

# E – BRIEF



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### Gang Laws: An Update

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#### 1 Introduction

This E-Brief provides an update on laws relating to gangs in NSW with the passing of the *Crimes (Criminal Organisations Control) Act 2009* and associated legislation.

The bashing death of Anthony Zervas on 22 March 2009, in full view of by-passers at Sydney Airport by members of a bikie gang, together with other high-profile incidents of conflict between rival gangs and the media's extensive coverage on the issue, has revived community concern about the depth and extent of bikie gang violence.

The immediate increase in community alarm prompted the NSW Parliament to quickly pass the *Crimes (Criminal Organisations Control) Act 2009* (the Act) on 3 April 2009, an Act with respect to the membership, occupation, activities and recruitment of certain outlaw bikie gangs.

Shortly after its enactment, the Parliament then passed the *Criminal Organisations Legislation Amendment Act 2009* which further enhanced the nascent steps in place to combat the criminal activities associated with outlaw bikie gangs.

The new laws have far-reaching implications regarding the activities of gangs and their members and are

designed to 'disrupt and ultimately dismantle criminal gangs'.<sup>1</sup>

The passing of these laws generated a considerable amount of debate with community opinion divided on the new legislation, specifically its effect on civil liberties and whether such liberties have been appropriately balanced against the police need to be equipped with sufficient tools to combat criminal organisations.

However, popular sentiment has largely been in favour of a broad toughening, with media coverage aligning itself in favour of the laws. There also appears to be a general nationwide shift toward stronger legislative measures with other States preparing to follow suit in due course.

In addition to the legislative response, the Government set up Strike Force Raptor, a specialist unit in the State Crime Command's Gangs Squad to target outlaw bikie gangs and associated criminal enterprises.<sup>2</sup>

These moves demonstrate the comprehensive approach Governments appear to be taking against what it considers to be an escalating threat of bikie gang violence.

#### 2 Declared Organisations

Under the Act, it is possible to proscribe groups as a 'declared

organisation'.<sup>3</sup> The effect of being a declared organisation is that members of such organisations may then be subject to control orders, which affect who they can associate with and what activities they can participate in.

The Commissioner of Police (the Commissioner) is able to apply to an eligible judge – those nominated by the Attorney-General<sup>4</sup> – for a particular organisation to be deemed a 'declared organisation'.<sup>5</sup> Importantly, the application must set out the nature of the organisation and any of its distinguishing characteristics, together with the grounds on which the declaration is being sought.<sup>6</sup> Although the legislation was enacted with outlaw bikie gangs in mind, the Act itself is not specific in this respect and could reasonably apply to any number of suspect organisations.

Soon after making an application, the Commissioner must publish a notice in the Gazette and at least one newspaper circulating throughout the State specifying that an application has been lodged, describing the consequences if the application is successful and inviting members of the organisation to make submissions in their favour on a date specified in the notice.<sup>7</sup> The declaration takes effect from the day of its notice in the Gazette and lasts for a period of 3 years unless it is earlier revoked or subsequently renewed.<sup>8</sup>

An individual may make a protected submission (that is, one made in private) in circumstances where the individual fears action in reprisal for making the submission.<sup>9</sup> Although the privacy and personal security considerations in allowing for protected submissions are obvious, this entitlement has nonetheless attracted criticism as it effectively enables the

judge to withhold critical information from individuals who may be adversely affected by the submission if they are later subjected to a control order. Without being aware of evidence used against them, affected individuals are essentially denied a right of reply or an opportunity to test the veracity of the evidence provided.<sup>10</sup>

In considering whether or not to make a declaration, the judge may have regard to the possible links between the organisation, or any of its members, and serious criminal activity, including whether any present or previous members have criminal convictions. In weighing up these considerations, if the judge is satisfied that members of the organisation associate for the purpose of organising or engaging in serious criminal activity and that the organisation represents a serious risk to public safety and order, then the judge may deem the organisation, a 'declared organisation'.<sup>11</sup>

The ordinary rules of evidence do not apply to the hearing of the application nor is the judge required to provide any grounds or reasons for any decision or declaration. The 'closed justice' nature of allowing the judge to refrain from providing reasons why a declaration was made has been criticised for curtailing the ability of an affected individual to seek a judicial review.<sup>12</sup>

A revocation of declaration can be considered either at the request of the Commissioner or upon the application by a member of a declared organisation. Where an application is made by a member, the revocation may only be revoked if the judge is satisfied that the members of the organisation no longer associate for the purpose of engaging in serious

criminal activity or if the organisation no longer represents a risk to public safety and order.<sup>13</sup>

### **3 Control Orders**

Perhaps the most significant aspect of deeming a group a declared organisation is that it creates the ability to institute control orders on some of its members. The Commissioner may apply to the Court for it to make two types of orders, an interim control order and the (confirmatory) control order, with the former to be made pending the hearing and final determination of the latter.

The purpose of issuing control orders is primarily to keep affected members of a declared organisation separate and minimise contact between them, if not preventing it entirely.

The Court may make a control order in relation to a person on whom notice of an interim control order has been served if the Court is satisfied that the person is a member of a particular declared organisation and sufficient grounds exist for making the control order.<sup>14</sup>

Although a control order must include a statement of the grounds on which the order has been made, it must not contain 'criminal intelligence', defined as information relating to actual or suspected criminal activity, the disclosure of which could prejudice a criminal investigation, enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or endanger a person's life or physical safety.<sup>15</sup>

### **4 Consequences of a Control Order**

Legally, a member of a declared organisation who is under a control

order may not associate with (that is, be in the company of or communicate with) another member of the declared organisation who is also under a control order. The penalty for a first time offence is two years, with second and subsequent offences attracting a five-year sentence.<sup>16</sup>

There is a range of broadly defined defences to breaching a control order. These are:

- If the defendant establishes that he or she did not know or could not reasonably be expected to know that the individual he or she was associating with was also under a control order of the declared organisation;
- If the defendant satisfies the Court that there was good reason why he or she associated with a member under a control order of the declared organisation;
- For interim control orders only, if the defendant proves that the association was reasonable in the circumstances, for example, associations between close family members or associations occurring at lawful occupations, at an education course or other defined possible encounters.<sup>17</sup>

When commencing proceedings for an offence of breaching a control order, it is not necessary for the prosecution to prove that the defendant associated with another person for the purpose of criminal activity, but merely that the association took place. On this point, the NSW Legislative Review Committee commented that the provision covering such encounters was 'excessively wide since it may include mere accidental or one-off meetings or short communications

rather than 'regular' or 'habitual' dealings'.<sup>18</sup>

It is also interesting to note that the standard of proof required regarding any question of fact, is to be decided on the balance of probabilities.<sup>19</sup> Given that the consequences that may flow from being a member of a declared organisation may be regarded as effectively constituting a criminal sanction, the Act has been criticised for diminishing the threshold for arbitrating matters to that of the ordinary civil standard.<sup>20</sup>

A later amendment to the *Crimes (Criminal Organisations Control) Bill 2009* also prohibited members under a control order from recruiting other individuals to become members of the declared organisation, the maximum penalty of which is 5 years imprisonment. This addition to the Act is designed to act as an impediment to the growth of bikie-gangs by discouraging, and potentially severing, part of the supply line that feeds gangs with new members.<sup>21</sup>

Perhaps the most significant effect of a control order is that there is a range of prescribed activities that members under a control order are prohibited from partaking in. The list of prohibitions generally relate to professional activities requiring a license, including:

- operating a casino;
- carrying out a security activity;
- pawnbroking;
- carrying on business as a commercial agent;
- possessing or using a firearm;
- operating a tow truck;
- carrying on repairs as a motor vehicle repairer; or
- activities associated with professional horse, greyhound

or harness racing, such as trainers, jockeys and bookmakers.<sup>22</sup>

If the member under a control order already had a license for, or was registered to partake in, a designated activity, then their authorisation is suspended for the duration of their control order.<sup>23</sup>

Disabling the ability for gang members to undertake businesses in 'high-risk industries that are vulnerable to bikie and organised crime infiltration' is designed to remove the 'profit motive' where, if not for this removal, bikie-gang members would otherwise engage in criminal activities.<sup>24</sup>

Further, the amendment Act varied the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) to expand police search powers by allowing a criminal organisations search warrant to be executed where there is reasonable suspicion of finding something in connection with the offence. The threshold of 'reasonable suspicion' replaces the ordinary requirement of 'reasonable belief', and is presumably a lower threshold to overcome. In addition, the warrants remain valid for 7 days, rather than the ordinary 72 hours.<sup>25</sup> The ability to execute a more expansive search warrant is tempered by provisions that restrict applications for this type of search warrant to being made only by police officers with the rank of superintendent or higher. In addition, applications may only be made to the Supreme Court.<sup>26</sup> The additional legislation was passed in 'order to combat the highly sophisticated and organised criminal activity perpetuated by criminal gang networks'.<sup>27</sup>

## 5 Rights of Appeal

Either the Commissioner or the 'controlled member' may appeal to the Court of Appeal against a decision in relation to the making of a control order within 28 days after which a decision was made. The appeal lies as a judicial review and only with leave as a merits review. Further, the Act specifically protects individuals who undertake functions conferred by the Act from having their decision challenged, even if the basis of the challenge is that there was a denial of procedural fairness.<sup>28</sup> To this end, there has been some criticism of the restricted review rights offered by the Act as contrary to fundamental principles of natural justice.<sup>29</sup>

## 6 Comparisons with Equivalent Legislation

Before the introduction of the *Crimes (Criminal Organisations Control) Act 2009 (NSW)*, the only other Australian jurisdiction to have comprehensive anti 'bikie gang' legislation was South Australia through its *Serious and Organised Crime (Control) Act 2008*. Although the NSW Act is ostensibly modelled on its SA equivalent,<sup>30</sup> key differences remain.

Whereas in NSW declared organisations may only challenge their 'declared' status once it has been proscribed, in South Australia the group may challenge a forthcoming declaration to the Attorney-General before it is proscribed.

The South Australian Act also enables the police to make public safety orders, which extend to prevent a class of individuals from being in a certain area or specified event. An example of this might be to prevent certain gang members from attending sporting events.

Lastly, the South Australian Act requires that an individual who knowingly or recklessly associates with someone who is a member of a declared organisation or subject to a control order, and does so at least six times in 12 months, is guilty of an offence. This contrasts with the NSW Act that only limits the associations between two controlled members of a declared organisation and does not prevent ordinary members of the public from associating with these members.<sup>31</sup>

Queensland<sup>32</sup> and Western Australia<sup>33</sup> are also taking steps to introduce similar anti-bikie gang legislation in concert with moves for a nationwide anti-bikie gang legislation, although it is yet to be seen just how closely the legislation will follow the South Australia or NSW examples.

## 7 Evaluating the Act

The Act received wide criticism from numerous quarters immediately after its introduction. Criticism of the Act has been aimed at both its content and the speed in which it was enacted.<sup>34</sup> It has been said that 'the rush to criminal law and process as a regulatory weapon of choice occluded alternative approaches'.<sup>35</sup> In addition, critics doubt that consideration was given to whether existing laws were sufficient to deal with the perceived problem.<sup>36</sup> Additionally, there has been some concern that the legislation goes too far in its impact on civil liberties and that some provisions of the legislation are 'draconian' in nature.<sup>37</sup>

To this end, there has been some discussion of a High Court challenge to render the Act, or parts of the Act, as invalid. In preparing to mount such a challenge, various bikie gangs who are concerned that they are affected

by the laws have formed the NSW Biker Council and sought legal advice.<sup>38</sup> However, the NSW Government has received advice from the Solicitor-General indicating that any High Court challenge to the legislation would not be likely to be successful.<sup>39</sup>

However, proponents argue the high rate of community support for a toughening of bikie gang laws. A survey in March 2009 (immediately prior to the enactment of the new legislation) found that 70% of respondents considered laws against bikie gangs to be insufficient and that Australia required tougher legislation, with 43% favoured a toughening of the legislation even if it meant a lessening of civil liberties.<sup>40</sup>

In any event, a full evaluation of the Act and its relative success or shortcomings will be made at the end of a 5-year review period.<sup>41</sup>

<sup>1</sup> The Hon. Mr Nathan Rees in NSWPD, 2 April 2009 at p 14440.

<sup>2</sup> ['NSW Police, Media Release, 27 May 2009'](#)

<sup>3</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss5 – 13.

<sup>4</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s5.

<sup>5</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s6.

<sup>6</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 6(2)(c), 6(2)(e).

<sup>7</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s10.

<sup>8</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s10, s11.

<sup>9</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s8, s29.

<sup>10</sup> Greg Walker, *A case of legislative overkill*, Canberra Times, 28 May 2009.

<sup>11</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s9.

<sup>12</sup> Greg Walker, *A case of legislative overkill*, Canberra Times, 28 May 2009.

<sup>13</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s12.

<sup>14</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s19.

<sup>15</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s3(1).

<sup>16</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s26.

<sup>17</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s26(5).

<sup>18</sup> NSW Legislation Review Committee, *Legislative Review Digest 5 of 2009*, p 18.

<sup>19</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s32.

<sup>20</sup> Mark Le Grand, *The strange new bikie legislation*, in *The Australian*, 19 June 2009.

<sup>21</sup> Barry Collier in NSWPD, 6 May 2009 at p14756.

<sup>22</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW), s27.

<sup>23</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW), s27.

<sup>24</sup> The Hon. Mr Nathan Rees in NSWPD, 2 April 2009 at p 14440.

<sup>25</sup> *Criminal Organisation Legislation Amendment Act 2009*, Sch 2 [8].

<sup>26</sup> *Ibid.*

<sup>27</sup> Barry Collier in NSWPD, 6 May 2009 at p14756.

<sup>28</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s35.

<sup>29</sup> Mark Le Grand, *The strange new bikie legislation*, *The Australian*, 19 June 2009.

<sup>30</sup> Arlie Loughnan, *The Legislation We Had to Have? The Crimes (Criminal Organisations Control) Act 2009 (NSW)* in *Current Issues in Criminal Justice*, March 2009 at p 461.

<sup>31</sup> See *Serious and Organised Crime (Control) Act 2008* (SA).

<sup>32</sup> Chris Barrett, *Bligh wants new bikie law*, ['Brisbane Times'](#), 26 March 2009.

<sup>33</sup> Rob Johnson, *New campaign to target WA's outlaw bikie gangs*, Media Statement, 7 June 2009.

<sup>34</sup> *New bikie laws are an overreaction, says the Law Society of NSW*, *The Australian*, 2 April 2009.

<sup>35</sup> Arlie Loughnan, *The Legislation We Had to Have? The Crimes (Criminal Organisations Control) Act 2009 (NSW)* in *Current Issues in Criminal Justice*, March 2009 at p 458.

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

<sup>37</sup> ACT Attorney-General, Simon Corbell, ['ABC News Online'](#), 25 March 2009.

<sup>38</sup> Transcript, 'Lateline' *Bikers council to challenge new laws*, ABC network, broadcasted 24 April 2009.

<sup>39</sup> Australian Institute of Criminology, *the status of laws of outlaw motorcycle gangs in Australia*, 12 June 2009 at p 3.

<sup>40</sup> UMR Research, *Bikie gang wars – Australians want stronger laws*, March 2009.

<sup>41</sup> *Crimes (Criminal Organisations Control) Act 2009* (NSW) s40.

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