CRIMES (CRIMINAL ORGANISATIONS CONTROL) BILL 2012

Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [1.00 p.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Crimes (Criminal Organisations Control) Bill 2012. The Australian Crime Commission estimates that organised crime costs Australia between $10 and $15 billion per year, and its impact on public safety in New South Wales cannot be understated. This bill represents part of the Government's response to this threat. The Crimes (Criminal Organisations Control) Act 2009 commenced on 3 April 2009 and introduced a scheme for the declaration of criminal groups by an eligible judge of the Supreme Court on the application of the Commissioner of Police. Under section 9 of the Crimes (Criminal Organisations Control) Act 2009, an eligible judge could make a declaration in relation to an organisation if he or she was satisfied that the members associated for the purposes of organising, planning, facilitating, supporting or engaging in serious criminal activity and that the organisation represented a risk to public safety and order in New South Wales. Once an organisation was so declared, the activities of its members could be restricted through control orders issued by the Supreme Court.

In 2010 the constitutional validity of this Act was challenged in the High Court by Mr Derek Wainohu, then president of the Hells Angels Motorcycle Club in New South Wales, the first organisation against which a declaration was sought. On 23 June 2011 the High Court ruled the Act to be invalid, focusing on the lack of a requirement in the legislation for an eligible judge to give reasons for his or her decision to make a declaration. Section 13 of the Act stated that an eligible judge is not required to give reasons for the decision. The High Court was of the view that the legislation created the appearance of a judge of the Supreme Court making a declaration while denying a hallmark of that office, the requirement to give reasons, and that this perception was to the detriment of the court itself.

Due to the decision of the High Court, the Crimes (Criminal Organisations Control) Act 2009 will have to be repealed. The Crimes (Criminal Organisations Control) Bill 2012 will do that and re-enact the Act in a form which repairs the identified constitutional shortcomings. 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.

Now that eligible judges are to be required to give reasons for their decision to declare an organisation, steps have also been taken in the bill to clarify the extent of the confidentiality

requirements under the new Act. Section 28 of the old Act requires a determining authority, that is, an eligible judge making a declaration or a court making a control order, to take steps to maintain the confidentiality of information that is properly classified by the Commissioner of Police as criminal intelligence. Criminal intelligence is material which, if disclosed, could prejudice criminal investigations, enable the discovery of the existence or identity of a confidential source of information or endanger a person's life or physical safety. It is proposed that section 28 will be amended to clarify that the requirement to take steps to maintain the confidentiality of the criminal intelligence will extend to the eligible judge's determination and, therefore, the reasons for the decision.

Judges are experienced in dealing with the issues that arise in cases involving confidential material. Dealing with such information in reasons for a decision is not an uncommon occurrence and judges have developed practices which will assist in working out how to best maintain the confidentiality of criminal intelligence in matters heard and determined under the new Act. In many cases it may be that the determining authority takes steps to maintain the confidentiality of criminal intelligence by preparing two sets of reasons. This means that the determining authority would prepare a full set of reasons containing criminal intelligence and access to it would be limited to those persons specified in the Act. In practical terms this may be achieved by the full set of reasons being held on the court file marked, "Confidential. Disclosure subject to the Crimes (Criminal Organisations Control) Act."

The second set of reasons would be one from which the criminal intelligence has been redacted. The confidentiality of the sensitive material will be maintained, as the redacted version will be the reasons available to the respondent and other interested parties. At the same time full and proper reasons will be available to those with a responsibility to review the operation of the Act or the determining authority's decision. The Act will specify those persons to whom criminal intelligence may be disclosed, and who may therefore receive a full copy of the reasons. They include a court, such as a court reviewing the determining authority's decision, a person conducting a review under the Act, such as the Ombudsman, the Attorney General, and other persons to whom the commissioner authorises disclosure. The last category is important in practical terms as it will allow the Commissioner of Police to authorise disclosure to individuals who may need to see the criminal intelligence, such as a judge's associates or staff in the Ombudsman's office. In this last category it will be up to the commissioner to decide to whom the criminal intelligence can be disseminated and under what conditions. The obligation to maintain the confidentiality of the criminal intelligence will extend to those persons to whom information has been disclosed under the Act.

I now turn to the detail of the bill. Part 1 deals with preliminary matters such as the commencement of the proposed Act on the date of assent, the definition of certain words and expressions used, as well as providing for the extraterritorial operation of the bill. Part 2 of the bill reintroduces the provisions dealing with declared organisations. Clause 5 provides for judges of the Supreme Court who consent to being eligible judges for the purposes of the proposed part to be declared to be eligible judges by the Attorney General. The clause makes it clear that the selection of the eligible judge is not made by the Attorney General or any

other Minister. The Attorney General merely promulgates the judge's selection by declaration. Clause 6 enables the Commissioner of Police to apply for a declaration in relation to a particular organisation and sets out the requirements for such an application.

Clause 7 requires notice of the application to be given by the commissioner no later than three days after the application has been made. Notice is given by publishing in the *Gazette* and in at least one newspaper circulating throughout the State. The notice must specify certain things set out in the Act and invite members of the organisation concerned and other persons who may be directly affected, whether or not adversely, by the outcome of the application to make submissions to the eligible judge at a hearing to be held on a date specified in the notice.

Clause 8 provides for the attendance of people at the hearing. Persons specified in the application have the right to be present and make submissions at the hearing. People who may be directly affected may be present and make submissions with leave. The commissioner may object to these people being present at a hearing in which criminal intelligence is disclosed. Provision is also made to enable submissions to be made in private in certain circumstances.

Clause 9 enables the eligible judge to make the declaration sought by the commissioner if the eligible judge is 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 New South Wales. The proposed section sets out the matters the eligible judge may take into account in deciding whether or not to make a declaration. These include any information suggesting that a link exists between the organisation and serious criminal activity; any criminal convictions recorded in relation to current or former members of the organisation; any information suggesting that current or former members of the organisation have been or are involved in serious criminal activity, whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions; any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity; any submissions made in relation to the application by the Attorney General or as referred to in section 8; and any other matter the eligible judge considers relevant.

Clause 10 requires notice to be given of the declaration in the *Gazette* and in at least one newspaper circulating throughout the State. Clause 11 provides for the duration of declarations. Clause 12 provides for the revocation of declarations. Clause 13 provides that the rules of evidence do not apply to the hearing of an application under part 2. The clause contains a new provision explicitly requiring the eligible judge to give reasons for making or revoking a declaration or refusing an application. Part 3 of the bill re-enacts the provisions dealing with the control of members of declared organisations.

Division 1 of part 3 deals with interim control orders. Clause 14 enables the Supreme Court,

on the application of the Commissioner of Police, to make an interim control order in relation to one or more members of a declared organisation pending the hearing and final determination of a confirmatory control order in relation to the member or members concerned. The order may be made in the absence of, and without notice to, the member concerned but takes effect only when the member is notified of its making in accordance with proposed sections 15 and 16. Clause 15 states that an interim control order takes effect when notice of it is served on the member concerned.

Clause 16 sets out the time frame within which the notice must be served, and the information that must be included in the notice served on the member. This includes the grounds on which the interim control order was made, an explanation of the ramifications of the making of the order and an explanation of the right to object to the making of the order at the hearing for the application for a confirmatory control order. It also provides police with powers to request the identity of persons reasonably suspected of being persons on whom interim control orders must be served, and to require such persons to remain at a particular place for a period not exceeding two hours in order to effect service. Clause 16A allows the Commissioner of Police to apply to the court for an extension of the time frame within which the notice must be served, provided it is satisfied that all reasonable steps have been taken to effect service during the ordinary time frame. Clause 17 provides for the duration of interim control orders. Clause 18 requires the Supreme Court to hear applications for confirmatory control orders as expeditiously as possible in hardship cases.

Division 2 of part 3 deals with the making of final control orders. Clause 19 provides for the making by the Supreme Court of confirmatory control orders. Clause 20 enables the member the subject of an order to object to appear at the hearing for the making of the order and to make submissions in relation to the application for the control order. Clause 21 provides for the form of a control order, including a requirement that it specify the right to appeal against its making. Clause 22 provides that a control order takes effect when the order is made if the person is present in court, or when persons are served personally with a copy of the control order in cases where they are not present when the order is made. Clause 23 provides for the duration of control orders—namely, that it remains in force until revoked. Clause 24 provides for appeals against the making of control orders. Clause 25 provides for the variation and revocation of control orders.

Division 3 of part 3 deals with the consequences of making of control orders. Clause 26 makes it an offence for a controlled member of a particular declared organisation to associate with another controlled member of the same organisation. This is punishable by up to two years imprisonment. It is also an offence for a controlled member to associate with another controlled member on three or more occasions within a three-month period, punishable by up to three years imprisonment. Any subsequent contravention of either offence is punishable by up to five years imprisonment. The clause also provides police with powers to require the disclosure of identity from persons suspected of committing offences under the clause.

Clause 26A creates an offence punishable by up to five years imprisonment for a controlled

member to recruit another person to become a member of the organisation. Clause 27 provides for the suspension and cancellation of authorisations to carry on prescribed activities held by a controlled person when interim control orders and control orders take effect, respectively. The prescribed activities cover a range of industries that are well known to be associated with outlaw gangs and related intimidatory practices, including the security industry, pawnbrokers, commercial agents and private investigators, liquor, racing and casinos, motor traders, repairers and tow-trucks. It also includes possessing or using a firearm under the Firearms Act 1996.

Part 4 of the bill contains a number of miscellaneous provisions. Clause 28 provides protections for criminal intelligence. The requirement to give reasons in clause 13 will be subject to the steps taken by the eligible judge or court to preserve the confidentiality of confidential material. Clause 28 requires a determining authority to keep criminal intelligence confidential. There are exceptions, such as when the material is provided to a subsequent court or to the Ombudsman when he conducts a review pursuant to clause 39. Clause 29 protects certain submissions. Clause 30 provides for the commissioner to keep a register of information relating to declared organisations and controlled members. Clause 30A permits the commissioner and regulatory authorities to enter into arrangements for the provision of police information concerning criminal organisations and any members or associates of such organisations that apply for authorisations to participate in regulated industries.

Clause 31 requires the Attorney General to be given notice of applications under the proposed Act and the right to be present and to make submissions at the hearings of the applications. Clause 32 states that questions of fact in proceedings under the proposed Act are to be decided on the balance of probabilities. Clause 33 enables the Commissioner of Police to delegate functions with respect to the categorisation of information as criminal intelligence. Clause 34 provides immunity from civil and criminal liability for persons exercising functions under the proposed Act and for the Crown. Clause 35 prevents challenge or review by a court—other than by way of appeal under proposed section 24—or administrative body. Clause 35A creates an offence, punishable by 20 penalty units, of failing to comply with a request for identity made under the proposed Act. Clause 36 provides for proceedings for offences under the proposed Act or regulations made under the proposed Act.

Clause 37 enables the making of rules of court, while clause 38 enables the Governor to make regulations for the purposes of the proposed Act. Clause 39 provides for the Ombudsman to keep under scrutiny and report on the exercise of powers by police under the proposed Act for a period of four years after the commencement of the proposed Act. Clause 40 provides for a retired judicial officer to review and report on the exercise of powers under the proposed Act annually. Clause 41 provides for the Attorney General to review the proposed Act after five years. Schedule 1 to the bill contains amendments to other Acts, including the Criminal Assets Recovery Act 1990, the Criminal Procedure Act 1986 and the Freedom of Information Act 1989. I commend the bill to the House.

Debated adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.