COMMENTS ON
ORGANISATION/ASSOCIATION LEGISLATION – "BIKIE GANGS"
Nicholas Cowdery AM QC - May 2009[1]

The comments in this paper are personal comments made by the Director, with input from Professor Howard SC, on the machinery by which declarations and orders may be made under the Act and its possible consequences. They are the Director's own comments and do not necessarily reflect the views of any other member of the Office of the DPP or anyone else.

The Director does not by these comments suggest in any way that Judges of the Supreme Court may not carry out their duties in accordance with their oaths of office and high principle. He and his Office have complete confidence in the integrity of the Judges and the Court.

No comment is made about any prosecution function that may fall to the Director and his Office in the enforcement of the Act. Such functions will continue to be carried out in accordance with the law, the evidence and the Prosecution Guidelines.

UPDATED November 2009 in light of amending legislation up to 11 November 2009 with the following comments:

- Subsection 5(6) of the Act has been replaced. The effect is that a declaration of an eligible Judge cannot be revoked by the Attorney General. It is revoked if the eligible Judge revokes his or her consent or ceases to be a Judge or the Chief Justice notifies the Attorney General that the Judge should not continue to be an eligible Judge. The new subsection also declares, for the avoidance of doubt, that the selection of the eligible Judge to exercise any particular function conferred on eligible Judges is not to be made by the Attorney General or any Minister of the Crown and the exercise of the function is not subject to the control and direction of any Minister.
- A new subsection 16(5) has been added providing that a police officer who has reasonable cause to suspect that a person is one upon whom an interim control order is required to be served may request the person to disclose his or her identity and request the person to remain at a particular place for a period not exceeding 2 hours as is reasonably necessary to serve the notice. Refusal or failure to comply enables police to detain the person for service.
- Subsection 19(1)(a) has been replaced to extend the reach of the Act to former members of a declared organisation with on-going involvement with the organisation and its activities.
- A new subsection 19(7) has been added enabling the Court to take into account whether the person regularly associates with members of the declared organisation without reasonable cause and the extent to which the

[1] I am indebted to Associate Professor Dan Howard SC of the University of Wollongong for the substance of parts of this commentary on the legislation.

conduct of the person demonstrates that the person has genuinely dissociated himself or herself from the organisation.

- A new subsection 26(1A) has been added prescribing an offence for a controlled member of a declared organisation who, at any time within a period of 3 months, associates with another controlled member on 3 or more occasions.
- A new subsection 26(7A) has been added enabling police to require the disclosure of the identity of a person suspected with reasonable cause to be a controlled member of a declared organisation who is associating with another.
- A new section 35A has been inserted prescribing offences for failing or refusing to disclose identity without reasonable excuse and giving false or inadequate information about identity and address.

This legislation has been described as laws against "bikie gangs" and as "gang laws". However, it is not confined in its terms to "outlaw motorcycle gangs" and its potential reach is much broader.

The *Crimes (Criminal Organisations Control) Act* 2009 ["the Act"] has become law with insufficient community consultation and over the deep concerns and protests of the NSW Bar Association, the NSW Law Society, academics and many others. While both the State government and the opposition may be right that something more needs to be done about bikie gangs and criminal groups, especially when they involve themselves in an organised manner in drug manufacture and supply and crimes of violence, this very troubling legislation (which borrows from related legislation in South Australia) is another giant leap backward for human rights and the separation of powers – in short, the rule of law in NSW. One questions the need for further legislation in this area at all. There is already anti-criminal-group legislation in Division 5 of Part 3A of the *Crimes Act 1900*, enacted in 2007, under which successful prosecutions have been brought. There may be more a need for better enforcement, than for new legal powers.

The Act introduces a system of control orders whereby members of declared organisations can be ordered not to associate with other members subjected to control orders. This is not legislation directed, in terms, at "bikie gangs" – it can apply to any organisation, defined in a manner to include any formal or informal grouping of persons, wherever it may be based and wherever those persons may reside.

The machinery of the Act works in two stages. First, the Police Commissioner may apply to have an organisation declared under the Act by an "eligible" Supreme Court judge. That judge must be satisfied (section 9(1)) 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 NSW. *"Serious criminal activity"* is defined to connect with *"serious*

indictable offences" which are offences punishable by imprisonment for 5 years or more.

Secondly, once a declaration is made against an organisation, any judge of the Supreme Court can, on application by the Police Commissioner, make an interim and then a final control order against a person, if the court is satisfied that the person is a member of a particular declared organisation and that "*sufficient grounds exist for making the control order"*. (The Act gives no useful guidance as to what constitute *"sufficient grounds"*).

Section 26 of the Act makes it an offence for a controlled member of a declared organisation to associate (*simpliciter*) with another controlled member of the same organisation. The purpose of any such association is irrelevant to liability. A first offence is punishable with a maximum penalty of 2 years imprisonment; a second or subsequent offence is liable to a maximum penalty of 5 years imprisonment. Certain reasonable circumstances of association are exempted (for example, between *"close family members"* or in the course of a lawful occupation, business or profession, during education courses, etc – including in lawful custody), but the onus is on the controlled person to prove that the association falls within such a reasonable exemption. The making of a final control order has the effect of revoking any authority or licence that the person had to carry on any prescribed activity (for example, operating a pawn broking business, a tow truck, selling or repairing motor vehicles, selling liquor, possessing a firearm, acting as a security agent, operating a casino).

The legislation has a number of troubling features, including the following.

- The legislation does not apply only to bikie gangs, but to any *"particular organisation"* in respect of which the Police Commissioner chooses to make an application. Where will the line be drawn? This legislation could be applied to any, even small, informally organised group whose members the Commissioner alleges *"associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity"*. These words cast a very wide net - far wider than the elements of conspiracy, one of the most broadly defined crimes in the criminal calendar. Why should the responsibility for identifying which organisations warrant being declared under the Act be vested in the Police Commissioner, an unelected official? The spectre of a police state lurks here – an unacceptable slide from the separation of powers by linking the powers of the Police Commissioner with those of "eligible" judges.

  It is curious to note that the Act does not apply to organisations organising, planning, facilitating, supporting or engaging in criminal activity that does not satisfy the definition of *"serious criminal activity"* – arguably for example, gangs of organised shoplifters or street drug dealers.

- Only an *"eligible"* Supreme Court judge can declare an organisation under the Act. To be eligible a judge must first consent to being declared eligible for this purpose and then be so declared by the Attorney General, who has the power to declare (or not to declare) him or her eligible and to amend or revoke the

declaration of eligibility at any time. In other words, if an Attorney General should so desire, he or she has unfettered power to "stack" the hearing of applications for declarations of organisations under the Act with judges willing to enforce it and to revoke or qualify the authority of a judge to determine applications for declarations if he or she does not perform to the government's satisfaction. This may not be the intention of the present Attorney General, but a provision so drafted left on the statute books is extremely dangerous and potentially open to serious misuse. It is also doubtful that the power to declare an organisation under this legislation is merely an administrative one - its ramifications for the organisation and its members are so serious that such an exercise of power may, in reality, more properly be regarded as an exercise of judicial power as the procedures laid down would seem to suggest. Indeed, these provisions may offend the doctrine of the separation of powers also for that reason.

- Whereas section 24 of the Act creates a right of appeal against the making of a control order against a person, section 35 purports, in the widest possible terms, otherwise to oust any review by the Supreme Court or any other review body (excepting investigations or proceedings under the *Independent Commission Against Corruption Act*) of a declaration or order made against an organisation or a person and to deny any right of appeal or review even when there has been a breach of the rules of procedural fairness (natural justice). In combination with the power vested in the Police Commissioner by the Act and the use of "eligible" judges, this alarming provision constitutes a frightening aggrandisement of power – in effect judicial power – to the executive.

- An eligible judge (in the case of an application for a declaration against an organisation) or any Supreme Court judge (in the case of an application in respect of a control order against a member of a declared organisation) hearing an application, is by section 28(3) *"to take steps to maintain the confidentiality of information that [they consider] to be properly classified by the Commissioner as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives and the public"*. One can only wonder what "argument" there can possibly be when affected parties and their legal representatives are excluded from the proceedings.

- Part 3 of the Act empowers any judge of the Supreme Court to make control orders against an individual member of an organisation. The definition of *"member"* of an organisation in section 3 is alarmingly wide – for example, it includes a *"prospective member (however described)"*. It also includes *"a person who is treated by the organisation or persons who belong to the organisation, in some way, as if he or she belonged to the organisation"*. This is extraordinarily broad-reaching – this criterion could be fulfilled without the person himself having any intention of being part of the organisation and could be established without any direct evidence of that person's actual involvement with the organisation.

  It is curious to note, however, that the definition of *"member"* does not include former member. Accordingly, it would seem that if a member received

notice of a control order being sought against him or her, all that would be required for the entire process to be frustrated at that point would be for the member to resign.

- Section 13 provides that the rules of evidence do not apply to hearings of applications for a declaration of an organisation. Are organisations to be declared on the basis of hearsay upon hearsay, or a police intelligence officer's "hunch", or a report of an anonymous telephone call?

- Section 32 provides that *"Any question of fact to be decided in proceedings under this Act is to be decided on the balance of probabilities"* (this does not apply to proceedings for offences under the Act). Such a standard is insufficiently rigorous for the removal of a right as fundamental as the right to freedom of association. Indeed, the Act purports to remove the rights to freedom of association and expression in circumstances that do not come within the permissible exceptions described in the International Covenant on Civil and Political Rights (ICCPR) – for national security, public order, etc.

- Section 13(2) of the Act provides that an "eligible" judge is not required to provide any grounds or reasons for his or her decision in respect of a declaration against an organisation (except to the Ombudsman conducting a review under section 39). This is entirely contrary to the general practice in modern jurisprudence that judges should give public reasons for their decisions.

- The placing of the burden of proof upon a controlled person to establish that an association with another controlled person falls within the exemptions under the Act (for example, close family members), is a draconian measure, reminiscent of reverse onus provisions that were in place for a time in Northern Ireland during the "troubles". This is highly unusual and almost always inappropriate in the context of legislation creating criminal consequences.

- The Act criminalises conduct other than by rules of general application in the community – another infringement of the rule of law.

Further legislation has been introduced targeting the recruitment of a person to be a member of a declared organisation, enabling the substitute service of notices on those subject to applications to be placed under control orders and authorising search warrants to be issued by eligible judges upon reasonable suspicion (rather than reasonable belief).

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC (now a Judge of Appeal in NSW) sounded a timely warning for us all. In her final column in the Bar's monthly newsletter she wrote:

> *"Lawyers tend to take these core values* [i.e. the rule of law and democratic principles] *for granted. We work with the Rule of Law every day. We should not lose sight of the fact that the Rule of Law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At*

> *times, the transient, but regrettably politically significant influence of opinion polls can push the Rule of Law to one side and allow pragmatism to prevail over principle.*

The corrupting force may not be just responses to opinion polls. These influences may be exerted openly or covertly by politicians, the media or rulers and policy makers of all kinds.

It matters not that the motives of the urgers or policy makers may be honourable. Justice Brandeis in 1928 warned in *Olmstead v United States* (277 US 438,479):

> *"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent… The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."*

We all need constantly to be alert to the erosion of rights and be proactive in preventing it. In 2000 Justice Arthur Chaskalson, National Director of the Legal Resources Centres in South Africa and inaugural President of the Constitutional Court of that country, addressed a Public Interest Advocacy (PIAC) dinner in Sydney. He said:

> *"… (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic.*
> *… Although South Africa was ruled* [in apartheid times] *by a minority regime the same course could (also) be followed … by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom.*
> *… (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun.*
> *… (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free."*

This is especially a time for vigilance in NSW. Someone once described it as the price of liberty.