitimate business enterprises....

4 NATIONAL APPROACH

The [Communiqué](#) from the meeting of the Standing Committee of Attorneys-General (SCAG) in April 2009 shows that the Attorneys-General agreed that organised crime needs a nationally coordinated response by all jurisdictions.¹⁶⁷ The broad measures agreed to appear to be aimed at organised crime perpetrated by all sorts of criminal groups, suggesting that any national approach will not be targeted specifically at bikie gangs.

SCAG noted that the Commonwealth is developing an Organised Crime Strategic Framework, with mechanisms to engage the states and territories. The purpose of such is to enhance understanding of the threats from organised crime; improve capacity to effectively prevent, disrupt, investigate and prosecute organised crime activities; and strengthen information sharing and interoperability.¹⁶⁸

SCAG also noted that, to combat organised crime, the Commonwealth will consider the introduction of a package of legislative reforms, including legislation to:¹⁶⁹

- strengthen criminal assets confiscation, including unexplained wealth provisions;
- prevent a person from associating with another person who is involved in organised criminal activity as an individual or through an organisation, to the extent the Commonwealth is able within its constitutional powers;
- enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection;
- facilitate greater access to telecommunication interception for criminal organisation offences, and
- address the joint commission of criminal offences.

States and territories also agreed to consider introducing legislative measures to combat organised crime where they have not already done so, as follows:¹⁷⁰

¹⁶⁷ State Committee of Attorneys-General (SCAG), *Communiqué*, April 2009, p 8.

¹⁶⁸ SCAG, *Communiqué* April 2009, p 8.

¹⁶⁹ SCAG, *Communiqué* April 2009, p 8.

¹⁷⁰ SCAG, *Communiqué* April 2009, p 9. SCAG also agreed to coordinate law enforcement efforts in various ways and agreement was reached to establish a SCAG Officers' Group to work on legislative, interoperability and information sharing measures, in consultation with MCPEMP officers, which should report back to SCAG as soon as possible.

- laws to permit coercive questioning of individuals to assist with the investigation of organised crime offences;
- legislation to prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation;
- legislative measures that enable police to engage in controlled operations and use assumed identities to facilitate investigations and intelligence gathering;
- legislation to permit the use of surveillance devices for the purposes of investigating serious and organised crime;
- witness protection legislation and asset confiscation legislation to enable restraint and forfeiture of tainted assets; and
- model laws providing for cross-border investigative powers for controlled operations, assumed identities, witness identity protection and surveillance devices.

The ACC and Queensland's Crime and Misconduct Commission (CMC) seem to consider that the suggestions for strengthening existing law enforcement powers and reforming proceeds of crime legislation and telecommunications interception laws are more effective ways to close bikie gangs down than enacting legislation to ban organised crime groups.¹⁷¹

The [Crimes Legislation Amendment \(Serious and Organised Crime\) Bill 2009 \(Cth\)](#) was introduced into the Commonwealth House of Representatives on 24 June 2009 and was referred to the Senate Legal and Constitutional Affairs Legislation Committee the following day. The Committee is due to report on 17 September 2009. When introducing the Bill, the Attorney-General, the Hon Robert McClelland MP, told the House of Representatives that the proposed legislation sought to implement the Commonwealth's commitment as part of the national response to organised crime agreed to at the April 2009 SCAG meeting.¹⁷² In brief, the proposals are:

- a range of measures to expand and enhance the Commonwealth's confiscation regime, particularly with the introduction of 'unexplained wealth' provisions. The unexplained wealth provisions seek to target persons, often senior crime

¹⁷¹ Michael McKenna, 'Proposed laws "could drive bikie gangs underground"', *Australian*, 2 April 2009, p 7.

¹⁷² Hon R McClelland MP, Attorney-General, Second Reading Speech, Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth), *House of Representatives Hansard*, 24 June 2009., pp 16-20, p 16.

figures – who derive profit from crime, but cannot be linked directly to an offence – and whose wealth exceeds the value of their lawful earnings. While there must be a connection between the unexplained wealth and Commonwealth criminal offences, there will not be a requirement for proof of a link to the commission of a specific offence. It is also proposed to extend the civil based confiscation regime to allow restraint and forfeiture of instruments used or intended to be used in the commission of serious offences without requiring a conviction, similar to what now occurs in relation to proceeds of crime. A range of other amendments sought include new, but limited, freezing orders directed at financial institutions;

- proposed model laws to facilitate controlled operations by law enforcement officers across jurisdictional borders to ensure that corresponding state and territory controlled operations laws are recognised. This means that state and territory law enforcement officers will not need separate Commonwealth authorisation to participate in a Commonwealth ‘controlled operation’. Similarly, the proposed model laws seek to recognise things done in relation to using an assumed identity authorised under a corresponding state or territory law; and they seek to implement a comprehensive scheme to protect the safety of witnesses who are undercover operatives by allowing them to give evidence using a pseudonym;
- a new joint commission provision to target offenders who commit crimes in organised groups; and
- amendments to facilitate access to telecommunications interception powers for criminal organisation offences.

The SCAG meeting observed that the Ministerial Council on Corporations is considering the issue of disqualification of directors under the *Corporations Act* 2001 who are involved in organised criminal activity. The intention is to stop activities such as money laundering occurring under the corporate veil and to also prevent gangs from setting up lending institutions.¹⁷³

5 OTHER COUNTRIES

Australia is not alone in attempting to curtail the criminal activities of bikie gangs through legislative and policing measures. The scope of this Research Brief allows only a brief discussion of relevant legislation in selected jurisdictions.¹⁷⁴

¹⁷³ SCAG, *Communiqué April 2009*, p 9. See also, ‘Bikies to be banned from boardrooms: Sherry’, *CCH Online News Article*, 17 April 2009.

¹⁷⁴ For a comprehensive discussion of selected overseas laws relating to organised criminal activity, see A Schloenhardt, [Submission to the Parliamentary Joint Committee](#), April 2008.

5.1 CANADA

Canadian *Criminal Code* provisions targeted at criminal organisations were initially introduced in 1997 in response to bikie gang crime and violence, particularly by the Hell's Angels, during the 1990s. In 2001, amendments to the *Criminal Code* were made, as a result of a parliamentary inquiry and report recommending various actions to combat organised criminal activity and outbreaks of violence in Quebec. The amendments extended the application of the offences beyond bikie gangs to other criminal organisations in pursuit of profit and other groups involved in the perpetuation of economic crime.¹⁷⁵

The new laws changed the meaning of 'criminal organisation' in s 467.1 of the *Criminal Code* to provide that a 'criminal organisation' means a group, however organised, that:

- is composed of three or more persons in or outside Canada; and
- has as one of its main purposes or main activities, the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It appears that the current definition of 'criminal organisation' is intended to be sufficiently flexible to allow the criminalisation of a broader range of organisations apart from just bikie gangs that wear obvious insignia and have hierarchical structures.¹⁷⁶ However, there are some who argue that the laws target only the most visible and the most 'slow and stupid' groups, those that use insignia for easy identification.¹⁷⁷

The amendments to the *Criminal Code* also replaced an older participation offence with three new separate offences:

- knowing participation in, or contribution to, any activity of a criminal organisation for the purposes of enhancing the ability of that organisation to facilitate or commit indictable offences (attracting up to 5 years imprisonment): s 467.11. This offence provision could apparently target persons who are not members of the organisation, provided there is some association or interaction with the organisation. For instance, it could possibly apply to a landlord who

¹⁷⁵ A Schloenhardt, Submission to the Parliament Joint Committee, April 2008, p 22.

¹⁷⁶ A Schloenhardt, Submission to the Parliament Joint Committee, p 35.

¹⁷⁷ A Schloenhardt, Submission to the Parliament Joint Committee, p 35, citing other commentators such as MA Moon, 'Outlawing the Outlaws: Importing RICO's Notion of "Criminal Enterprise" into Canada to Combat Organised Crime', *Queens Law Journal*, 24, 1999, p 451, 466.

leases premises to a bikie gang enabling the gang to carry out its criminal activities;¹⁷⁸

- commission of an indictable offence for the benefit of, at the direction of, or in association with, a criminal organisation (attracting up to 14 years imprisonment): s 467.12;¹⁷⁹
- a person who is one of the persons constituting a criminal organisation knowingly instructing another person to commit an offence for the benefit of, at the direction of, or in association with, the criminal organisation (attracting a penalty of life imprisonment): s 467.13.

The separate offences correspond with the offender's level of involvement with the organisation and provide higher penalties depending on the closeness of association. The first two bulleted offences (ss 467.11-467.12) do not require that the defendant be part of the criminal organisation but the final bulleted offence (s 467.13) does require that the person doing the instructing is one of the persons constituting the criminal organisation.¹⁸⁰

Schloenhardt observes that most of the concern about the 3 new offences above relates to the breadth of the offences. He comments that they cover a range from the most minor association with a criminal organisation to the most serious involvement. Moreover, the offences can also be extended by conventional principles of liability (e.g. someone might be charged with attempting to participate in a criminal organisation).¹⁸¹ Schloenhardt suggests that the threshold mental elements of the offences are quite low (with some not requiring proof of specific intention) and there are high penalties attached, leaving them open to challenge on the basis of incompatibility with Canada's *Charter of Rights and Freedoms*.

Schloenhardt has noted that, in practice, the ss 467.11-467.13 offences have not been used often, with the courts and prosecutors favouring other substantive offences in most instances. Few cases seem to have utilised the new offence provisions and the most prominent ones have been cases involving core leaders of criminal organisations giving directions to other persons to commit an offence.¹⁸²

¹⁷⁸ A Schloenhardt, Submission to the Parliament Joint Committee, April 2008, pp 29, 30, citing other research.

¹⁷⁹ An example of a s 467.12 offence would be debt collecting for a criminal organisation by means of violence: A Schloenhardt, Submission to the Parliament Joint Committee, p 30, citing other research.

¹⁸⁰ A Schloenhardt, Submission to the Parliament Joint Committee, p 27.

¹⁸¹ A Schloenhardt, Submission to the Parliament Joint Committee, p 34.

¹⁸² A Schloenhardt, Submission to the Parliamentary Joint Committee Inquiry, p 35.

Thus, the question has been raised about whether it was necessary that Canada needed new criminal organisation legislation.¹⁸³

It has been reported that many members of the Hell's Angels in Canada were imprisoned under the legislative provisions, leading to fatal reprisals against police. It appears that a number of mass trials followed the introduction of the new laws that did result in many persons going to prison. However, it was also reported that there has been no decrease in violence and that the Hell's Angels are still seen as a 'public enemy' by Canadian law enforcement bodies.¹⁸⁴ Moreover, there does not appear to have been a noticeable decline in organised criminal activity and many of the bikie gangs who were targeted by the original 1997 legislation '*continue to thrive and control large parts of the drug market throughout Canada*'.¹⁸⁵ There has also been a spate of gangland killings in Vancouver in the past few years.

In March 2009, Canada's *National Post* reported that a three year investigation which resulted in more than 80 people being charged under the anti-gang legislation had been closed. Charges were withdrawn against the national president of a bikie gang and his alleged associate when problems emerged in the Crown's case and the credibility of senior Government officials was called into question.¹⁸⁶

5.2 UNITED KINGDOM

In 2005, the UK passed the [Serious Crime Act 2007](#), a feature of which is a provision allowing the issue of a Serious Crime Prevention Order (SCPO) by courts to prevent organised crime by placing restrictions on individuals and organisations. The grounds for making a SCPO are that the Court is, on the balance of probabilities, satisfied that the organisation or individual has been involved in serious crime (in essence, defined as involvement in a serious offence as described in Sch 1) and the order is necessary to protect the public by preventing, restricting or disrupting involvement by the person in serious crime. SCPOs last for up to 5 years. Penalties apply for breach of the restrictions. There are rights of appeal and variation and discharge of SCPOs are provided for.

¹⁸³ A Schloenhardt, Submission to the Parliamentary Joint Committee Inquiry, p 35, citing other research.

¹⁸⁴ Arthur Veno, 'Putting the wild ones off the road', *Age*, 26 March 2009.

¹⁸⁵ A Schloenhardt, Submission to the Parliamentary Joint Committee Inquiry , p 36.

¹⁸⁶ Shannon Kari, 'Crown's credibility takes hit in biker crackdown', *National Post Online*, 25 March 2009.

For an individual, a SCPO might relate to his or working arrangements; the means by which the individual associates with others; and the premises to which the individual has access. For an organisation, such as a company, a SCPO might relate to the financial, property or business dealings or holdings of the organisation; the types of arrangements to which it might be a party; and the premises to which it may have access.¹⁸⁷

The Court can also make a Financial Reporting Order (FRO), regarded to be a preventative measure, which is conviction based and can be imposed on a person for up to 15 years. The serious offences on which FROs can be based include money laundering and drug offences. A person under a FRO might have to report on their finances – e.g. report quarterly on all sources of income. The information supplied can be verified by UK agencies by requesting information from any source. If it appears that the person’s way of living is not commensurate with their apparent financial position, forfeiture action might be commenced.¹⁸⁸

The ACC regards the UK’s legislative regime as one that is worthy of consideration in the Australian context. It is directed at organised crime groups and the measures under the *Serious Crime Act 2007* ‘are designed to reduce the harm caused by the most serious manifestations of organised crime. SCPOs would appear to offer powerful tools for the medium to long-term management of enduring and resilient offenders, notably in relation to constraining [their] capacity ... to engage in legitimate commercial activities that might conceal illicit activities.’¹⁸⁹ The ACC did warn, however, that consideration of SCPO type powers might raise extensive debate about the balances between community protection and individual rights. In relation to FROs, the ACC considered that such orders would address the profit motive at the heart of most serious and organised crime as it would ‘provide continuing assurances about the legitimacy of the financial circumstances of convicted, high risk criminals...’.¹⁹⁰

5.3 NEW ZEALAND

Section 98A of the [Crimes Act 1961 \(NZ\)](#) was enacted to fulfil New Zealand’s obligations under the United Nations Convention Against Organised Crime. The provision makes it an offence (carrying a maximum penalty of 5 years

¹⁸⁷ ACC, Submission to the Parliamentary Joint Committee Inquiry, pp 5, 6.

¹⁸⁸ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 6.

¹⁸⁹ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 7.

¹⁹⁰ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 8.

imprisonment) to participate¹⁹¹ (whether as a member or an associate or prospective member) in an organised criminal group (including a gang)¹⁹² knowing that such participation contributes to the occurrence of criminal activity; or is reckless as to such effect. An organised criminal group is a group of 3 or more people who have as one of their objectives: obtaining material benefits from offences attracting at least 4 years imprisonment; or committing certain serious violent offences.¹⁹³

It is also provided that internal organisational arrangements are irrelevant and having a hierarchy, a division of labour and continuing membership are not essential to there being an organised criminal group (s 98A(3)). However, there is case law indicating that there needs to be structure and organisation to some degree but it can range from traditional hierarchical type of organisations to more fluid social networks without formal membership.¹⁹⁴ It appears that there is no need to prove any actual criminal activity just that the structural requirements exist.¹⁹⁵

It appears that the Government considers that s 98A has not been as effective as it was hoped to deal with participation in organised criminal and gang activities due to the complexity of the provision and the high evidential burden on the prosecution to prove the offence.¹⁹⁶ The relatively low penalty (5 years imprisonment) is apparently seen as inappropriate to reflect the culpability of gang leaders who may organise criminal activity without directly offending themselves.

The [Gangs and Organised Crime Bill 10-1 2009 \(NZ\)](#) (the Bill) was introduced to New Zealand Parliament in February 2009 and most of its amendments relate to s 98A. It is currently still before the Parliament. The amendments to s 98A seek to

¹⁹¹ 'Participate' is not defined.

¹⁹² [Gangs and Organised Crime Bill 10-1 2009 \(NZ\)](#), *Explanatory Note*, p 2.

¹⁹³ As defined by s 312A that are punishable by imprisonment for at least 10 years.

¹⁹⁴ A Schloenhardt, 'Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region', pp 67-68, referring to a number of New Zealand cases.

¹⁹⁵ A Schloenhardt, 'Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region', p 67, citing relevant New Zealand case law.

¹⁹⁶ See, [Gangs and Organised Crime Bill 10-1 2009 \(NZ\)](#), *Explanatory Note* (p 2). On the other hand, Dr Andreas Schloenhardt, 'Palermo in the Pacific: Organised Crime Offences in the Asia Pacific Region', p 71, argues that the number of prosecutions and convictions increased between 2002 (2 prosecutions) and 2004 (156 prosecutions) with the introduction of the new offence. However, as noted (p 72), the numbers have dropped again since 2005.

ensure that those involved in criminal groups and gangs are investigated and prosecuted.¹⁹⁷

The main features of the Bill are:¹⁹⁸

- amendments to s 98A to provide that it is an offence punishable by up to 10 years imprisonment (rather than 5 years) to participate in an organised criminal group:
 - knowing that 3 or more people share any 1 or more of the objectives described in paragraphs (a) to (d) of s 98A(2) (whether or not the person shares the particular objective or particular objectives); and
 - 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
 - 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;
- providing authority for police to apply for an interception warrant to investigate offending by organised criminal groups (as defined in s 98A of the *Crimes Act*);
- amending the *Local Government Act 2002* (NZ) to enable a District Court to make removal orders on the grounds of the intimidating nature of structures, including gang fortifications; and
- amending the *Sentencing Act 2002* (NZ) to require the sentencing court to consider as an aggravating factor that the offender committed the offence due to his or her participation in an organised criminal group or involvement in an organised criminal association.

5.4 UNITED STATES

In the United States of America, the [*Racketeer Influenced and Corrupt Organisations Act*](#) (RICO) has been used to target the financial gains of criminal organisations. Schloenhardt notes that the legislation has been used against bikie gangs as well as Asian crime gangs and the US branch of the Sicilian Mafia.¹⁹⁹ RICO is seen as enabling law enforcement agencies to target the organising body and associates behind a crime, not just the criminal activity itself.

¹⁹⁷ *Explanatory Note*, pp 1-2.

¹⁹⁸ See *Explanatory Note*, pp 1-2.

¹⁹⁹ Madonna King, 'Outlaws run wild', *Courier Mail*, 28 March 2009, p 51.

It is an offence under RICO to use a pattern of ‘racketeering activity’, or the income derived from such, to conduct or acquire an interest in a criminal enterprise. It appears that a ‘racketeering activity’ means a conspiracy involving 2 or more offences against specified state and federal laws which constitute the underlying predicate offences within a period up to 10 years. An ‘enterprise’ is a highly structured entity or a relatively ad hoc group formed for a short term activity:²⁰⁰

Racketeering attracts a fine of up to \$US25,000 and/or up to 20 years in prison and the convicted racketeer must forfeit his or her proceeds of crime and interests in any business gained through racketeering (s 1963).

Mark Le Grand, a member of the National Crime Authority and former director of Queensland’s former Criminal Justice Commission, considers that the RICO legislation has been successful and has been backed by effective organised crime investigation.²⁰¹ Mr Le Grand said that ‘*Australian law enforcement has not made the transition to the investigation of the criminal enterprise rather than the individual malefactors, as the FBI [in the US] achieved almost four decades ago*’.²⁰²

On the other hand it has been argued that RICO has its shortcomings, particularly the requirement of sufficient evidence to convict on the underlying predicate offence before these can be set in the wider racketeering context. Thus, it may not assist against large scale trafficking groups who have evaded detection altogether.²⁰³ The Queensland Crime and Misconduct Commission also notes that the US experience shows that RICO prosecutions can be resource intensive and can be protracted (up to 3 to 4 years).²⁰⁴

²⁰⁰ See RICO, s 1962. See the Queensland CMC, Submission to the Joint Committee Inquiry, May 2008, p 5.

²⁰¹ Tony Koch, ‘Anti-bikie legislation “obnoxious”’, referring to observations made by Mr Mark Le Grand, who is also member of the National Crime Authority and has had past involvement in a number of bikie gang investigations.

²⁰² Tony Koch, ‘Anti-bikie legislation “obnoxious”’, quoting Mr Mark Le Grand.

²⁰³ Queensland CMC, Submission to the Parliamentary Joint Committee Inquiry, p 5, citing a statement from the UK Government in 2004 (*One step ahead: a 21st strategy to defeat organised crime*).

²⁰⁴ Queensland CMC, Submission to the Parliamentary Joint Committee Inquiry, p 6.

6 OPINIONS ABOUT ‘ANTI-BIKIE GANG’ LAWS

There has been considerable debate about the desirability of ‘anti-bikie gang’ laws of the type existing in South Australia and in New South Wales.

6.1 ISSUES ABOUT ‘ANTI-BIKIE GANG’ LAWS

There have been a number of issues and concerns voiced by various commentators, legal academics, law enforcement agencies, and civil libertarians about the South Australian and New South Wales legislation that seek to curtail the operations of bikie gangs. Governments who have, or are planning the introduction of, ‘anti-bikie gang’ laws have pointed to their involvement in serious and organised crime and recent outbreaks of violence that threaten public safety.²⁰⁵ For instance, the SA Premier has said that he was ‘*interested in the public’s safety*’ and that ‘[b]asically, these [gangs] are terrorists...’.²⁰⁶

Some opposition to the recent laws in SA and NSW has been on the following bases:

- that the laws make a person guilty by association, without the person having actually being charged with particular wrongdoing, which challenges the premise of a democratic society;²⁰⁷
- that the laws restrict freedom of assembly; and,
- that, particularly in terms of the SA Act, the laws remove access to the courts to challenge decisions of the SA Attorney-General and Police Commissioner;²⁰⁸
- that the SA Act provides that it is up to the Attorney-General (a single individual person who is also a politician) not the courts to determine whether

²⁰⁵ As noted throughout this paper.

²⁰⁶ ‘Charges laid over airport bashing death’, *ABC News Online*, 23 March 2009.

²⁰⁷ Tony Koch, ‘Anti-bikie legislation “obnoxious”’, *Australian*, 1 April 2009, p 8, referring to comments made by Mark Le Grand. See also, A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 278.

²⁰⁸ According to an article in the *Australian Financial Review*, 27 March 2009, p 42 (‘Get on yer bike: police powers the real threat’), citing comments from the Law Society of SA and the SA Bar Association. See also, Alex Boxsell & James Evers, ‘Bikie laws “out of dictator’s handbook”’, *Australian Financial Review*, 3 April 2009, p 41, referring to Cameron Murphy, President of the NSW Council for Civil Liberties.

an organisation is to be a ‘declared organisation’. It has been suggested that this might be an unconstitutional intrusion into the judicial system.²⁰⁹

In terms of the general offence provisions under s 35 the SA Act, criminal law barrister, Greg Barns, comments that ‘*if a friend of yours is subject to a control order or is a member of a declared organisation and you meet with them six times or more in one year you can go to jail for up to five years*’.²¹⁰

Indeed, the restrictions on the use and disclosure of ‘criminal intelligence’ information provided by the police to the Attorney-General (under the SA Act) and to the courts under both Acts have caused some disquiet. The main concern is that the making of orders and decisions on the basis of ‘criminal intelligence’ information that cannot be viewed by the defendant or his or her lawyers may not afford procedural fairness. That is because there is no opportunity for the defendant to challenge the criminal intelligence information.²¹¹

Some suggestion has also been made that, given the broad definition of ‘organisation’ in both the NSW and SA Acts (i.e. any incorporated or unincorporated group), there is potential for a government to come under pressure to, for instance, make declarations against environmental groups trespassing onto land or resisting arrest (if such offences were prescribed to be ‘serious criminal activity’).²¹²

On a different front, some doubts have been raised about the effectiveness of such types of laws targeted at organisations. It has been observed, including by law enforcement bodies such as the ACC, that many criminal groups have fluid membership, have influence across many jurisdictions, and are able to expand their operations quickly to exploit opportunities. This means that legislative measures, particularly those taken by any one jurisdiction, may have short term impacts only.²¹³ The ACC noted that, currently, bikie gangs are one of the most highly visible groups with common cultures and ethos and they tend to retain strong self-

²⁰⁹ Mike Sexton, ‘Fatal bashing heightens bikie gangs debate’, *7.30 Report – ABC Online*, 23 March 2009, quoting John Goldberg, President of the Law Society of SA. See also, A Schloenhardt, Submission to the Parliamentary Joint Committee Inquiry, p 98.

²¹⁰ Greg Barns, ‘South Australia abandons due process in face of imaginary bikie threat’, www.ipa.or.au, (undated).

²¹¹ Richard Ackland, ‘Rees goes gangbusters with draconian response’, *Sydney Morning Herald Online*, 27 March 2009.

²¹² A Schloenhardt, Submission to the Parliamentary Joint Committee Inquiry, p 98; Greg Barns, ‘South Australia abandons due process in face of imaginary bikie threat’.

²¹³ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 8.

identification. Moreover, membership of bkie gangs is presently more structured and enduring such that specific legislation targeted at them may prove effective in disrupting their activities. However, according to the ACC, bkie gangs are changing and are developing greater flexibility in terms of membership and association. This change could well be hastened by laws targeted at them.²¹⁴

Thus, the ACC concluded that the outlawing of criminal groups and any membership or association with them *'is likely to prove extremely challenging for all but the most visible groups'*.²¹⁵ It called for an approach combining legislative changes with policy measures informed by intelligence and analysis and effective operational measures.²¹⁶ This is echoed by Schloenhardt's view that it is important for all Australian states and territories and the Commonwealth to identify and address the shortcomings of existing laws and *'work together towards a uniform approach based on thorough empirical research and analysis of international best practice'*.²¹⁷

Doubts about the effectiveness of the targeted legislative approach are also raised by a variety of commentators and others (including Victoria Police).²¹⁸ There is a view that criminal members of declared organisations will be driven further underground or to other jurisdictions without such laws, making it harder for police to access information about their activities.²¹⁹ Schloenhardt considers that the banned organisations might just regroup under different names and resume their normal business.²²⁰

Schloenhardt suggests that the NSW and SA legislation will not meet their stated goals because neither Act is underpinned by any real and systematic analysis of the whole spectrum of criminal organisations.²²¹ The Canadian legislation, discussed

²¹⁴ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 9.

²¹⁵ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 9. See also, Queensland CMC, Submission to the Parliamentary Joint Committee Inquiry, May 2008, pp 7, 11.

²¹⁶ ACC, Submission to the Parliamentary Joint Committee Inquiry, p 9.

²¹⁷ A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 279.

²¹⁸ Victoria Police, Chief Commissioner Christine Nixon, Submission to the Parliamentary Joint Committee Inquiry (undated).

²¹⁹ Jane Margetts, 'New anti-bkie laws creating a stir', referring to comments by Mark Findlay, Professor of Criminal Justice, University of Sydney.

²²⁰ Madonna King, 'Outlaws run wild', referring to comments by A Schloenhardt.

²²¹ A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 278.

earlier, is said to encompass different types and levels of involvement with criminal organisations and creates higher penalties for closer involvement with the group (the highest penalty being for instructing another person to commit an offence). Thus, Schloenhardt considers, Canada's legislation is more suitable for criminalising core directors as well as those who provide only quite minimal support.²²²

However, it has been noted that there has not been a remarkable decrease in organised crime in Canada and in New Zealand since the 'anti-gang' type laws were introduced. It has been said that bikie gangs have continued to thrive in those countries and control large parts of the illicit drug market.²²³ Further, in both countries, it appears that prosecutors tend to use other substantive offence provisions, rather than the participation offence provisions, in most cases.²²⁴

A number of academics, commentators, the Queensland CMC and the ACC have suggested that laws targeting the profits from the criminal activities of criminal organisations could be more effective than laws directed at banning those organisations themselves. It has been observed that many bikie gang members have been '*charged with serious crimes including murder, but the power and wealth of the major gangs continue to grow*' and that it was necessary to target the whole enterprise rather than individual members.²²⁵ Schloenhardt considers that a better response '*would be one that aims at the key directors and financiers of criminal organisations and targets the wealth accumulated from drugs trafficking ... and other types of organised crime*'.²²⁶

The ACC's approach to targeting criminal groups has emphasis on the identification of financial activity and resource movements, such as financial transfers and repositories and identification of high risk money flows. It argues that seizing of criminal assets '*is a key available means of disrupting the activities of serious and organised criminal groups. Whereas they continue to prove resilient and adaptable to legislative amendment and law enforcement intelligence and investigative methodologies, the reduction or removal of their proceeds of crime is likely to represent a significant deterrent and disruption to their activities*'.²²⁷ The Queensland CMC also says that from a Queensland perspective, it believes '*that an enhancement of existing*

²²² A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 278.

²²³ A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 279.

²²⁴ A Schloenhardt, *Mafias and Motorbikes: New Organised Crime Offences in Australia*, p 279.

²²⁵ Tony Koch, 'Anti-bikie legislation "obnoxious"', quoting Mark Le Grand.

²²⁶ Madonna King, 'Outlaws run wild', quoting Schloenhardt.

²²⁷ ACC, *Submission to the Parliamentary Joint Committee Inquiry*, p 11.

*law enforcement powers, including the refinement of the existing proceeds of crime legislation and the introduction of telephone interception powers, are likely to be more effective in disrupting organised crime networks than legislation to outlaw serious and organised crime groups’.*²²⁸

6.2 PUBLIC POLLING

It has been reported that recent polling of 1,000 Australian adults by leading research company UMR Research in late March 2009 shows that a large majority of respondents (70%) believed that existing laws are not sufficiently strong to deal with bikie gang violence and 74% would back uniform national legislation on the matter.²²⁹

However, many also seemed to be concerned about the effect that legislation preventing members of bikie gangs from associating with one another would have on civil liberties, with just one in three respondents (31%) supporting such measures and 46% opposing them.²³⁰ The research found that Victorians were the least likely of all state respondents to support laws if they meant a challenge to civil liberties of ordinary Australians. Forty nine per cent of Victorians were opposed to laws that prevented bikie gang members from associating with one another, compared with 45% nationally. The UMR poll also revealed that those most in favour of the legislation were Queenslanders, Coalition voters, and rural residents.²³¹

²²⁸ Queensland CMC, Submission to the Parliamentary Joint Committee Inquiry, p 8.

²²⁹ Tony Wright, ‘Most want crackdown on bikies’, *Age Online*, 1 April 2009.

²³⁰ Geesche Jacobsen & Andrew Clennell, ‘Stop the violence, begs bikie mother’, *Sydney Morning Herald Online*, 1 April 2009.

²³¹ Tony Wright, ‘Most want crackdown on bikies’.

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