Research Brief

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Criminal Organisations Control Bill 2012

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NB: *Readers should note that this Research Brief was current at the time of its preparation prior to the conclusion of debate on the Bill by the Victorian Parliament. For further information please visit the Victorian Legislation and Parliamentary Documents website @ http://www.legislation.vic.gov.au.*

Introduction

The Victorian Government introduced the Criminal Organisations Control Bill 2012 ('the Bill') on 14 November 2012. The Bill creates an Act to provide for the making of declarations and control orders for the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity, and of their members, former members, prospective members and associates. The Bill also provides for the recognition and application of declarations and control orders made under corresponding laws, such as laws in other jurisdictions.

This research brief includes: an overview of the second reading speech; background information about outlaw motorcycle gangs; a description of the key provisions of the Bill; and a review of legislation targeting criminal organisations in other jurisdictions.

1. Second Reading Speech

The Hon. Robert Clark, the Attorney-General, gave the second reading speech for the Criminal Organisations Control Bill 2012 ('the Bill') on 15 November 2012. The Attorney-General stated in his speech that 'Criminal organisations pose a serious and ongoing threat to public safety and order in Victoria' and that 'More needs to be done to tackle the criminal activities of these organisations than simply waiting until the crimes are committed'.[1] He noted that this Bill delivers on the Government's election commitment to legislate to allow criminal bikie and similar organisations to be outlawed, while ensuring that these decisions are made by the courts and after 'a robust assessment of the evidence and with affected parties having the opportunity to be heard'.[2]

According to the Attorney-General, criminal organisations often 'regard themselves as beyond the reach of the law, and commonly use violence and intimidation to achieve their criminal aims'.[3] Such organisations, the Attorney-General stated, are 'resistant to traditional policing methods' and 'typically intermingle their illegal activities with lawful business or social activity'.[4] He noted that this makes such groups harder to detect and prosecute and that 'traditional criminal laws are limited in their effectiveness to respond to these organisations'.[5]

The Attorney-General listed a range of crimes that, according to law enforcement agencies, criminal organisations are involved in, such as the production and distribution of drugs, serious assaults, illegal firearms trafficking, vehicle rebirthing, prostitution, serious fraud and extortion. He also stated that the Bill would address organisations that are 'primarily established and exist for the purpose of criminal activity', as well as

[1] Victoria, Legislative Assembly (2012) *Debates*, Book 16, 15 November, pp. 5070-5073, 5070.
[2] ibid.
[3] ibid.
[4] ibid.
[5] ibid.

'legitimate organisations with lawful purposes that may have members and associates that seek to infiltrate the organisation for serious criminal purposes'.[6]

The Attorney-General stated that the Bill provides strong, proactive powers that will allow Victoria Police to apply to the Supreme Court for orders that will prevent and disrupt serious criminal activity before more crimes are committed.[7] Acknowledging that the powers contained in this Bill are 'significant and far reaching', the Attorney-General outlined several safeguards around the making of declarations and control orders, as well as provisions to both protect and test criminal intelligence.

In making a declaration against an organisation, the Attorney-General stated:

> … the court must be satisfied beyond reasonable doubt that the organisation has engaged in, organised, or otherwise facilitated serious criminal activity, or else that two or more members of the organisation have used or are using the organisations, or their relationship with that organisation or its members, for such a purpose. In either case, the court must also be satisfied that the activities of the organisation pose a serious threat to public safety and order.[8]

In making a declaration against an individual, he stated:

> … the court must be satisfied beyond reasonable doubt that the individual is a member, former member, or prospective member of an organisation; and that the individual, with at least one other member, former member or prospective member, is using the organisation or their relationship with it for the purpose of serious criminal activity. The court must also be satisfied that the activities of those members pose a serious threat to public safety and order.[9]

Regarding control orders, the Attorney-General noted that the Chief Commissioner will be able to apply for a control order against the declared organisation and its members or against the declared individual: 'It is the control order that will limit the activities of the organisation and its members, or the declared individual'.[10]

The Attorney-General noted that if a court decides to make a control order against an organisation, the court will be able to impose a wide range of prohibitions and conditions, such as prohibiting the organisation from continuing to operate, prohibiting members from participating in the activities of the organisation and restricting the organisation from carrying out an activity or activities specified in the order. If the court makes a control order against specific members of a declared organisation, the order may prohibit them from associating with other members of that organisation or prohibit an individual from continuing to be a member of the declared organisation.

Regarding criminal intelligence material, the Attorney-General noted that the Bill protects sensitive criminal intelligence material, while still ensuring that it can be tested

[6] ibid., p. 5071.
[7] ibid., pp. 5070, 5072.
[8] ibid., p. 5071.
[9] ibid.
[10] ibid.

before the courts, which is important to prevent harming ongoing police investigations or endangering the safety of covert police members and those who have cooperated with police. The Attorney-General also mentioned that criminal intelligence applications will be heard in a closed court, unless the court determines otherwise, and that the court will be able to appoint a 'special counsel' to represent the interests of the respondent organisation or person against whom the criminal intelligence information may be used.

The Bill also provides for the mutual recognition and enforcement of declarations and control orders made under corresponding interstate legislation to ensure that Victorian and interstate schemes complement one another. The Attorney-General stated that this will ensure that criminal organisations 'cannot avoid the restrictions of an order by simply moving interstate'. The Attorney-General concluded by restating that the measures in this Bill 'will give Victoria Police strong, proactive powers to prevent, disrupt and deter the activities of criminal organisations'.[11]

[11] ibid, p. 5072.

2. Background

In the second reading speech, the Attorney-General stated:

> Organisations involved in serious criminal activity, including bikie gangs, often regard themselves as beyond the reach of the law, and commonly use violence and intimidation to achieve their criminal aims.[12]

This section of the Bill will provide background information about 'bikie gangs' or Outlaw Motorcycle Clubs (OMCs).[13] This information will include: a broad overview of OMC culture; a discussion of the link between OMCs and crime; a description of Taskforce Echo (which was established by Victoria Police to target the illegal activities of OMCs); and an outline of the Coalition's policy on OMCs.

Outlaw Motorcycle Clubs

Outlaw motorcycle clubs (OMCs) are a particular set of motorcycle groups. OMCs have their own constitutions, organisational structures and rigid sets of rules. Members of OMCs are known as 'bikies' and wear their club's 'patches' (or insignia) on their riding gear. All OMCs have their own 'territory' in which their members are free to display their patches.[14] Most motorcycle enthusiasts belong to recreational motorcycling clubs rather than outlaw clubs.

Outlaw motorcycle clubs originated in the United States. In the 1930s, motorcycle clubs affiliated with the American Motorcyclists Association (AMA) were regarded as 'responsible' and 'legal' clubs. Those that were not affiliated with the AMA were considered 'outlaws' (meaning 'non-AMA' rather than 'criminal').[15]

Thomas Barker is an academic from Eastern Kentucky University who has studied OMCs. He states that, concurrent with the emergence of the 'outlaw' label, criminal gangs who used motorcycles as a cheap form of transportation also appeared in America.[16] He specifies that these groups emerged during the 1930's Depression and comprised of people who were unemployed and travelled together across the States on motorcycles, working in menial jobs and engaging in deviant lifestyles (including heavy drinking, rowdy behaviour and various criminal pursuits).[17]

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[12] ibid., p. 5070.

[13] The term 'outlaw motorcycle *club*' (OMC) is contested as a descriptor for groups of outlaw motorcyclists. Outlaw motorcycle members prefer the term OMC as they argue they have a legitimate, rather than criminal, purpose (i.e. to pursue an alternative lifestyle through motorcycles). Whereas, the police and media tend to use the term 'outlaw motorcycle *gang*' (OMCG). The term 'OMC' is used in this Research Brief for simplicity purposes only and is not intended to reflect the criminality or otherwise of these groups.

[14] A. Veno (2010) *The Brotherhoods– Inside the Outlaw Motorcycle Clubs*, Crows Nest, Allen & Unwin, p. 35.

[15] T. Barker (2007) *Biker Gangs and Organized Crime*, Newark, LexisNexis, p. 25.

[16] ibid.

[17] ibid.

Both AMA-affiliated and outlaw motorcycle clubs grew steadily into the 1940s.[18] On 4 July 1947, in Hollister, California, the AMA hosted an event titled the Gypsy Tour. Although not allowed to participate in the scheduled events, outlaw motorcycle clubs also travelled to Hollister. It is alleged that a riot erupted after a member of one of the OMCs was arrested.[19]

In an attempt to distance AMA-affiliated clubs from the events in Hollister, the president of the AMA is alleged to have said that motorcyclists consisted of '99 per cent law abiding citizens and one per cent outlaws'.[20] The 'one per cent' referred to the OMCs. In response, the OMCs embraced the 'one per cent' label and began calling themselves the '1%ers'.[21] Some of today's outlaw motorcycle clubs include the one per cent label on their patches.

According to Detective Superintendent Doug Fryer of Victoria Police, there are around 25 OMCs in Victoria comprising approximately 1,200 OMC members.[22] The *Sunday Herald Sun* reports that OMCs with Victorian chapters include: the Comancheros; the Bandidos; the Finks; Bros; the Coffin Cheaters; the Hells Angels; the Gypsy Jokers; the Outcasts; the Outlaws; the Rebels; the Highwaymen; the Immortals; and the Black Uhlans.[23]

Barker outlines the difficulties of researching OMCs: 'As with the study of deviant groups in general, usual research techniques are often not successful. One percent bikers are not likely to fill out a survey and return it. They rarely grant interviews and respond to questions with "that's club business"'.[24] A prominent academic on Australian OMCs is Arthur Veno, of Victoria University, who has been involved in social action research of bikie clubs for more than 20 years.

Veno suggests that OMCs are built around four tenets: motorcycle riding; brotherhood; defence of territory; and partying.[25] He states that 'bikers' (a term for those adopting a motorcycling lifestyle) may become 'bikies' for different reasons, including: the renegade, menacing image fostered by OMCs; and/or a resentment of the police whom bikies often view as targeting motorcyclists unfairly on the road.[26]

Veno asserts that to belong to an OMC, a bikie must embrace motorcycle riding as a lifestyle and commit to a long and arduous process to gain membership of the club.[27]

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[18] ibid.
[19] Veno (2010) op. cit., p. 21.
[20] ibid., p. 23.
[21] ibid.
[22] SBS Television (2012) 'Uneasy Riders', *Insight*, online transcript, 5 June, viewed 4 September 2012, <http://www.sbs.com.au/insight/episode/transcript/481/Uneasy-Riders>.
[23] J. Kaila (2011) 'Cops Vow to Bust Up Outlaw Gangs', *Sunday Herald Sun*, 22 May, p. 6.
[24] T. Barker (2005) 'One Percent Bikers Clubs: A Description', *Trends in Organized Crime*, vol. 9, no. 1, p. 102.
[25] Veno (2010) op. cit., p. 89.
[26] ibid., pp. 41, 43.
[27] ibid., p. 44.

All members must have a reputable motorcycle and many prefer to customise and modify their Harley Davidson bikes – a process known as 'chopping'.[28]

OMCs foster a clear commitment to 'brotherhood' or standing up for fellow members.[29] For example, during a recent appearance on SBS Television's *Insight* program, Rohan Tidswell, sergeant-at-arms of the Rebels Motorcycle Club stated:

> … I met the Rebels in Queensland. They showed me support. They love their motor bikes. I love to ride motor bikes. I have been riding motor bikes since the day I turned 16. They are good people. They are friends. They took me in when I was at a loose end in my life. They were there for me.[30]

As well as having a formal organisational structure, OMCs have rigid rules and there are penalties for non-compliance. Rules of a club may include: club colours are not to be worn when in a car; club colours are to be worn when on a motorbike and to every club meeting; $5 fine for late attendance at a meeting without an acceptable excuse; up to $50 fine for a member who fights with another member; and a member must have an acceptable reason for having his bike off the road for more than three months.[31] OMCs also adopt a 'code of silence' as a response to a deep distrust of the police, politicians and the media. [32]

Outlaw motorcycle clubs are male-dominated and women are not accepted as members. Veno asserts that female partners of OMC members, in general, are 'expected to prepare the food, maintain the home, look after the man and raise the kids'.[33] He states that a female partner of an OMC member can wear 'property of' colours, with the name of her bikie partner inscribed on the patch.[34]

Nike Bikies

Over the past decade, a new 'breed' of bikies has emerged nationally on the OMC scene. Non-riders, called 'Nike Bikies' (reflecting their preference for sports shoes rather than riding boots) have been joining some OMCs leading to a fundamental change in the nature of these clubs.[35]

In a bid to boost membership, some OMCs have relaxed their traditional 'riding rules'. Riding rules include, for example, that members must own a bike and ride at least

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[28] ibid., p. 100.
[29] ibid., p. 90.
[30] SBS Television (2012) op. cit. See also: Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (2009) *Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups*, Canberra, The Committee, p. 31, viewed 23 March 2012, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2008-10/laoscg/report/index.htm>.
[31] These are excerpts from the rules of the Darwin-based Blonks Motorcycle Club, as cited in Veno (2010) op. cit., pp. 83-84.
[32] Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (2009) op. cit., p. 30.
[33] Veno (2010) op. cit., p. 124.
[34] ibid., p. 131.
[35] ibid., pp. 246-7, 249.

8,000 to 10,000 kilometres a year.[36] The impact of the relaxation of these rules has been that non-riders, whom Veno asserts are generally criminals, have joined the clubs.[37]

Veno argues that clubs with Nike Bikies are OMCs 'in name only' and are therefore fundamentally different to *genuine* OMCs (where members are committed to the bikie lifestyle). He gives, as an example, a description of a 'pure' Nike Bikie club that has been operating in Sydney:

> While it wore the patches and colours of a motorcycle club, [the club] had none of the rules or structures of a motorcycle club. There was never any pretext that members would even go near a motorcycle. The fraternity's vehicle of choice was a four-wheel drive, usually black with heavily tinted windows.[38]

At a conference in 2011 involving police from throughout Australia and New Zealand, as well as the FBI, the NSW Police Gangs Squad Commander, Superintendent Arthur Katsogiannis, discussed the emergence of Nike Bikies:

> These organisations are recruiting at a very, very fast rate and, if I can use the analogy, they are basically building franchises, not only nationally but internationally... The traditional bikie has significantly changed over the last 10 years. The old beer-drinking, motorcycle-riding bikie is no longer there. We have the new-aged bikie, or the 'Nike Bikie'; they are advanced with their technology.[39]

Detective Superintendent Fryer, from Victoria Police, has also noted the change in the composition of the bikie scene in recent years. He states:

> The face of bikies today has changed. Many are no longer the heavily tattooed, bearded types. Now many are body-conscious, taking steroids and pumping iron in the gyms, which some own. We call them 'Nike Bikies'.[40]

Outlaw Motorcycle Clubs and Crime

Violent Crime

There is evidence that OMCs use violence to protect their memberships as well as to 'patch over' (or take over) other clubs.[41] There have also been violent incidents where bystanders have been injured or killed. Four violent incidents involving OMCs, or

[36] ibid., p. 245.
[37] ibid., p. 246.
[38] ibid., p. 232.
[39] N. Ralston & S. Howden (2011) 'Police Gang up Nationally to Catch 'Nike Bikies'', *smh.com.au*, 28 July, viewed 4 April 2012, <http://www.smh.com.au/national/police-gang-up-nationally-to-catch-nike-bikies-20110727-1i0bc.html>.
[40] J. Kaila (2012) 'Outlaw Bikies Menace Notorious King St, Melbourne', *heraldsun.com.au*, 5 February, viewed 5 April 2012, <http://www.heraldsun.com.au/news/more-news/outlaw-bikies-menace-king-st/story-fn7x8me2-1226262783023>.
[41] Australian Crime Commission (2011) *Organised Crime in Australia 2011*, Canberra, Commonwealth of Australia, p. 51, viewed 26 November 2012, <http://www.crimecommission.gov.au/sites/default/files/files/OCA/2011/oca2011.pdf>.

individual members of OMCs, which have received extensive media coverage are detailed below.

Perhaps the most notorious episode of inter-club violence was the 'Milperra Massacre' which occurred in Sydney on 2 September 1984. This confrontation, between members of the rival Comanchero and Bandido motorcycle clubs, occurred during a motorcycle 'swap meet'[42] at the Viking Tavern in Milperra. Seven people died as a result of gunshot wounds from the conflict, including two Bandidos, four Comancheros and a teenage member of the public, Leanne Walters. A further 21 people, most of whom were involved in the fight, were injured.[43]

More locally, on 18 June 2007, in the Melbourne CBD during morning peak hour, a member of the Hells Angels motorcycle club, Christopher Hudson, shot dead father-of-three, Brendan Keilar and wounded two others: Dutch traveller, Paul de Waard; and Kaera Douglas, a woman with whom Hudson had had an occasional relationship. The two male victims were attempting to intervene as Hudson dragged Douglas by the arms and hair from a taxi. Earlier in the morning, he had seriously assaulted another female, Autumn Daly-Holt, outside a bar on King Street. Hudson was sentenced to a minimum of 35 years in jail for the events of 18 June 2007.[44]

On 22 March 2009, at Sydney Airport, a violent brawl between members of the Hells Angels and the Comancheros resulted in the death of Anthony Zervas, a Hells Angels associate. The violence was sparked when six Comancheros, including national president Mahmoud Hawi, coincidentally boarded the same flight as Derek Wainohu, a president of the Hells Angels, from Melbourne to Sydney. The two clubs had a history of violence against each other.[45]

Prior to the departure of the flight, Hawi exhibited animosity towards Wainohu. Both Wainohu and the Comancheros communicated via phone with members of their respective clubs to send 'reinforcements' to meet them at Sydney airport. After the plane arrived in Sydney, a violent brawl between 12 members of the Comancheros and five members of the Hells Angels occurred in the Departures Hall. Anthony Zervas, an associate of the Hells Angels, was subsequently killed.[46] Mahmoud Hawi was later found guilty of Zervas' murder.[47]

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[42] A 'swap meet' is 'an informal market where people bring along motorcycle parts, literature and associated material for display and sale or swap'. *R v Annakin* (1988) 37 A Crim R 131.
[43] See: *R v Annakin* (1988) 37 A Crim R 131.
[44] See: *R v Hudson* [2008] VSC 389. See also: *Hudson v R* (2010) 30 VR 610. See also: R. Rennie (2008) '35 Years' Jail for CBD Gunman', *theage.com.au*, 22 September, viewed 26 March 2012, <http://www.theage.com.au/national/35-years-jail-for-cbd-gunman-20080922-4leb.html>; R. Robinson (2007) 'Good Man Down', *Herald Sun*, 23 June, pp. 29-31; P. Kent (2009) 'Taste of Hell for a Killer', *Herald Sun*, 7 May, pp. 4-5.
[45] See: *R v Menzies* [2012] NSWSC 158.
[46] ibid.
[47] M. Brown (2011) 'Bikie Mayhem at Airport: One Murder Conviction, Two New Trials for Manslaughter', *The Sydney Morning Herald*, 3 November, p. 1; M. Brown (2011) 'Bikie Boss Mick Hawi Convicted of Murder Over Airport Brawl', *smh.com.au*, 2 November, viewed 26 March 2012, <http://www.smh.com.au/nsw/bikie-boss-mick-hawi-convicted-of-murder-over-airport-brawl-20111102-1mv2z.html>.

Most recently in Victoria, on 28 November 2011, the sergeant-at-arms of the Bandidos motorcycle club, Toby Mitchell, was shot up to five times in broad daylight in Brunswick. The shooting commenced outside a gym near the Bandidos clubhouse on Weston Street and continued through the car park of a nearby shopping centre. One of the bullets from the attack struck a car with two children inside (who were unharmed).[48] The *Herald Sun* reported earlier this year that Mitchell had refused to speak with investigators following the shooting.[49]

Serious and Organised Crime

The nature of the relationship between OMCs and organised crime is contested. OMCs themselves assert that they are clubs primarily for people who enjoy riding motorcycles.[50] Whilst they acknowledge that some members of their clubs may engage in criminal activities, they deny that OMCs as a whole are organised crime units. They believe they are unfairly targeted by the media and the police.[51]

In contrast, reports of OMCs in the media are typically associated with a range of criminal activities such as: illegal drug manufacturing and distribution; violent attacks; weapons offences; murders; intimidation; extortion; and money laundering.[52]

The Australian Crime Commission states that Australian-based OMCs are involved in a range of organised criminal activities including: the production, distribution and importation of methylamphetamine and precursor chemicals; trafficking MDMA (ecstasy); importing counterfeit goods; and the commercial cultivation of cannabis.[53]

Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups (2009)

During 2008-09, the Commonwealth Parliamentary Joint Committee on the Australian Crime Commission conducted an inquiry into the 'legislative arrangements to outlaw

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[48] A. Dowsley (2012) 'Shot Bikie Enforcer Home from Hospital', *Herald Sun*, 24 January, p. 14; ABC Radio (2011) 'Bikie Shooting an Organised Hit', *The World Today with Eleanor Hall*, online transcript, 29 November, viewed 25 March 2012, <http://www.abc.net.au/worldtoday/content/2011/s3378848.htm>; M. Butler & A. Dowsley (2011) 'Bandidos Bikie Toby Mitchell Believed To Have Been Under Surveillance', *heraldsun.com.au*, 1 December, viewed 26 March 2012, <http://www.heraldsun.com.au/news/more-news/bandidos-bikie-toby-mitchell-believed-to-have-been-under-surveillance/story-fn7x8me2-1226210786090>.

[49] Dowsley (2012) op. cit.

[50] ABC Television (2010) 'Inside the Bikie Bunker', *Hungry Beast*, 24 March, viewed 4 April 2012, <http://hungrybeast.abc.net.au/stories/inside-bikie-bunker>.

[51] ibid.

[52] See, for example: N. McKenzie & R. Baker (2012) 'Fugitive Bikie set up Meth Lab in India as Crime Gangs Expand Web into Asia', *Sunday Age*, 25 March, p. 5; D. Oakes (2012) 'Bikie Gangs Expanding into South-East Asia', *The Age*, 15 March, p. 3; A. Lowe (2012) 'Bikie Link in 'Drug Syndicate' Arrest, *theage.com.au,* 8 November, viewed 23 November 2012, <http://www.theage.com.au/victoria/bikie-link-in-drugs-syndicate-arrest-20121108-28zi6.html>; A. Rule (2012) 'Bad to the Bone – The War We're Not Winning Against Bikies', *Herald Sun*, 3 February, p. 15; P. Anderson (2012) 'Bail Denied Over Strip Club Brawl', *Herald Sun*, 21 January, p. 10; N. McKenzie, B. Schneiders & R. Baker (2011) 'Hells Angels' Extortion Bid', *theage.com.au*, 2 April, viewed 22 November 2012, <http://www.theage.com.au/victoria/hells-angels-extortion-bid-20110401-1crsn.html>; N. Bucci (2011) 'Police Say Bikie Drug Syndicate Broken', *The Age*, 6 May, p. 9.

[53] Australian Crime Commission (2011) op. cit., pp. 10, 51, 58, 60, 65, 75.

serious and organised crime groups'.[54] The inquiry was, in part, established to consider South Australia's *Serious and Organised Crime (Control) Act 2008* which, at that point, signalled a new approach to dealing with serious and organised crime.[55]

Chapter Two of the Committee's report included an examination of the involvement of OMCs in organised and serious crime in Australia. At that time, the Committee concluded:

> The level of [OMC] involvement in serious and organised crime is difficult to clearly establish. The committee acknowledges that it varies across the states. However, the committee is persuaded by the ACC [Australian Crime Commission] that [OMC]s are a visible and therefore prominent target in both the political and public arenas, and that serious and organised crime often involves a level of sophistication or capacity above that of many [OMC]s.[56]

The Committee also noted that, if bikers wished to challenge media and public perceptions, they must play an active role in that process, including by removing any criminal elements from their clubs.[57]

Chapter Four of the report reviewed a range of legislative approaches in existence at that time, both in Australia and overseas, that were designed to target participation in an organised crime group. These approaches included the initial versions of the South Australian and NSW criminal organisations legislation (see the Other Jurisdictions section of this Research Brief).[58] The Committee noted that the development of legislative approaches to combat serious and organised crime was 'an evolving process, and must continuously adapt to the changing organised crime environment'.[59]

The Committee stated that there were advantages and disadvantages for each of the legislative approaches it had examined. It found that there were common difficulties with laws targeting association including: the challenge in defining 'organised crime groups'; and in ensuring an efficient and transparent process for determining whether a person is involved in organised crime.[60]

The Committee concluded that:

> Of the approaches examined by the committee, the UK's Serious and Organised Crime Prevention Orders (SPCOs) seem to be an effective way of managing the activities of known criminals.[61]

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[54] Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (2009) op. cit.
[55] ibid., p. 53. A brief description of the Serious and Organised Crime (Control) Act 2008 (SA) is detailed in the Other Jurisdictions section of this Research Brief.
[56] ibid., p. 32.
[57] ibid.
[58] Other jurisdictions examined were: the United States (*Racketeer Influenced and Corruption Organisations Act 1970*); Canada (*Criminal Code (Organised Crime and Law Enforcement) 2001*); New Zealand (*Crimes Act 1961*); China, Hong Kong and Macau.
[59] ibid., p. 93.
[60] ibid., p. 94.
[61] ibid.

Readers are directed to the Other Jurisdictions section of this Research Brief for a description of SCPOs.

Victoria Police Taskforce Echo

Victoria Police established the Echo Taskforce in February 2011 to target the illegal activities of OMCs. Detective Superintendent Fryer from Victoria Police stated, 'Not every single person in an [OMC] is a criminal, but most, if not all members know what is going on or are deliberately ignorant'.[62]

Detective Superintendent Fryer indicated that the OMCs extend across jurisdictions: 'They are trans-national and multi-jurisdictional in nature and so we are working closely with all of the other states to determine the best way to deal with these issues'.[63] He also stated that approximately 80 per cent of office bearers at the larger OMCs in Victoria have significant criminal histories. These may include convictions for: importing drugs of dependence; serious assaults; significant firearms offences; and affray.[64]

The head of Taskforce Echo, Detective Acting Inspector Murray, explained that a lot of the crimes committed by bikies are not 'seen in the public eye' and involve legitimate businesses (such as tattoo parlours, nightclubs and exotic dance clubs) being used for clandestine purposes.[65]

Since the commencement of the Taskforce, police raids (mainly at OMC clubhouses) have seized over 50 firearms and other weapons, cash and drugs. Taskforce Echo also works with Victoria Police and other police forces to coordinate responses to events such as bikie runs.[66] Detective Acting Inspector Murray from the Taskforce stated:

> We are certainly not there to spoil their good time at runs and functions, especially if their activities are within the law, but if they are going to hold these events, they will comply with the law like every other citizen.[67]

Coalition Policy on Outlaw Motorcycle Clubs

Prior to the 2010 state election, the Coalition announced that, if successful in winning the election, it would 'introduce tough legislation to outlaw criminal bikie gangs'.[68] The proposals in the Coalition's plan included: providing for removal orders for fortifications around premises in suburban streets; giving the Supreme Court the power to declare OMCs or other gangs 'declared organisations' on the application of

[62] J. Houghton (2012) 'Close Eye on Bikie Gangs', *Police Life*, Autumn ed., p. 18.
[63] ibid.
[64] SBS Television (2012) op. cit.
[65] Houghton (2012) op. cit., p. 18.
[66] A 'run' is a group ride, for members only, out of the city to celebrate an occasion. A run is also an opportunity for different chapters of a club to get together. Veno (2010) op. cit., p. 97.
[67] Houghton (2012) op. cit., p. 18.
[68] Victorian Liberal Nationals Coalition (2010) *Vic Coalition to Outlaw Criminal Bike Gangs*, Media Release, 18 March.

the Chief Police Commissioner or the Director of Public Prosecutions; making it a criminal offence for members or associates of a declared organisation to continue to participate in or remain members of such an organisation or wear gang patches or insignia; and to provide for the power to forfeit gang assets which have been used for criminal activities.[69]

On 14 November 2012, the Government introduced the Criminal Organisations Control Bill 2012.

Law Institute of Victoria's Commentary on the Bill

In a media release, the Law Institute of Victoria's President Michael Holcroft questioned whether the Victorian Government's legislation to outlaw bikie gangs will be legally enforceable, especially given the High Court challenges in other states, and said that the Government should have waited for the result of Queensland's High Court challenge before 'rushing into' legislation.[70] Noting that Victoria's Supreme Court does not have jurisdiction over another state's decisions, Mr Holcroft also questioned how Victoria will enforce bans of bikie groups in other states.[71]

Further to this, Mr Holcroft stated, 'The new laws will not stamp out illegal activities and will make lawful activities, such as meeting, a criminal offence'. He also stated that the LIV 'oppose laws that make criminals out of a whole class of people', noting that 'Not all members of motorcycle clubs are criminals. Turning otherwise law-abiding citizens into criminals simply because they associate with a group is wrong and an anathema to the rule of law and freedom of association'.[72] He also said that the LIV believed that existing criminal laws could effectively deal with criminal offending.[73]

The Attorney-General stated that the LIV's response was disappointing.[74] He defended the proposed legislation, stating that Victoria's legislation was different to the South Australian and New South Wales legislation, which have both been challenged in the High Court.[75] In an interview on 3AW Breakfast, the Attorney-General noted, "[Our approach] is based on evidence put before the court. The gang or their members have

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[69] ibid.

[70] Law Institute of Victoria (2012) *Peak Legal Body Throws Doubt on Effectiveness of Bikie Legislation*, Media Release, 14 November, viewed 19 November 2012, <http://www.liv.asn.au/Practice-Resources/News-Centre/Media-Releases/Peak-legal-body-throws-doubt-on-effectiveness-of-B>.

[71] ibid.

[72] ibid.

[73] ibid. See also J. Ferguson (2012) 'Law Institute Questions 'Challenge-Proof' Bikie Laws', *The Australian*, 15 November, viewed 19 November 2012, <http://www.theaustralian.com.au/national-affairs/state-politics/law-institute-questions-challenge-proof-bikie-laws/story-e6frgczx-1226516938560>; D. Oakes (2012) 'New Bikie Laws 'A Serious Assault on Civil Liberties', *The Age*, 15 November, viewed 22 November 2012, <http://www.theage.com.au/victoria/new-bikie-laws-a-serious-assault-on-civil-liberties-20121114-29cq0.html>.

[74] P. Mitchell (2012) 'Attorney General Defends New Bikie Laws', *774 ABC*, www.abc.net.au, 14 November, viewed 21 November 2012, <http://www.abc.net.au/local/audio/2012/11/14/3632909.htm?site=melbourne>.

[75] E. Feely & H. Murphy (2012) 'Attorney-General says Bikie Laws Will Survive High Court Challenge', *www.3AW.com.au*, 14 November, viewed 26 November 2012, <http://www.3aw.com.au/blogs/breaking-news-blog/attorneygeneral-says-bikie-laws-will-survive-high-court-challenge/20121114-29bdr.html>. See also Mitchell (2012) op. cit.

the right (to) have their say and test the evidence'.[76] He also stated that 'All of this is decided on evidence before the court and any legitimate organisation that's not engaged in serious criminal activity will not be subject to this legislation'.[77]

[76] Feely & Murphy (2012) op. cit.
[77] ibid.

3. The Bill

This section of the Research Brief summarises some of the key provisions of the Bill. For an overview of the Bill in its entirety, readers are directed to the Explanatory Memorandum. This section is for general information purposes only and is not legal advice. In addition, some legal details have been omitted to provide a brief overview of the Bill.

Part 1 – Preliminary

Clause 1 outlines the purposes of the proposed legislation. These are:

(a) to provide for the making of declarations and control orders for the purpose of preventing and disrupting the activities of organisations involved in serious criminal activity, and of their members, former members, prospective members and associates; and
(b) to provide for the recognition and application of declarations and control orders made under corresponding laws; and
(c) to make related amendments to other Acts.

Clause 2 is the commencement provision. The clause states:

(1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
(2) If a provision of this Act does not come into operation before 1 November 2013, it comes into operation on that day.

Clause 3 provides for definitions of specific terms used in the Act. These definitions include:

associate, in relation to—
(a) a body corporate, has the meaning given by section 125;
(b) an individual, includes an individual who is regularly in company with, or in communication with by any means (including by electronic communication) that individual;

associate with means—
(a) to be in company with; or
(b) to communicate with by any means (including by electronic communication);

Court means the Supreme Court;

criminal intelligence means any information, document or other thing relating to actual or suspected criminal activity in Victoria or elsewhere, the disclosure of which could reasonably be expected to—
(a) prejudice a criminal investigation, including by revealing intelligence-gathering methodologies, investigative techniques or technologies, or covert practices; or
(b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
(c) endanger a person's life or physical safety;

member, of an organisation, includes—
(a) an individual who is a current member of the organisation because the individual—
  (i) has paid a membership fee to be a member of the organisation; or
  (ii) has been accepted as a member of the organisation through another process set by the organisation; or
(b) an honorary member of the organisation; or
(c) an individual who identifies himself or herself as belonging to the organisation, including an individual who displays the patches or insignia (if any) of the organisation; or
(d) an individual whose conduct in relation to the organisation would reasonably lead another person to consider the individual to be a member of the organisation; or
(e) an office holder of the organisation;

related organisation means an organisation the membership, former membership or prospective membership of which formed the basis on which the Court was satisfied under section 19(3)(b) in making a declaration that applies to an individual;

serious criminal activity means conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute any one or more applicable offences and includes any such conduct that occurs before the commencement of Part 2;

Clause 4 provides a definition of 'applicable offence'. Subclause (1) states:

(1) For the purposes of this Act, an ***applicable offence*** is an offence specified in subsection (2) that—
  (a) involves 2 or more offenders; and
  (b) involves substantial planning and organisation; and
  (c) forms part of systemic criminal activity; and
  (d) has a purpose of obtaining profit, gain, power or influence, or of sexual gratification where the victim is a child.

Subclause (2) states:

(2) For the purposes of subsection (1) the following offences are specified—
  (a) an indictable offence that is punishable by at least 10 years imprisonment;
  (b) an offence against a provision specified in an item of the Schedule, being a provision of the Act specified in the heading to that item;
  Note
  See also section 10.
  (c) an offence under section 321, 321G or 321M of the *Crimes Act 1958* in relation to an offence referred to in paragraph (a) or (b).

The Schedule, as referred to in subclause (2)(b), is described in more detail at the end of this Bill section of the Research Brief. The offences in the Crimes Act to which subclause (2)(c) refers are: conspiracy to commit an offence (s 321); incitement (s 321G); and attempting to commit an indictable offence (s 321M).

Clause 7 provides for a definition of 'organisation'. The clause states:

(1) For the purposes of this Act, an ***organisation*** is an incorporated body or association (including a company or registered foreign company within the

meaning of the Corporations Act) or an unincorporated body or association (however structured), whether the body or association—

(a) is based in Victoria or elsewhere; or
(b) consists of persons who are or are not ordinarily resident in Victoria; or
(c) is part of a larger organisation; or
(d) is affiliated with another organisation.

Example

A chapter of a motorcycle club could be an organisation to which paragraph (c) or (d) applies.

(2) To avoid doubt, for the purposes of this Act, an ***organisation*** can include individuals who are related to one another.

Clause 8 of the Bill defines the term 'prospective member'. The clause states that a prospective member is a person who has commenced but not completed the process of becoming a member of an organisation. Under subclause (2), a prospective member includes: a person whom members describe as a 'prospect' or 'nominee' of the organisation; a person nominated or sponsored by the organisation for the purpose of becoming a member; a person who wears a version of the organisation's insignia or a specific identifier that identifies them as a prospective member; a person undertaking a probationary period of membership.

Part 2 – Declarations

Division 1 – Applications for Declarations

Clause 14 of the Bill specifies that the Chief Commissioner may apply to the Court for a declaration that: an organisation is a declared organisation; or an individual is a declared individual.

Clause 17 lists the persons who may object to a declaration application. These include: the respondent named in the application; if the application is to declare an organisation, a member of the organisation and/or with the leave of the Court, another person whose interests may be affected by the determination of the application.

Division 2 – Determination of Applications

Clause 19(1) of the Bill provides that

(1) The Court, on an application under section 14, may make a declaration—
  (a) in the case of an organisation the subject of the application—that the organisation is a declared organisation;
  (b) in the case of an individual the subject of the application—that the individual is a declared individual.

Subclause (2) provides that the Court must be satisfied with certain matters in order to declare an organisation. These include:

(a) either—
  (i) the organisation—

(A) has engaged in, organised, facilitated or supported serious criminal activity; or
(B) is engaging in, organising, facilitating or supporting serious criminal activity; or

(ii) any 2 or more members, former members or prospective members of the organisation have used or are using—
(A) the organisation; or
(B) their relationship with that organisation or with that organisation's members, former members or prospective members—

for a criminal purpose; and

(b) the activities of the organisation pose a serious threat to public safety and order.

Subclause (3) specifies that the Court must be satisfied with certain matters in order to declare an individual. These include that:

(a) the individual is a member, former member or prospective member of an organisation; and
(b) that individual and at least one other member, former member or prospective member of that organisation have used or are using—
(i) that organisation; or
(ii) their relationship with that organisation or with that organisation's members—

for a criminal purpose; and

(c) the activities of that individual and the member, former member or prospective member pose a serious threat to public safety and order.

Subclause (4) provides that the Court may decide that it is satisfied as required by subclause (2) or (3) only if it is satisfied by acceptable, cogent evidence that is of sufficient weight to justify making the declaration.

Clause 21 specifies the standard of proof that applies to applications for declarations. The clause provides that:

(1) A question of fact to be decided by the Court for the purpose of being satisfied as required by section 19(2)(a) or (3)(a) and (b) is to be decided beyond reasonable doubt.
(2) A question of fact to be decided by the Court in respect of any other aspect of an application under section 14 is to be decided on the balance of probabilities.

Clause 24 specifies that a declaration remains in effect for three years unless it is sooner revoked.

Division 3 – Revocation of Declarations

Clause 27 of the Bill refers to an application for a revocation of a declaration. The Chief Commissioner may apply to the Court for a revocation. Subclause (2) provides that a declared organisation or declared individual may also apply, with the leave of the Court. Subclause (3) provides that the Court may grant leave to apply under subclause (2) if it is satisfied that there has been a substantial change in circumstances since the declaration was made.

Under clause 29, the Court, on application under clause 27, may revoke the declaration if it is satisfied that the matters in clause 19(2) or (3) are no longer satisfied.

Division 4 – Renewal of Declarations

Under clause 33(1) the Chief Commissioner may apply to the Court for the renewal of a declaration. Subclause (2) states that the application for renewal must be made before the declaration has ceased to have effect.

Clause 35 outlines the applicable procedures for the renewal of declarations.

Clause 37 provides that declarations may be renewed more than once.

Part 3 – Control Orders

Division 1 – Applications for Control Orders

Clause 38 of the Bill provides that the Chief Commissioner may apply to the Court for a control order in respect of an individual or organisation. The application may be made at the same time as an application for a declaration is made for the same organisation or individual.

Clause 41 specifies the persons who may object to the control order application. These are: the respondent named in the application; if the application for the control order is in respect of an organisation – a member of the organisation and/or with the leave of the Court, a person whose interests may be affected by the determination of the application.

Division 2 – Determination of Applications

Clause 43 provides that the Court may make a control order. Subclause (1) specifies that the Court may make a control order that applies to an *organisation* if the Court is satisfied that:

(a) the organisation is a declared organisation; and
(b) the making of the control order is likely to contribute to the purpose of preventing or disrupting serious criminal activity by—
  (i) the organisation; or
  (ii) any members, former members or prospective members of the organisation.

Subclause (2) specifies that the Court may make a control order that applies to an *individual* if the Court is satisfied that:

(a) the individual is—
  (i) a declared individual; or
  (ii) a declared organisation member; and
(b) the making of the control order is likely to contribute to the purpose of preventing or disrupting—
  (i) serious criminal activity by the declared individual or declared organisation member; or

(ii) serious criminal activity by any other person that is being or may be facilitated by the declared individual or declared organisation member.

Subclause (3) provides that, for the purposes of subclauses (1) and (2), the Court may be satisfied that the control order is likely to contribute to the purpose of preventing or disrupting serious criminal activity without needing to determine which particular applicable offence or offences would be prevented or disrupted.

Subclause (4) states that the Court may decide it is satisfied under subclause (1) or (2) only if it is satisfied by acceptable, cogent evidence that is of sufficient weight to justify the making of a control order.

Clause 45 specifies the content of a control order for a declared organisation. Subclause (1) provides that the Court may impose conditions in a control order that the Court considers appropriate.

Subclause (2) indicates that, without limiting subclause (1), a control order may include conditions that do any one or more of the following:

(a) prohibit the declared organisation from continuing to operate, carry on a business or take on new members;
(b) prohibit members, former members or prospective members of the declared organisation from participating in the activities of the organisation;
(c) require the declared organisation to exclude certain members, former members or prospective members of the organisation from participating in the activities of the organisation;
(d) prohibit members, former members or prospective members of the declared organisation from wearing or displaying the patches or insignia of the organisation;
(e) prohibit the declared organisation from carrying out an activity specified in the condition;
(f) restrict the declared organisation from carrying out an activity specified in the condition in a specified way;
(g) prohibit the declared organisation from using specified property it owns, possesses, uses or occupies for specified activities (whether that property is located in Victoria or elsewhere);
(h) restrict, as specified in the condition, the use and possession by the declared organisation of property it owns possesses, uses or occupies (whether that property is located in Victoria or elsewhere).

Clause 47 specifies the content of control orders for an individual. Subclause (1) provides that the Court may impose conditions in a control order that the Court considers appropriate.

Subclause (2) indicates that, without limiting subclause (1), *if the individual is a declared organisation member*, the control order may include conditions that do any one or more of the following:

(a) prohibit the individual from associating with another declared organisation member or an associate of another declared organisation member;

(b) restrict, as specified in the condition, the individual from associating with another declared organisation member or an associate of another declared organisation member;
(c) prohibit the individual from continuing to be a member of a declared organisation;
(d) prohibit the individual from participating in the activities of a declared organisation;
(e) restrict the nature of the individual's membership of a declared organisation or participation in the activities of a declared organisation;
Example
A condition may prohibit a member from wearing or displaying the patches or insignia of the declared organisation.
(f) prohibit the individual from using or possessing property which a declared organisation owns, possesses, occupies or uses;
(g) restrict, as specified in the condition, the individual's use or possession of property which a declared organisation owns, possesses, occupies or uses;
(h) if the individual is a member of a declared organisation that is an unincorporated body or association—
  (i) prohibit the individual from using property made available by any person for use by any member of the organisation in their capacity as a member; or
  (ii) restrict, as specified in the condition, the individual's use of property made available by any person for use by any member of the organisation in their capacity as a member.

Subclause (3) specifies that, without limiting subclause (1), *if the individual is a declared individual*, the control order may include conditions that do any one or more of the following:

(a) prohibit the individual from associating with a related organisation member or an associate of a related organisation member;
(b) restrict, as specified in the condition, the individual from associating with a related organisation member or an associate of a related organisation member;
(c) prohibit the individual from continuing to be a member of a related organisation;
(d) prohibit the individual from participating in the activities of a related organisation;
(e) restrict the nature of the individual's membership of a related organisation or participation in the activities of a related organisation;
Example
A condition may prohibit a member from wearing or displaying the patches or insignia of the related organisation.
(f) prohibit the individual from using or possessing property which a related organisation owns, possesses, occupies or uses;
(g) restrict, as specified in the condition, the individual's use or possession of property which a related organisation owns, possesses, occupies or uses;
(h) if the individual is a member of a related organisation that is an unincorporated body or association—
  (i) prohibit the individual from using property made available by any person for use by any member of the organisation in their capacity as a member; or
  (ii) restrict, as specified in the condition, the individual's use of property made available by any person for use by any member of the organisation in their capacity as a member.

Clause 48 provides that, on making a control order, the Court may make any ancillary orders it considers appropriate to enable the order to be given effect.

Clause 51 specifies the standard of proof that applies to applications for control orders. The clause states, 'A question of fact to be decided by the Court in respect of an application for a control order is to be decided on the balance of probabilities'.

Clause 53 provides that a control order remains in effect for three years after it takes effect unless: the control order is revoked; or the declaration is revoked.

Division 3 – Variation or Revocation of Control Orders and Ancillary Orders

Clause 56 of the Bill refers to an application for a revocation or variation of a control order or ancillary order. The Chief Commissioner may apply to the Court for a variation or revocation. Under subclause (2), a declared organisation to which, or an individual to whom, a control or ancillary order applies may also apply for a variation or revocation, with the leave of the Court. Subclause (3) provides that the Court may grant leave to apply under subclause (2) if it is satisfied that there has been a substantial change in circumstances since the control order or ancillary order was made.

Clause 58 refers to the determination of an application for a variation or revocation of a control order or an ancillary order:

> (1) The Court, on an application under section 56, may vary or revoke the control order or ancillary order that is the subject of the application.
> (2) The Court may vary the control order or ancillary order if the Court considers there has been a substantial change in circumstances since the order was made.
> (3) The Court may revoke the control order if the Court is satisfied that the matters in section 43(1) or (2) that satisfied the Court in making the control order are no longer satisfied.
> (4) The Court may revoke the ancillary order if the Court is satisfied that the basis on which the order was made no longer exists.

Division 4 – Renewal of Control Orders

Clause 63(1) states that the Chief Commissioner may apply to the Court for the renewal of a control order. Subclause (2) specifies that the application must be made before the control order ceases to have effect.

Clause 65 outlines the procedure for the renewal of a control order.

Clause 67 specifies that a control order may be renewed more than once.

Division 5 – Offences

Clause 68 provides that an individual to whom, or an organisation to which, a control order applies must comply with the order. The penalty for contravention of this clause is: in the case of an individual, 600 penalty units ($84,504) or five years imprisonment

or both; in the case of a body corporate, 3,000 penalty units ($422,520).[78] An offence under this clause will be an indictable offence.

Part 4 – Protection of Criminal Intelligence

Division 1 – Preliminary

Clause 69 provides for definitions of the following terms:

> ***protection application*** means an application under section 70 for a criminal intelligence protection order;
>
> ***substantive application*** means—
> (a) an application for a declaration or a control order; or
> (b) an application for the revocation of a declaration or a control order; or
> (c) an application for the variation of a control order; or
> (d) an application for the registration of a corresponding control order referred to the Court under section 102; or
> (e) an application—
> (i) for the variation of a registered corresponding control order; or
> (ii) for the cancellation of the registration of a registered corresponding declaration or a registered corresponding control order.

Division 2 – Criminal Intelligence Protection Orders

According to the Explanatory Memorandum, clause 70:

> … enables the Chief Commissioner to apply to the Supreme Court for a criminal intelligence protection order to protect the confidentiality of any information, document or other thing that is related to a substantive application (as defined in clause 69) and that the Chief Commissioner believes on reasonable grounds is criminal intelligence.[79]

Under clause 71, if a protection application is made, the Court may appoint a special counsel to represent the interests of the respondent to the substantive application. Subclause (2) specifies that the special counsel must be a barrister who, in the opinion of the Court, has the appropriate abilities and skills to represent the interests of the respondent at the hearing of the protection application.

Subclause (3) outlines when the special counsel may communicate with the respondent prior to attending the hearing or obtaining any information that is the subject of the protection application:

> (3) At any time before the special counsel attends the hearing or obtains any information or the original or a copy of any document or other thing that is the subject of the protection application, the special counsel may communicate with the respondent, or any representative of the respondent, for the purposes of

[78] Based on the 2012-2013 penalty unit value of $140.84. See: Office of the Chief Parliamentary Counsel (2012) 'Penalty and Fee Units', OCPC website, viewed 26 October 2012, <http://www.ocpc.vic.gov.au/CA2572B3001B894B/pages/faqs-penalty-and-fee-units>.
[79] Explanatory Memorandum, Criminal Organisations Control Bill 2012, p. 23.

> obtaining information from the respondent or representative in relation to the protection application.

Subclause (4) sets out when the special counsel may communicate with the respondent once the hearing has commenced or the special counsel has obtained any information that is the subject of the protection application:

> (4) At any time after the special counsel commences to attend the hearing or obtains any information or the original or a copy of any document or other thing that is the subject of the protection application, the special counsel—
>
> (a) may communicate to the respondent or a representative of the respondent any order made by the Court at or in relation to the hearing; and
>
> (b) must not communicate any other information in relation to the hearing to the respondent or a representative of the respondent, but may seek information from the respondent or representative that is necessary for the special counsel to represent the interests of the respondent.

Subclause (5) clarifies that the special counsel must not compromise the confidentiality of the information that is subject to the protection application.

Clause 73(1) states that unless the Court orders otherwise, a protection application must be heard in a closed court. Subclause (2) specifies that the Court may make an order under subclause (1) if appropriate.

Subclause (3) states that, if the hearing is closed, the only persons permitted to be present are: the Chief Commissioner (or delegate); any lawyers representing the Chief Commissioner; the special counsel for the respondent; any witnesses who may be called to give evidence; the presiding judge and any court staff necessary for the hearing.

Subclause (5) states that the Chief Commissioner may withdraw a protection application or a substantive application if the Court makes an order under subclause (1). In the second reading speech, the Attorney-General explained:

> If the court determines that the application should be heard in open court, the chief commissioner will have the option of withdrawing the application to ensure the confidentiality of the criminal intelligence is maintained.[80]

Clause 75 specifies that the Court may make a criminal intelligence protection order for all or any part of the information to which the application relates, if the Court is satisfied that: the information is criminal intelligence; and the reasons for maintaining the confidentiality of the intelligence outweigh any prejudice or unfairness to the respondent to the substantive application.

Subclause (2) states that if the Court declines to make a criminal intelligence protection order for all or part of the information, the Chief Commissioner: is not

[80] Victoria, Legislative Assembly (2012) *Debates*, Book 16, 15 November, p. 5072.

obliged to adduce that information in evidence in the proceeding on the substantive application; and may withdraw the substantive application.

Further to this, subclause (3) states:

> (3) The Chief Commissioner may also withdraw the substantive application if the Court at any time during the proceeding on the substantive application makes an order for discovery of all or any part of the information, document or other thing that was the subject of the protection application, whether or not a criminal intelligence protection order was made.

Division 3 – How Protected Criminal Intelligence is dealt with in Substantive Applications

Clause 78 provides that Division 3 of Part 4 applies to any part of a proceeding on a substantive application in which protected criminal intelligence is sought to be admitted in evidence. This part of the proceeding is referred to as the 'relevant part'.

Clause 79 provides that the Court may appoint a special counsel to represent the respondent to the substantive application at the hearing of the relevant part. Subclause (3) specifies that the Court may appoint the same or a different special counsel than was appointed under clause 71.

If a new special counsel is appointed, they will be able to communicate with the respondent at any time before the special counsel obtains the protected criminal intelligence. Once the special counsel has received the intelligence, they may only communicate to the respondent any order made by the Court in relation to the hearing. The special counsel must not communicate any other information in relation to the hearing however they will be able to seek information from the respondent that is necessary to represent the respondent's interests.

If the same special counsel is appointed as was appointed under clause 71, they may communicate to the respondent any order made by the Court in relation to the hearing of the relevant part. The special counsel must not communicate any other information to the respondent in relation to the hearing, but may request information from the respondent that is necessary to represent them.

Subclause (9) provides that the Court may direct that the special counsel may be an observer at any part of the hearing for the substantive application at which the special counsel is not otherwise entitled to be present.

Clause 81(1) specifies that, unless the Court orders otherwise, the relevant part must be heard in a closed court. Subclause (2) indicates that the Court may make an order under subclause (1) if it considers it appropriate.

Subclause (3) provides that, if the Court is closed for the hearing, the only persons who may be present are: the Chief Commissioner (or delegate); lawyers representing the Chief Commissioner; the special counsel appointed under clause 79; any witnesses

who may be called to give evidence; the presiding judge and any court staff necessary for the hearing.

Subclause (5) states:

> (5) If the Court makes an order under subsection (1)—
> (a) the Chief Commissioner is not obliged to adduce any protected criminal intelligence in evidence; and
> (b) the Chief Commissioner may withdraw the substantive application.

Division 4 – General

Clause 84 refers to the disclosure, receipt or solicitation of protected criminal intelligence. The clause makes it an indictable offence to disclose, receive or solicit any information if the person knows or is reckless as to the fact that the information is protected criminal intelligence. The penalty for an offence under this clause is, for an individual, 600 penalty units ($84,504) or imprisonment for 5 years or both; or 3,000 penalty units ($422,520) in the case of a body corporate.

Clause 85 refers to the disclosure, receipt or solicitation of other confidential material. Subclauses (1) and (2) state:

> (1) This section applies to any information, document or other thing that was the subject of a protection application that was not granted by the Court.
> (2) Subject to subsection (4), a person must not disclose, receive or solicit any information, document or other thing to which this section applies if the person knows or is reckless as to the fact that the information, document or other thing is information or a document or other thing to which this section applies.

An offence under subclause (2) is an indictable offence. The penalty for a contravention is, for an individual, 600 penalty units ($84,504) or imprisonment for 5 years or both; or 3,000 penalty units ($422,520) in the case of a body corporate.

Subclause (4) provides for exceptions to the offence provision in subclause (2).

Part 5 – Recognition of Corresponding Declarations and Control Orders

Part 5 of the Bill provides for the procedures for registering, in Victoria, declarations and control orders made in other jurisdictions.

Part 6 – General

Clause 130 of the Bill will require the Chief Commissioner to establish and maintain a register of declarations, control orders and registered corresponding declarations and control orders.

Clause 132 specifies that certain details on the register must be accessible to any person on payment of the prescribed fee (if any).

Under clause 133, the Chief Commissioner must provide an annual report to the Attorney-General in relation to specified matters under the Bill. A non-exhaustive list of these matters include the number of applications made during the financial year in the following categories: applications for declarations (organisations); applications for declarations (individuals); applications for control orders (declared organisations); applications for control orders (declared individuals); and applications for control orders (individuals who are declared organisation members).

Subclause (3) specifies that the Attorney-General must cause a copy of the report to be laid before each House of Parliament within 12 sitting days after the report is received by the Attorney-General.

Clause 135 states that proceedings on applications under the Bill are civil in nature, except as otherwise provided.

Clause 137 states that the Attorney-General must cause a review to be undertaken of the first five years of operation of the Act.

Clause 138 empowers the Governor-in-Council to make regulations for, or with respect to, any matter required or permitted by this Act.

Part 7 – Amendment of Other Acts

Clause 139 amends section 17A (Restriction on Appeals) of the *Supreme Court Act 1986*. The Explanatory Memorandum specifies that the effect of this amendment will be that appeals in relation to applications under Parts 2, 3, 4 or 5 of the Bill will 'lie as of right to the Court of Appeal, without the need for leave'.[81]

Clause 140 amends section 4(2) of the *Civil Procedure Act 2010*. Section 4 refers to the application of the Civil Procedure Act. The amendment will exclude the operation of the Civil Procedure Act to proceedings under the Bill. The Explanatory Memorandum states:

> The general procedures in that [the Civil Procedure] Act are primarily directed towards civil proceedings between private parties. The Bill provides for its own specific procedural provisions, which are more appropriately framed for the specific types of proceedings under the Bill, which are initiated by the Chief Commissioner.[82]

Schedule

The Schedule of the Bill contains the offences that are specified for the purposes of clause 4(2)(b). Clause 4(2)(b) provides for offences that are 'applicable offences' when combined with other features outlined in clause 4(1) and (2) of the Bill. The specified offences include offences under the following Acts: the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*; the *Control of Weapons Act 1990*; the

[81] Explanatory Memorandum, Criminal Organisations Control Bill 2012, p. 36.
[82] ibid., p. 37.

Crimes Act 1958; the *Dangerous Goods Act 1985*; the *Drugs, Poisons and Controlled Substances Act 1981*; the *Firearms Act 1996*; and the *Sex Work Act 1994*.

4. Other Jurisdictions

This section gives an overview of legislation to combat criminal organisations in New South Wales, South Australia, Queensland and the United Kingdom.[83] Legislation to combat criminal organisations in South Australia and New South Wales has been subject to successful challenges in the High Court. Readers are reminded that the information presented does not constitute legal opinion and is a summary only. A list of 'further reading' materials is contained at the conclusion of this section for readers seeking a deeper understanding of the legal implications of the High Court cases.

New South Wales

Crimes (Criminal Organisations Control) Act 2009

Ten days after the bikie club feud at Sydney Airport in March 2009 (see the Background section of this research brief), the NSW Parliament passed the *Crimes (Criminal Organisations Control) Act 2009* ('CCOCA 2009').

The CCOCA 2009 permitted an 'eligible judge' (explained below) to make a declaration that a particular organisation was a 'declared organisation' for the purposes of the Act.[84] Under section 13, the judge was not required to provide any reasons or grounds for his or her decision.[85]

In 2010, the constitutional validity of the CCOCA 2009 was challenged by Derek Wainohu, then President of the Hells Angels OMC, in the High Court of Australia. Mr Wainohu's challenge followed an application by the Acting NSW Commissioner of Police to the Supreme Court to declare the Hells Angels a 'declared organisation'. The majority of the High Court held that the Act was invalid.[86] The judgment summary from the High Court states:

> The absence of an obligation to give reasons for the declaration [under s 13, Part 2 of CCOCA 2009] after what may have been a contested application was repugnant to, or incompatible with, the institutional integrity of the Supreme Court. Because the validity of other parts of the Act relied on the validity of Part 2, the whole Act was declared invalid.[87]

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[83] The Northern Territory has also passed legislation to combat criminal organisations: the *Serious Crime Control Act 2009* (NT). Western Australia passed the Criminal Organisation Control Bill 2011(WA) on 14 November 2012.

[84] If, on application by the Commissioner, the eligible judge was satisfied that the members of the organisation associated for the 'purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity', and the organisation represented a risk to public safety and order in NSW. Crimes (Criminal Organisations Control) Act 2009, s 9.

[85] Other than to a person conducting a review, such as the Ombudsman, if requested.

[86] *Wainohu v The State of New South Wales* [2011] HCA 24.

[87] High Court of Australia (2011) 'Wainohu v The State of New South Wales', Judgment Summary, 23 June, viewed 16 April 2012, <http://www.hcourt.gov.au/publications/judgment-summaries/2011-judgment-summaries>. For the High Court's reasons, refer to: *Wainohu v The State of New South Wales* [2011] HCA 24. For a more comprehensive description of the issues raised by the Wainohu case, please see: G. Griffith & L. Roth (2012) 'Crimes (Criminal Organisations Control) Bill 2012: The Constitutional

Crimes (Criminal Organisations Control) Act 2012

Subsequently, the new Coalition Government in NSW introduced the Crimes (Criminal Organisations Control) Bill 2012, which was passed by the NSW Parliament in March. In the Agreement in Principle speech (second reading speech), the Attorney General[88] stated that the Crimes (Criminal Organisations Control) Bill 2012 will repeal the CCOCA 2009 and 're-enact the Act in a form which repairs the identified constitutional shortcomings'. He said:

> The Crimes (Criminal Organisations Control) Bill 2012 will specify that where an eligible judge makes a declaration, revokes a decision or refuses an application, the eligible judge is required to provide reasons for doing so. The Government believes this will be sufficient to address the constitutional issue identified in the decision of the High Court.[89]

Declaring Organisations

Part 2 of the *Crimes (Criminal Organisations Control) Act 2012* provides for an 'eligible judge' to make declarations in relation to particular organisations. To be eligible, a judge of the Supreme Court must firstly, consent in writing to being declared eligible, and secondly, be declared an 'eligible judge' by the Attorney General.[90] Section 5 clarifies that selection of the eligible judge is 'not to be made by the Attorney General or other Minister'.[91] Rather, the Attorney General 'merely promulgates the judge's selection by declaration'.[92] In addition, the Act states that an eligible judge 'is not subject to the control and direction of the Attorney General or other Minister'.[93]

Section 6 of the Act provides that the Commissioner of Police may apply to an eligible judge for a declaration under Part 2. A member of the organisation specified in the application may make submissions to the eligible judge at a hearing.[94] Any other person who may be directly affected may make submissions with the leave of the judge.[95] The Commissioner of Police may object to any person being present during any part of the hearing in which information classified by the Commissioner as criminal intelligence is disclosed.[96]

Issues', *E-Brief 6/2012*, Sydney, NSW Parliamentary Library Research Service, viewed 16 April 2012, <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/V3ListRPSubject>.

[88] Unlike South Australia and Queensland, NSW does not hyphenate Attorney General.

[89] NSW, Legislative Assembly (2012) *Debates,* 15 February, p. 8279.

[90] Crimes (Criminal Organisations Control) Act 2012, ss 5(1), (2), (3). Also see: N. Cowdery, (2010) 'The Law of the Ruler?' keynote address to the Australian and New Zealand Critical Criminology Conference 2010, Sydney, 1-2 July, viewed 30 April 2012, <http://ses.library.usyd.edu.au/handle/2123/7366>.

[91] Crimes (Criminal Organisations Control) Act 2012, s 5(7).

[92] NSW, Legislative Assembly (2012) *Debates,* 15 February, p. 8280.

[93] Crimes (Criminal Organisations Control) Act 2012, s 5(7).

[94] Crimes (Criminal Organisations Control) Act 2012, s 8(1).

[95] Crimes (Criminal Organisations Control) Act 2012, s 8(2). A protected submission may also be made in private to the judge, and will be dealt with in accordance with s 29. Section 8(7) defines a 'protected submission' as 'a submission made by a person who has reasonable grounds to believe that he or she may be subjected to action comprising or involving injury, damage, loss, intimidation or harassment in reprisal for making the submission'.

[96] Crimes (Criminal Organisations Control) Act 2012, s 8(3). The judge must deal with such an objection in accordance with s 28.

The eligible judge may make a declaration that the organisation is a declared organisation if the judge is satisfied that:

(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, and
(b) the organisation represents a risk to public safety and order in this State.[97]

For the purposes of making a declaration, the eligible judge may be satisfied that 'members of an organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity', whether or not all the members associate for that purpose or only some of the members,[98] whether it is in relation to the same serious criminal activity or different serious criminal activity, and whether or not the members also associate for other purposes.[99]

In deciding whether or not to make a declaration, the eligible judge may have regard to a range of factors set out in the Act, including:

- Any submissions made in relation to the application by the Attorney General or at the hearing;
- Any information suggesting a link between the organisation and serious criminal activity;
- Any criminal convictions of current or former members of the organisation;
- Any information suggesting that current or former members have been, or are involved in serious criminal activity;
- Any information suggesting that members of an interstate or overseas branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- Any other matter considered relevant by the eligible judge.[100]

The eligible judge must provide reasons for making a declaration.[101] The declaration remains in force for three years.[102]

Control Orders

Once a declaration has been made, the Court may make control orders restricting the activities of current or former members of the declared organisation.[103] In order to make a control order, the Court must be satisfied that:

[97] Crimes (Criminal Organisations Control) Act 2012, s 9(1).
[98] The judge must, however, be satisfied that those members constitute a 'significant group within the organisation, either in terms of their numbers or in terms of their capacity to influence the organisation or its members'. Crimes (Criminal Organisations Control) Act 2012, s 9(4)(a).
[99] Crimes (Criminal Organisations Control) Act 2012, s 9(4).
[100] Crimes (Criminal Organisations Control) Act 2012, s 9(2).
[101] Crimes (Criminal Organisations Control) Act 2012, s 13(2).
[102] Crimes (Criminal Organisations Control) Act 2012, s 11(2). The procedure for revoking a declaration is set out in s 12 of the Act.
[103] Section 19 provides that the Court may make a control order in relation to a person on whom notice of an interim control order has been served. The requirements for an interim control order are set out in Division 1 of the Act.

(a) the person:
  (i) is a member of a particular declared organisation, or
  (ii) is or purports to be a former member of a particular declared organisation but has an on-going involvement with the organisation and its activities, and
(b) sufficient grounds exist for making the control order.[104]

The person to whom a control order relates may make submissions at the hearing for the control order.[105] A control order remains in force until it is revoked.[106]

The Act makes it an offence for: a controlled member to associate with another controlled member of the declared organisation;[107] and for a controlled member to recruit a new member to the declared organisation.[108] The maximum penalty for a controlled member who recruits another person is five years imprisonment.

Controlled members are also prohibited from applying for authorisation (or a licence) to carry out 'prescribed activities' while the control order is in force. Prescribed activities include:

- operating or working as a 'special employee' in a casino;
- carrying on a 'security activity' such as acting as a bodyguard, crowd controller or patrolling, protecting or guarding property;
- working as a pawnbroker;
- working as a 'commercial agent' (i.e. licensed to carry out debt collection, process serving, or repossession of goods);
- working as a 'private inquiry agent' (i.e. licensed to carry out investigations or surveillance of persons);
- possessing or using a firearm;
- operating a tow truck;
- working as a motor vehicle dealer or repairer;
- working as a seller or supplier of liquor;
- working as a bookmaker.[109]

Any authorisation already in place will be suspended until the interim control order is confirmed by a control order, at which time the authorisation will be revoked.[110]

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[104] Crimes (Criminal Organisations Control) Act 2012, s 19(1).
[105] Crimes (Criminal Organisations Control) Act 2012, s 20.
[106] Crimes (Criminal Organisations Control) Act 2012, s 23. The procedure for the revocation of a control order is set out in s 25 of the Act. Rights of appeal are set out in s 24.
[107] Maximum penalties range from 2 to 5 years imprisonment. See s 26 of the Act for more information.
[108] Crimes (Criminal Organisations Control) Act 2012, ss 26 and 26A. It is, however, a defence to a prosecution for an offence under s 26 if the defendant 'establishes that he or she did not know, and could not reasonably be expected to have known, that the other person with whom he or she associated was a controlled member of the declared organisation'. s 26(3).
[109] For the full list of prescribed activities, see Crimes (Criminal Organisations Control) Act 2012, s 27(6).
[110] Crimes (Criminal Organisations Control) Act 2012, s 27(1), (2), (3).

Criminal Intelligence

Section 28 of the Act provides protections for criminal intelligence during hearings for declarations and control orders. Criminal intelligence is defined as information relating to 'actual or suspected criminal activity', the disclosure of which could reasonably be expected:

(a) to prejudice criminal investigations, or
(b) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement, or
(c) to endanger a person's life or physical safety.[111]

The Act requires the eligible judge and the Supreme Court to maintain the confidentiality of information it considers to be 'properly classified' by the Commissioner as criminal intelligence.[112] This may include receiving evidence or hearing arguments in private.[113]

Burden of Proof

Section 32 provides that any question of fact to be decided in proceedings under the Act 'is to be decided on the balance of probabilities'. It does not apply in relation to proceedings for an offence against the Act.

South Australia

Serious and Organised Crime (Control) Act 2008

The *Serious and Organised Crime (Control) Act 2008,* which received Royal Assent on 15 May 2008, contained a number of measures 'aimed at tackling the menace of outlaw motorcycle gangs and other criminal associations'.[114]

The Act provided for the Attorney-General, upon application from the Commissioner of Police, to 'declare' an organisation for the purposes of the Act if the Attorney-General was satisfied that:

(a) members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
(b) the organisation represents a risk to public safety and order in this State.[115]

Under section 13, the Attorney-General was not required to provide any reasons or grounds for the declaration or decision (unless as part of a review under Part 6 of the Act).

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[111] Crimes (Criminal Organisations Control) Act 2012, s 3(1).
[112] Crimes (Criminal Organisations Control) Act 2012, s 28(3). There are, however, some exceptions, such as when the material is provided to a subsequent court, to the Attorney General, or to the Ombudsman conducting a review under s 39. See: NSW, Legislative Assembly (2012) *Debates,* 15 February, p. 8282.
[113] Crimes (Criminal Organisations Control) Act 2012, s 28(3).
[114] South Australia, House of Assembly (2007) *Debates*, 21 November, p. 1805.
[115] Serious and Organised Crime (Control) Act 2008, s 10(1).

Section 14(1) of the Act specified that the Magistrates Court must, on the application of the Police Commissioner, make a control order against a person if the Court was satisfied that the person was a member of a declared organisation. Such control orders could, for example, prohibit the defendant from associating with other members of declared organisations and from possessing a dangerous article or a prohibited weapon.[116]

On 14 May 2009, the South Australian Attorney-General declared the Finks Motorcycle Club to be a 'declared organisation'. The Commissioner then sought a control order from the Magistrates Court against Mr Sandro Totani, an alleged Finks member. Mr Totani commenced proceedings in the Supreme Court to have section 14(1), which provided for the Magistrates Court to issue a control order, to be declared invalid. The Supreme Court held that section 14(1) of the Act was invalid.[117] The State of South Australia appealed the outcome in the High Court.

On 11 November 2010, the High Court also determined that section 14(1) was invalid.[118] The judgment summary from the High Court states:

> A majority of the Court considered that the provision authorised the executive to enlist the Magistrates Court in implementing decisions of the executive and that the manner in which that occurred was incompatible with the Magistrates Court's institutional integrity.[119]

As a result of the High Court's decision, the South Australian Parliament passed the *Serious and Organised Crime (Control) (Miscellaneous) Amendment Act 2012*. The amendments made by the Act also incorporated the High Court's decision in the *State of NSW v Wainohu* case. The main amendments to the principal Act were:

- that declarations will be made by an 'eligible judge' of the Supreme Court rather than the Attorney-General;
- the eligible judge must make reasons available for the declaration or decision; and
- that the Supreme Court *may* (rather than *must*) make a control order if it is satisfied that the individual is a member of a declared organisation and that a control order is appropriate in the circumstances.[120]

Declaring Organisations

The South Australian Act now provides that an 'eligible judge' may make a declaration on application by the Commissioner that an organisation is a 'declared organisation' for

[116] Serious and Organised Crime (Control) Act 2008, s 14(5)(b).
[117] *Totani v South Australia* (2009) 259 ALR 673.
[118] *South Australia v Totani* [2010] HCA 39.
[119] High Court of Australia (2010) 'State of South Australia v Totani & Anor', Judgment Summary, 11 November, viewed 18 June 2012, <http://www.hcourt.gov.au/publications/judgment-summaries>. For the High Court's reasons, refer to: *South Australia v Totani* [2010] HCA 39.
[120] N. McGarrity (2012) 'Much Ado About Nothing? The Future of 'Bikies' Control Orders in Australia', paper presented to the Constitutional Law Conference 2012, Sydney, 17 February.

the purposes of the Act.[121] Section 8 provides that an 'eligible judge' is a judge of the Supreme Court who:

- consents in writing to being selected as an 'eligible judge'; and
- is subsequently selected by the Chief Justice of the Supreme Court to act as an 'eligible judge'.

The Act provides that the Commissioner and the organisation to which the application relates are entitled to make oral submissions to the eligible judge at a hearing, and with permission, written submissions.[122] A former or current member of the organisation and any other person who may be directly affected by the outcome of the application may provide written submissions, and with permission, make oral submissions.[123]

In considering whether or not to make a declaration, the eligible judge may have regard to:

- information suggesting a link between the organisation and serious criminal activity;
- any recorded convictions against current or former members or associates;
- information suggesting that current or former members or associates have been or are involved in serious criminal activity (whether or not the involvement resulted in convictions);
- information suggesting that members of an interstate or overseas branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and
- anything else considered relevant by the eligible judge.[124]

For the purposes of making the declaration, the eligible judge may be satisfied that 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity': whether all the members associate for that purpose, or only some members; whether it is in relation to the same serious criminal activity or different serious criminal activity; and whether or not the members also associate for other purposes.[125]

The judge must make available his or her reasons for the decision to the Commissioner, the organisation to whom the decision relates, and any person who made submissions.[126] Written reasons must also be published in the Gazette. A

[121] Serious and Organised Crime (Control) Act 2008, s 11. The eligible judge may make a declaration if satisfied that: 'members of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; and the organisation represents a risk to public safety and order in this State'. See: s 11(1).
[122] Serious and Organised Crime (Control) Act 2008, s 15(1).
[123] Serious and Organised Crime (Control) Act 2008, s 15(2). Such a person may also apply to the judge to make a 'protected submission', which is defined in s 15(11) as 'an oral or written submission made by a person who has reasonable grounds to believe that he or she may be subjected to action (whether directly or indirectly) comprising or involving injury, damage, loss, intimidation or harassment in reprisal for making the submission'.
[124] Serious and Organised Crime (Control) Act 2008, s 11(2).
[125] Serious and Organised Crime (Control) Act 2008, s 11(5).
[126] Serious and Organised Crime (Control) Act 2008, s 16(1).

declaration will remain in force until it is revoked in accordance with section 14 of the Act.[127]

The Act makes it an offence for an owner, occupier or lessee to knowingly permit their premises to be 'habitually used as a place of resort by members of a declared organisation'.[128] It is also an offence for a person to be 'knowingly concerned in the management' of any such premises.[129] Each offence carries a maximum penalty of two years imprisonment.

Control Orders

Control orders may be made under Part 3 of the South Australian Act.[130] Section 22 provides that the Supreme Court, on application by the Commissioner, may make a control order relating to a person ('respondent') if the court is satisfied that:

> (a) the respondent is a member of a declared organisation; or
> (b) the respondent—
> (i) has been a member of an organisation which, at the time of the application, is a declared organisation; or
> (ii) engages, or has engaged, in serious criminal activity,
> and associates or has associated with a member of a declared organisation; or
> (c) the respondent engages, or has engaged, in serious criminal activity and associates or has associated with other persons who engage, or have engaged, in serious criminal activity,
> and that the making of the order is appropriate in the circumstances.[131]

In determining an application for a control order, the court may have regard to:

- whether the respondent's behaviour suggests that there is a risk he or she will engage in serious criminal activity;
- the extent to which the control order might assist in preventing the respondent from engaging in serious criminal activity;
- the prior criminal record of the respondent (and any specified associates);
- any legitimate reason the respondent may have for associating with a person specified in the application; and
- any other matter the court considers relevant.[132]

A control order may prohibit the respondent from: associating with a specified person or persons of a specified class; holding an authorisation to carry on a prescribed activity; being present at, or being in the vicinity of, a specified place; possessing a specified article or weapon; carrying more than a specified amount of cash; using or possessing a telephone, mobile phone, computer or other communication device

[127] Serious and Organised Crime (Control) Act 2008, s 13.
[128] Serious and Organised Crime (Control) Act 2008, s 34A(1).
[129] Serious and Organised Crime (Control) Act 2008, s 34A(2).
[130] The Act also provides for interim control orders to be made under s 22A.
[131] Serious and Organised Crime (Control) Act 2008, s 22(2).
[132] Serious and Organised Crime (Control) Act 2008, s 22(7).

except as may be specified; or 'engaging in other conduct of a specified kind that the Court considers could be relevant to the commission of serious criminal offences'.[133]

A control order will remain in force for the period of time specified in the order (if any) or until the order is revoked in accordance with s 22C.[134]

Section 22I provides that it is an offence to contravene or fail to comply with a control order or interim control order, punishable by up to five years imprisonment.[135] Section 34B also makes it an offence for a member of a declared organisation, or a person who is the subject of a control order or interim control order, to recruit a person to become a member of a declared organisation or encourage a person to associate with a member of a declared organisation.[136] The maximum penalty for doing so is five years imprisonment.

Section 35 of the Act provides that it is an offence to associate, 'on not less than six occasions during a 12 month period', with a member of a declared organisation or the subject of a control order, punishable by up to five years imprisonment.[137] It is also an offence for a person who has a criminal conviction (of a kind prescribed by regulation) to associate, 'on not less than six occasions during a period of 12 months', with another person who has such a criminal conviction.[138]

Criminal Intelligence

The South Australian Act defines criminal intelligence as information relating to actual or suspected criminal activity 'the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person's life or physical safety'.[139]

In any proceedings under the Act before a court, the court must, on application of the Commissioner, 'take steps to maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence'.[140] This may include receiving evidence or hearing arguments in private.[141] In addition, the court may take evidence consisting of criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.[142]

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[133] Serious and Organised Crime (Control) Act 2008, s 22(5).
[134] Serious and Organised Crime (Control) Act 2008, s 22B.
[135] The person must have known or was reckless as to the fact that the act or omission constituted a contravention of the order. See: s 22I(2).
[136] The person must have known or was reckless as to the fact that the organisation was a declared organisation and the person was a member of a declared organisation. See: s 34B(2).
[137] The person must have known or was reckless as to the fact that the other person was a member of a declared organisation or the subject of a control order. See: s 35(2).
[138] This is also punishable by up to five years imprisonment. However, the person must have known (on each occasion) or was reckless as to the fact that the other person had the relevant criminal conviction. See: s 35(4).
[139] Serious and Organised Crime (Control) Act 2008, s 3.
[140] Serious and Organised Crime (Control) Act 2008, s 5A(1)(a).
[141] Serious and Organised Crime (Control) Act 2008, s 5A(1)(a).
[142] Serious and Organised Crime (Control) Act 2008, s 5A(1)(b).

In any proceedings before an eligible judge, the judge must also take steps to 'maintain the confidentiality of information properly classified by the Commissioner as criminal intelligence', including receiving, hearing or dealing with submissions or information in private.[143] The judge may also receive such information by way of statutory declaration of a police officer of or above the rank of superintendent.

Burden of Proof

Section 5 provides that any question of fact to be decided by a court in proceedings under the Act 'is to be decided on the balance of probabilities'. It does not apply in relation to proceedings for an offence against the Act.

Corresponding Declarations and Control Orders

Part 6 of the Act deals with corresponding declarations and control orders made in other Australian jurisdictions. It provides that the Commissioner may apply to the registrar[144] for the registration of a corresponding declaration or control order. A registered corresponding declaration or control order has effect in South Australia as if it were a declaration or control order made under the South Australian Act.[145]

Queensland

The Bligh Queensland Government introduced legislation to combat criminal organisations in October 2009. The *Criminal Organisation Act 2009* (Qld) received Royal Assent on 3 December that year. In June 2012, the Queensland Police Commissioner made the first application under the Act, to the Queensland Supreme Court, to have the Gold Coast chapter of the Finks declared a criminal organisation. The application followed the shooting of two people at a Gold Coast shopping centre. The Finks legal representation challenged the constitutionality of the legislation and in October 2012 was successful in their application to have the matter bought before the full bench of the High Court.[146] Queensland media has reported that the High Court will hear the matter on 4-5 December 2012.[147]

Declaring Criminal Organisations

Part 2 of Queensland's Criminal Organisation Act provides that particular organisations can be declared 'criminal organisations'. Section 8 of the Act provides that the Police Commissioner may make a civil application to the Supreme Court for a

[143] Serious and Organised Crime (Control) Act 2008, s 5A(2).
[144] Section 37 states that, in relation to a corresponding declaration, a registrar means: 'the holder of an office prescribed by the regulations'.
[145] See: Serious and Organised Crime (Control) Act 2008, ss 39-39S.
[146] See T. Keim (2012) 'Finks Outlaw Motorcycle Club Wins Right to High Court Challenge Against Queensland's Anti-Bikie Laws', *Courier Mail* website, 5 October 2012, viewed 22 November 2012, <http://www.couriermail.com.au/news/finks-outlaw-motorcyle-club-wins-right-to-high-court-challenge-against-queenslands-anti-bikie-laws/story-e6freon6-1226488980157>; AAP (2012) 'Finks Win Day in Court to Fight Bikie Ban', *Brisbane Times* website, 5 October, viewed 22 November 2012, <http://www.brisbanetimes.com.au/queensland/finks-win-day-in-court-to-fight-bikie-ban-20121005-273mf.html>.
[147] R. Wuth (2012) 'Finks Fight for Fair Trial', *Gold Coast Bulletin* website, 13 November, viewed 22 November 2012, <http://www.goldcoast.com.au/article/2012/11/13/441671_crime-and-court-news.html>.

declaration that a particular organisation (the respondent) is a criminal organisation. Under section 9 the respondent may file a response to the application. Under section 10(1), the court may make a declaration that the respondent is a criminal organisation, if it is satisfied that:

> (a) the respondent is an organisation; and
> (b) members of the organisation associate for the purpose of engaging in, or conspiring to engage in, serious criminal activity; and
> (c) the organisation is an unacceptable risk to the safety, welfare or order of the community.

Section 10(2) then provides that in considering whether or not to make a declaration, the court must have regard to—

> (a) the following information before the court—
> (i) information suggesting a link exists between the organisation and serious criminal activity;
> (ii) any conviction for current or former members of the organisation;
> (iii) information suggesting current or former members of the organisation have been, or are, involved in serious criminal activity, whether directly or indirectly and whether or not the involvement resulted in convictions;
> (iv) information suggesting members of an interstate or overseas chapter or branch of the organisation associate for the purposes of engaging in, or conspiring to engage in, serious criminal activity; and
> (b) anything else the court considers relevant.[148]

Once a declaration has been made, it forms the basis of applying for further civil orders including control orders (Part 3 of the Act). In addition, the declaration may also assist in making public safety orders (Part 4).

Control Orders

Part 3 of Queensland's Criminal Organisation Act deals with control orders. It provides that the Police Commissioner may apply to the Supreme Court for a control order for a person and that the person may file a response to the application.[149] Section 18(1) of the Act provides that the court may make a control order if the court is satisfied that the respondent—

> (a) is, or has been, a member of a criminal organisation; and
> (b) engages in, or has engaged in, serious criminal activity; and
> (c) associates with any person for the purpose of engaging in, or conspiring to engage in, serious criminal activity.

Section 18(2) adds that the court may also make a control order, if the court is satisfied that the respondent—

[148] Also see subsections 10(3) – 10(5) of the Criminal Organisation Act (Qld) for further provisions regarding how the court may make a declaration.
[149] See sections 16-17 of the Criminal Organisation Act (Qld).

(a) engages in, or has engaged in, serious criminal activity; and
(b) associates with any member of a criminal organisation for the purposes of engaging in, or conspiring to engage in, serious criminal activity.

Section 18(3) then adds that in considering whether or not to make an order, the court must have regard to—

(a) information about the following before the court—
  (i) the respondent's criminal history;
  (ii) the criminal history of a person whose association with the respondent is relied on in the application to support the making of the order;
  (iii) any activity or behaviour of the respondent at any time that tends to prove a matter of which the court must be satisfied under subsection (1) or (2); and
(b) anything else the court considers relevant.

Section 19 provides that a court can attach conditions to a control order. The Explanatory Memorandum (for the Bill that became the Criminal Organisation Act) summarised that:

> Activities that may be controlled by an order include associating with other persons; possessing stated weapons and other things; carrying or applying to carry on certain prescribed activities, e.g. in the gaming, liquor or security industry; entering or being in certain places; and recruiting new members into a criminal organisation.[150]

A control order remains in force until it is revoked and a person must not knowingly contravene a control order.[151] The maximum penalty for doing so is three years imprisonment for the first offence, and five years imprisonment for each later offence.[152]

Criminal Intelligence

Part 6 of the Queensland Act provides that the Police Commissioner may apply to the Supreme Court for a declaration that particular evidence is 'criminal intelligence' and accordingly can be withheld from other parties to the proceedings. Section 59(1) sets out the definition of criminal intelligence as follows:

> ***Criminal intelligence*** is information relating to actual or suspected criminal activity, whether in the State or elsewhere, the disclosure of which could reasonably be expected to—
> (a) prejudice a criminal investigation; or
> (b) enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement; or
> (c) endanger a person's life or physical safety.

Safeguards implemented by the Act to address the abrogation of natural justice include: that the Supreme Court is given complete discretion in making a criminal intelligence

[150] Criminal Organisation Bill 2002 (Qld), Explanatory Notes p. 2.
[151] See section 20 of the Criminal Organisation Act (Qld).
[152] See section 24 of the Criminal Organisation Act (Qld).

declaration; the court may decide how much weight to place upon the criminal intelligence; and the COPIM (see below) must be present at all hearings under the Act and have access to information before the court (except for information involving an informant's personal details).[153]

Criminal Organisation Public Interest Monitor

Part 7 of the Queensland Act provides for the creation of the Criminal Organisation Public Interest Monitor (COPIM). According to a media release of the then Attorney-General: 'The Criminal Organisation Public Interest Monitor will represent the public interest by assisting the court during application hearings to test the validity of applications, particularly where the respondent cannot be present due to the use of covert intelligence'.[154]

The COPIM is appointed by the Governor in Council and must have served, or be eligible to serve, as a judge of the Supreme, Federal or High Court.[155] Section 86 of the Act provides that the functions of the COPIM are:

> (a) to monitor each application to the court for a criminal organisation order or the variation or revocation of a criminal organisation order; and
> (b) to monitor each criminal intelligence application; and
> (c) to test, and make submissions to the court about, the appropriateness and validity of the monitored application.

Corresponding Orders

Part 8 of the Queensland Act deals with corresponding orders made in other Australian jurisdictions. It provides that the Police Commissioner may apply to the registrar for the registration of a corresponding order. A corresponding order can be either a corresponding declaration or a corresponding control order made under a provision of law in another state that is prescribed under a regulation.[156]

Burden of Proof

Section 110 of the Queensland Act states the questions of facts in proceedings under the Act (other than proceedings for an offence) are to be decided on the balance of probabilities.

United Kingdom

In the United Kingdom, the *Serious Crimes Act 2007* provides for the making of 'Serious Crime Prevention Orders' or 'SCPOs'. SCPOs are intended to prevent or disrupt the

[153] Criminal Organisation Bill 2009, Explanatory Memorandum, p. 3.
[154] A. Bligh, Premier & C. Dick, Attorney-General (2009) 'Legislation Introduced to Disrupt Serious Criminal Activity', Media Release, 29 October, viewed 10 October 2012, <http://statements.qld.gov.au/Statement/Id/67135>.
[155] See sections 83 and 84 of the Criminal Organisation Act (Qld).
[156] See Schedule 2 of the Criminal Organisation Act (Qld).

involvement of a person in serious crime.[157] The SCPO provisions came into force in the UK in 2008.[158]

As noted in the Background section of this Research Brief, the Commonwealth Parliamentary Committee in to the Australian Crime Commission report (on its inquiry into outlawing serious and organised crime groups) stated that, of the approaches examined by the committee, the UK approach seemed to be effective.[159]

The UK Crown Prosecution Service explains that, a SCPO may contain restrictions that the court considers appropriate to protect the public from a person involved in serious crime.[160] Provisions that could be contained in a SCPO include: restrictions on a person's working arrangements; who the person can associate or communicate with; premises the person is allowed to use; the use of any item; and travel both within the UK and abroad.[161] A SCPO can also require the person to answer questions or provide information or documents specified in the Order.[162]

A SCPO can be made on application by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office to the High Court or the Crown Court.[163] If the application is before the High Court, the judge must be satisfied that the person has been involved in serious crime. If the matter is before the Crown Court, the person must have been convicted of a serious offence.[164] Apart from individuals, an application for a SCPO can also be made against a body corporate, a partnership or an unincorporated association.[165] The UK Crown Prosecution Service notes that:

> There is clearly a significant difference between seeking an order in the Crown Court against a defendant who has just been convicted of a serious offence and an application to the High Court against a person or organisation where there has been no such conviction but it is to be proved that they have been involved in serious crime.[166]

Proceedings in both courts are civil proceedings and require a civil standard of proof.[167] A SCPO can be for a maximum of five years. It is possible for a subsequent

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[157] See Baroness Scotland's Second Reading Speech for the Serious Crimes Bill 2007, House of Lords, 16 January 2007.
[158] Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (2009) op. cit., p. 76.
[159] See p. 12 of this Research Brief.
[160] Crown Prosecution Service (2012) 'Serious Crime Prevention Orders: Legal Guidance', CPU website, viewed 22 November 2012, <http://www.cps.gov.uk/legal/s_to_u/serious_crime_prevention_orders_(scpo)_guidance/#A01>; also see sections 1 and 19 of the Serious Crimes Act (UK).
[161] See section 5(3) of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.
[162] See section 5(5) of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.
[163] See section 6 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.
[164] See sections 1 and 19 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit. The term 'serious offence' is defined in Schedule 1 to the Act.
[165] See sections 30-32 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.
[166] Crown Prosecution Service (2012) op. cit.
[167] See sections 35-36 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit. Notably, in regard to the standard of proof required by the High Court for the granting of SCPOs,

Order to then be made by the High Court.[168] A breach of a SCPO without reasonable excuse is an offence punishable by a maximum of five years imprisonment and/or a fine.[169]

The aforementioned Commonwealth Parliamentary Committee on the Australian Crime Commission noted in its report that – as of mid-2009 – all of the SCPOs that the UK's Serious Organised Crime Agency (SOCA) had applied for had been against persons convicted of serious criminal offences, that would come into effect once the person is released from prison.[170]

More recently, as of 15 February 2012, SOCA stated that it continues to monitor compliance with a total of 89 Crown Court granted SCPOs.[171]

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commentators – including Baroness Scotland in the Second Reading speech for the Serious Crimes Bill 2007 and the Crown Prosecution Service – commonly point out that case law involving other types of civil orders show that such proceedings are viewed by the courts on a 'sliding scale', and the required standard of proof may be very close to the criminal standard.

[168] See section 16 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.

[169] See section 25 of the Serious Crimes Act (UK) and Crown Prosecution Service (2012) op. cit.

[170] Commonwealth Parliamentary Joint Committee on the Australian Crime Commission (2009) op. cit., p. 77.

[171] Serious Organised Crime Agency (UK) (2012) 'The Long Arm of the Serious Crime Prevention Order', SOCA website, 15 February, viewed 23 November 2012, <http://www.soca.gov.uk/news/400-the-long-arm-of-the-serious-crime-prevention-order>.

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