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The status of laws on outlaw motorcycle gangs in Australia

This paper sets out the laws in Australia governing organised crime gangs and, in particular, outlaw motorcycle gangs (OMCGs). It presents an overview of each jurisdiction's current and proposed legislative framework, as well as recent proposals to coordinate legislative responses.

Current state and territory legislative responses

This section details each state and territory's recent legislative responses to the issue of OMCGs and organised crime.

Current legislative provisions on OMCGs

Jurisdiction	Legislation
South Australia	*Statutes Amendment (Anti-Fortification) Act 2003* *Serious and Organised Crime (Control) Act 2008*
New South Wales	*Crimes Legislation Amendment (Gangs) Act 2006* *Crimes (Criminal Organisations Control) Act 2009*
Western Australia	*Corruption and Crime Commission Act 2003*
Victoria	*Crimes (Assumed Identities) Act 2004* *Crimes (Controlled Operations) Act 2004* *Evidence (Witness Identity Protection) Act 2004* *Major Crimes (Investigative Powers) Act 2004* *Surveillance Devices (Amendment) Act 2004*
Tasmania	*Police Offences Amendment Act 2007*
Northern Territory	*Justice Legislation (Group Criminal Activities) Act 2006*
Australian Capital Territory	*Crimes (Controlled Operations) Act 2008*

South Australia

In 2003, South Australia passed the *Statutes Amendment (Anti-Fortification) Act 2003* which seeks 'to prevent the construction of outlaw motorcycle gang headquarters in South Australia and also to allow police to demolish the existing fortifications when they are excessive' (Atkinson 2003: 3,557).

In May 2008, South Australia passed what Premier Mike Rann proclaimed as 'the world's toughest anti-bikie laws' (Rann 2008), with the introduction of the *Serious and Organised Crime (Control) Act 2008*. The Premier cited the following as highlights of the Act:

- gang members who engage in acts of violence that threaten and intimidate the public will be guilty of serious offences and will find it harder to get bail
- police will be able to prohibit members of a bikie gang from attending a place, event or area where this would pose a serious threat to the public
- the old law of consorting will be replaced with a new law of criminal association that prohibits telephone calls as well as meetings in the flesh
- stalking a person with the intention of intimidating a victim, witness, court official, police officer or public servant will become a serious offence
- it will be easier for police to secure orders to dismantle fortifications protecting gang clubrooms
- in addition, the legislation created new offences of violent disorder (maximum penalty of 2 years jail); riot (7 years, 10 years where aggravated); affray (3 years, 5 years where aggravated) and stalking of public officials by OMCG members (7 years; Rann 2008).

Under the Act, the Attorney-General may declare an organisation an outlaw organisation 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 (s. 10(1)).

In considering whether to make a declaration, the Attorney-General may have regard to any of the following:

- any information suggesting that a link exists between the organisation and serious criminal activity

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- any criminal convictions recorded in relation to current or former members of the organisation, or persons who associate, or have associated, with members of the organisation
- any information suggesting that current or former members of the organisation, or persons who associate, or have associated, with members of the organisation, have been, or are involved in serious criminal activity (whether directly or indirectly and whether or not such involvement has resulted in any criminal convictions)
- any information suggesting that members of an interstate or overseas chapter or branch of the organisation associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity
- any submissions received from members of the public in relation to the application
- any other matter the Attorney-General considers relevant (s. 10(3)).

The Attorney-General is not required to provide any grounds or reasons for a declaration or decision, nor is criminal intelligence information provided by the Commissioner of Police to be disclosed (s. 13).

Under s. 14(1), the court must, on application by the Commissioner, make a control order against a person if the court is satisfied that the person is a member of a declared organisation. In addition, the court may make such an order if satisfied that:

- the person has been a member of an organisation which, at the time of the application, is a declared organisation; or engages, or has engaged in serious criminal activity and regularly associates with members of a declared organisation or
- engages, or has engaged, in serious criminal activity and regularly associates with other persons who engage, or have engaged, in serious criminal activity
- the making of the order is appropriate in the circumstances (s. 14(2)).

If a control order is made and the defendant is a member of a declared organisation, the order must prohibit the person from associating with other persons who are members of declared organisations, or prohibit a dangerous article or weapon (s. 14(5)(b)).

The maximum penalty for contravening or failing to comply with a control order is five years' imprisonment (s. 22). The offence of criminal association also attracts a penalty of five years (s. 35). A person is guilty of such an offence if they associate, on not less than six occasions during a period of 12 months, with a person who is a member of a declared organisation or the subject of a control order, or by email or other electronic means. *Associating* includes communication by letter, telephone or facsimile (s. 35(11)(a)). Certain forms of association are excluded, for example, between close family members or associations occurring in the course of lawful occupation or training (s. 35(6)).

Under Part 4 of the Act, a senior police officer has the power to make a public safety order, whereby a person may be prohibited from being at specified premises or attending a specified event. Section 37 provides for an annual review by a retired judicial officer, with the Attorney-General announcing recently that such an appointment would be made by the end of 2009 (Atkinson 2009b). Section 38 provides for a review by the Attorney-General after four years, while s. 39 provides that the Act is to expire after five years, in September 2013.

On 16 December 2008, the Attorney-General, Michael Atkinson, received an application from the Police Commissioner to declare the Finks Motorcycle Club as a criminal organisation under the Act. On 24 March 2009, he advised that he would invite the Commissioner to comment on the submissions he had received on behalf of the Finks and observed that the making of the declaration 'is not a foregone conclusion' (Atkinson 2009a). On 14 May 2009, the Attorney-General declared the Finks a gang, with 48 members listed. In making the declaration, Mr Atkinson determined that:

> The Finks are an organisation whose members associate for the purpose of organising, planning, facilitating, supporting and engaging in serious criminal activity. The Finks Motorcycle Club is a risk to public safety and order in the State of South Australia (Atkinson 2009b).

Police will now be able to apply to a magistrate for an order preventing members from associating with each other, or a public safety order banning people from attending a public event (Emerson 2009). The Finks are challenging the legitimacy of the legislation (Eccleston 2009) and this challenge will reportedly be heard by the Full Court of the Supreme Court in July or August 2009 (Fewster 2009).

New South Wales

In 2006, the NSW Government passed the *Crimes Legislation Amendment (Gangs) Act 2006*, making it the first Australian jurisdiction to legislate specific offences against criminal organisations (Schloenhardt 2008: 260). The provisions make it an offence to participate in a criminal group, defined as three or more people who have as their objectives either to obtain material benefits from serious indictable offences or to commit serious violent offences. The Act also created power for the court to make a fortification removal order, in order to deal with OMCGs' heavily fortified premises.

On 2 April 2009, NSW Premier Rees introduced the Crimes (Criminal Organisations Control) Bill 2009, which was assented to on 3 April 2009 and commenced on assent. The *Crimes (Criminal Organisations Control) Act 2009* is based substantially on the SA legislation and provides power for seeking to declare OMCGs as criminal organisations. The government has received advice from the Solicitor General indicating that any High Court challenge to the legislation would not be likely to be successful.

Under the Act, the Commissioner of Police may seek a declaration that a bikie gang is a declared criminal organisation (s. 6). The test for making an order, under s. 9(1), is the same as in South Australia, but the order is to be made by a judge, rather than by the Attorney General. The factors to be taken into account under s. 9(2) are essentially the same as the South Australian legislation, but pertain in subsections (b) and (c) only to current or former members, not persons who associate, or have associated, with members of the organisation.

The judge is not required to provide reasons for making a declaration and the rules of evidence do not apply to the hearing of an application for a declaration (s. 13). The applicable standard of proof is on the balance of probabilities (s. 32). It is also worth noting that the declaration can be made in the absence of any of the affected members (s. 9(3)).

Once the organisation is declared, the commissioner may then seek control orders from the Supreme Court in respect of one of more persons on the basis that they are members of a declared criminal organisation and there are sufficient grounds for making the order (Part 3). Unlike the South Australian legislation, the NSW Act only provides that the court may make an order, not that it must do so (s. 19).

If an order is made, the controlled member is prohibited from associating with another controlled member of the organisation. The maximum penalty for such association is two years' imprisonment for a first offence and five years for subsequent offences (s. 26). Unlike the South Australian model, which requires a pattern of association, a single instance will constitute an offence. As in South Australia, certain forms of associations are permissible, for example, between close family members (s. 26(5)).

Section 27 provides that controlled members of declared criminal gangs will also be stripped of any licence for working in industries that are vulnerable to bikie and organised crime infiltration, such as the security, tow truck, car repair and motor trading industries; they will also have to forfeit any firearms licence. Amendments to the *Criminal Assets Recovery Act 1990* also removed the potential for dishonest earnings, enabling the NSW Crime Commission to pursue people who participate in criminal groups, either knowingly or recklessly, regardless of whether they are a controlled member of a declared criminal organisation.

Like the South Australian legislation, the NSW Act is to be reviewed by the Attorney General (s. 40), but there is no sunset clause on the life of the Act. In late April 2009, eight OMCGs, including the Rebels and the Finks, formed the United Motorcycle Club Council of NSW, which reportedly plans to challenge the NSW legislation and which asserts on its website that 'freedom to associate [is] every Australian's right' (United Motorcycle Council NSW 2009).

On 13 May 2009, New South Wales passed further legislation dealing with OMCGs (*Criminal Organisations Legislation Amendment Act 2009*). In particular, the amending legislation creates a new offence of recruiting a person to be a member of a declared organisation, carrying a maximum penalty of five years imprisonment (s. 26A Crimes (*Criminal Organisations Control) Act 2009*). In the second reading speech, it was noted by the Parliamentary Secretary that:

> Police have evidence that a number of youth gangs are being used by some criminal organisations to 'feed' their gangs with members. We also know that some of the most violent disputes between clubs are where members of one gang offer inducements for members of other gangs to 'patch' over and join their organisation. The offence will help stamp out these practices by deterring recruitment activity, the poaching of members, and the associated violence. (Sharpe 2009: 15,143).

The amendments also give power to the police to share confidential criminal intelligence concerning associates of declared criminal organisation members with high risk industry regulators. Industry licences to associates, who act as 'front people', will be refused or cancelled if the regulator believes improper conduct to further criminal activity is likely to occur. In addition, the *Surveillance Devices Act 2007* was amended to authorise the use of intelligence obtained through a surveillance warrant to be used in proceedings to declare a gang or place a control order on a gang member (Hatzistergos 2009).

Western Australia

Western Australia first introduced legislation targeting OMCGs in 2001, purporting to create 'the toughest laws in Australia for combating the sinister and complex activities of criminal gangs' (Gallop 2001: 5,038). The *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002* came into effect in July 2002 and sought to facilitate the investigation of criminal activity and provide for the removal or

modification of certain fortifications and other security measures. The Act was subsequently repealed, but similar provisions are now contained in Part 4, Division 6 of the *Corruption and Crime Commission Act 2003*. The validity of these provisions was upheld by the High Court in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4.

One of the key purposes of the *Corruption and Crime Commission Act 2003* is 'to combat and reduce the incidence of organised crime' (s. 7A), which it is to do through the Corruption and Crime Commission (CCC) created by the Act. The CCC can grant the Commissioner of Police exceptional powers to investigate organised crime but it has recently been reported that 'in more than five years...the police did not seek the CCC's help to bust open the bikie gangs' (Murray 2009). The Attorney General at the time the laws were introduced recently expressed concern about the effectiveness of such laws, noting that 'toughening the law is fine at a political, rhetorical level...[but] our experience in Western Australia has shown that they haven't been used and therefore have not been effective' (Edwards 2009).

Queensland

At present, Queensland does not have any legislation specifically targeting OMCGs, although the Opposition unsuccessfully attempted to criminalise OMCG membership in 2007 with the Criminal Code (Organised Criminal Groups) Amendment Bill 2007.

Victoria

Victoria has stated that it will not introduce new legislation to criminalise motorcycle gangs, arguing that it already has tough laws for dealing with organised crime (Hulls 2009). Victoria has implemented an extensive suite of legislative powers to ensure that Victoria Police has the necessary powers to investigate organised crime, not just outlaw motor cycle gangs. In accordance with the agreement from the Leaders' Summit on Terrorism and Multi-jurisdictional Crime in 2002, Victoria has implemented:

- the *Crimes (Controlled Operations) Act 2004*, which enables police to engage in activities which may otherwise be illegal, while undertaking 'undercover' duties
- the *Surveillance Devices (Amendment) Act 2004*, which provides police with powers in relation to the installation, use, maintenance and retrieval of surveillance devices for the purposes of investigating serious and organised crime
- the *Crimes (Assumed Identities) Act 2004*, which allows for the lawful acquisition and use of assumed identities to facilitate investigations and intelligence gathering
- the *Evidence (Witness Identity Protection) Act 2004*, which provides for the protection of the identity of covert operatives who may be required to give evidence.

Victoria has also enacted the *Major Crimes (Investigative Powers) Act 2004*, which established a coercive questioning regime for organised crime. In combination with Victoria's asset confiscation regime, which enables assets that have been used in or derived from criminal activity to be confiscated, thereby removing the profit motive for criminality, these powers enable police to gather intelligence to target organised criminal activity and to identify suspects for prosecution.

Tasmania

In 2007, Tasmania passed the *Police Offences Amendment Act 2007* to empower the Commissioner of Police to apply to a court for authority to remove or modify any heavy fortifications of the clubhouses of criminal organisations, including OMCGs.

Northern Territory

In 2006, the Northern Territory passed the *Justice Legislation (Group Criminal Activities) Act 2006*, which included association restrictions for identified gang members, and were reported by the Attorney-General to have formed the basis for the subsequent South Australian legislation (Cavanagh 2009).

Australian Capital Territory

The ACT has agreed to implement the model Cross Border Investigations law; the first phase is already in place with the *Crimes (Controlled Operations) Act 2008*. The ACT is currently working towards enacting the balance of these laws. The second area of law to be enacted is 'assumed identities'. The ACT intends to extend the model laws to provide for both local and cross-border investigations. Legislation relating to witness protection and surveillance devices will follow to give full effect to the Cross Border Investigations model laws in the ACT.

Although the ACT does not have OMCG-specific legislation, there are a number of legislative measures used to combat serious organised crime groups and their activities, including the *Confiscation of Criminal Assets Act 2003*, non-association orders under the *Crimes (Sentencing) Act 2005* and serious drug offence provisions under the *Criminal Code 2002*.

National response

On 16 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed to a united response to OMCGs. It was agreed that organised

crime requires a nationally coordinated response by all jurisdictions. It was noted that the Australian Government will consider introducing a package of legislative reforms to combat organised crime, including measures to:

- strengthen criminal asset confiscation, including unexplained wealth provisions
- prevent consorting, subject to constitutional powers and to the extent practical and effective
- enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection
- facilitate greater access to telecommunication interception for criminal organisation offences and
- address the joint commission of criminal offences (SCAG 2009).

The ministers agreed that the states and territories should consider introducing the following legislative measures, where they have not already done so:

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

In addition, ministers agreed to:

- introduce arrangements to ensure cooperation between jurisdictions in relation to organised criminal activity
- coordinate law enforcement efforts through developing shared priorities, facilitating improved information and intelligence sharing and coordinating investigative and target development activities
- establish a SCAG Officers' Group to undertake work on legislative, interoperability and information sharing measures in consultation with Ministerial Council for Police and Emergency Management—Police officers (SCAG 2009).

The Australian Government Attorney-General and the Minister for Home Affairs noted in a joint media release that a 'nationally consistent response is essential to ensure there can be no safe havens for organised crime groups' (McClelland & Debus 2009). They also reported that the Australian Government is developing an Organised Crime Strategic Framework to enhance the understanding of threats posed by organised crime; improve the capacity to effectively prevent, disrupt, investigate and prosecute organised crime activities; and strengthen information sharing and interoperability. The framework is to be finalised by mid-2009 (SCAG 2009).

The Australian Government Attorney-General said he was confident the new national approach 'will significantly curtail organised crime, including bikie crime' (Boxsell 2009). These developments, especially in respect of the proposed model cross-border powers, build on the 2002 Leaders' Summit on Terrorism and Multi-Jurisdictional Crime, which marked the being of a new era of cooperation between governments in the fight against crime (Williams 2002).

Future responses

South Australia

On 25 March 2009, South Australia proposed strengthening the provisions of the Act. The proposal, to go to Cabinet during 2009, would create a new offence of participating in, or contributing to, a criminal organisation's activities. Under the proposal, it would be an offence for members of an organised criminal group to instruct others to commit offences for the benefit of, at the direction of, or in association with the criminal organisation. Mutual recognition of laws in other jurisdictions would also be introduced, enabling the Attorney-General to ban a chapter of a gang in South Australia if it exists or relocates there and is banned interstate (Owen & Edwards 2009).

On 28 May, it was reported that control orders had been granted against two members of the Finks OMCG (SA Democrats MP challenges bikies law 2009); by 10 June, eight Finks member and a convicted police killer had reportedly been subject to such orders, but a magistrate hearing an application in respect of a further two Finks members refused to impose the orders, pending the outcome of the Supreme Court appeal on the legitimacy of the legislation (Fewster 2009). When granting the first control order under the legislation, the Chief Magistrate issued a memo that media not be allowed to inspect the criminal records of alleged offenders (Dowdell 2009). At that time, the Premier told the media that 'there will be a lot more to come' (More Finks bikies facing control orders 2009).

Western Australia

In November 2008, the newly elected government announced 'a multi-million dollar fighting fund to combat outlaw bikie gangs and other organised crime' (Porter & Johnson 2008). In the wake of gang violence in early 2009, the Police Minister and the Attorney General have both expressed interest in the South Australian model for dealing with OMCGs, but have also indicated that the government is awaiting the results of the proposed legal challenge to those laws (Johnson 2009; Murray 2009; Porter 2009: 2,305b).

Queensland

The Queensland Government has indicated its intention to introduce similar legislation (Queensland joins crackdown... 2009). It is not yet clear whether the South Australian (Attorney-General) or NSW (judicial officer) model will be adopted. The government will consult legal groups on the legislation, which is expected be in place by mid-2009. In response to the proposed legislation, members of 17 clubs, including 14 OMCGs and two Christian motorcycle clubs, have formed the United Motorcycle Council of Queensland, which may join together to fund a legal challenge to the proposed new laws (Ironside 2009).

Tasmania

There does not appear to be any intention to introduce legislation criminalising OMCGs, with the Attorney General noting that 'we are fortunate in Tasmania not to have the same problems with organised crime'. She acknowledged, however, the need for collaboration to 'ensure that there can be no safe haven for people involved in such illegal activities anywhere in Australia' (Giddings 2009).

Northern Territory

On 11 June 2009, the Northern Territory Government introduced the Serious Crime Control Bill 2009 into Parliament. The Bill provides for 'the making of orders for disrupting and restricting the activities of persons who engage or have engaged in serious criminal activity and members and former members of particular organisations, and for related purposes'. Part 3 of the Bill sets out the provisions in respect of declared organisations; as in NSW, the Police Commissioner may apply to an eligible judge for a declaration (cl 13). Part 4 deals with control orders and Part 5 with public safety orders. Part 6 provides for fortification removal orders.

The Chief Minister asserted that the new laws would restrict and disrupt the activities of persons and organisations such as bikie gangs engaged in serious criminal activity, making it an offence for members of a declared organisation subject to a control order to associate with each other. The legislation is expected to be passed in August (Henderson 2009).

Australian Capital Territory

On 1 April 2009, the ACT Government agreed to commission a report to examine the nature and operation of existing laws on organised crime groups and any proposed review of such laws, as well as considering the impact of relevant laws in Australia and overseas and the human rights implications of such laws. On 24 June 2009, the report *Serious and Organised Crime Groups and Activities* was tabled in the ACT Legislative Assembly by Attorney General Simon Corbell MLA. The report proposes a range of legislative reforms to tackle unexplained wealth, conspiracy and joint commission of criminal offences and provides advice on:

- the nature and operation of existing ACT laws used to combat organised crime groups and any proposed review of such laws
- issues arising from the South Australian and NSW legislation and similar laws internationally, including any available early evidence as to its operation and efficacy in reducing organised criminal activity
- the human rights issues raised by legislation that provide mechanisms that allow for the banning of certain organisations
- legislative changes that may be considered to enhance the ACT's response to serious organised crime groups and activities.

National response

The proposals agreed to by SCAG will be informed by the findings of the Parliamentary Joint Committee on the Australian Crime Commission inquiry into the legislative arrangements to outlaw serious and organised crime groups. The committee will examine the effectiveness of legislative efforts to disrupt and dismantle serious and organised crime groups and associations with these groups, especially with reference to:

- the need in Australia to have legislation to outlaw specific groups known to undertake criminal activities, and membership of and association with those groups
- Australian legislative arrangements developed to target consorting for criminal activity and to outlaw serious and organised crime groups, and membership of and association with those groups, and the effectiveness of these arrangements

- the impact and consequences of legislative attempts to outlaw serious and organised crime groups, and membership of and association with these groups on society, criminal groups and their networks, law enforcement agencies and the legal system.

The Inquiry has held public hearings in each capital city and by March 2009 had received 21 submissions (Australia. Parliament. Joint Committee on the Australian Crime Commission 2009). The Committee is due to release its report in the second half of 2009.

The Secretary of the Australian Government Attorney-General's Department recently advised the Legal and Constitutional Affairs Committee of the imminent development of the Organised Crime Strategic Framework, which will examine all the agencies, information and intelligence held by the Australian Government and, where relevant, the states and territories (Wilkins 2009: 108).

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All URLs were correct at 18 May 2009

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Major Crime (Investigative Powers) Act 2004 (Vic)

Police Offences Amendment Act 2007 (Tas)

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

Serious Crime Control Bill 2009 (NT)

Surveillance Devices (Amendment) Act 2004 (Vic)

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This report reflects the law as at 12 June 2009 and the law in this area is subject to frequent change. The report is not intended to constitute legal advice, which should be sought before acting or relying on the content of this report. The paper will be updated later in 2009 to reflect any further developments.

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