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Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs

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Abstract In the past three years, new laws have been introduced in four Australian states designed to prevent criminal conspiracies by outlaw motorcycle gang (OMG) members and to disrupt the criminal activities of these gangs. The Australian laws push the boundaries previously set in similar laws in other jurisdictions, in that controls can be imposed because of membership of an organization perceived as a threat by the state. The laws constitute a pre-emptive strike against OMGs. However, there are very real issues about their likely effectiveness, given research suggesting that the primary structures targeted in this legislation, the clubs, are not necessarily the ones that OMG members use to conduct their criminal business. This article explores these issues, and suggests that the reaction of OMGs to this legislation may provide important information about OMG adaptiveness and resilience.

Keywords Outlaw motorcycle gangs · State responses · Criminal structures · Effectiveness · Australian bikie laws

Outlaw motorcycle gangs (OMGs) have caused significant problems in Australia over the last few decades. There are reported to be 39 currently active OMGs in Australia with around 3,330 members (ABC News, 2009), many of whom have been involved in criminal activities, particularly the trade in illicit synthetic drugs, serious violence, blackmail, intimidation of witnesses and money laundering, and the infiltration of legitimate businesses such as security, transport and money lending. Some of these OMGs have links to OMGs in other countries. Criminal connections between OMGs and other criminal groups such as Chinese triads have also been revealed by police investigations (ABC News, 2010). The Chief Executive of the Australian Crime Commission (ACC) has stated that OMGs "represent a real and present criminal threat to Australia" (ABC News, 2009).

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OMG feuds over honor and drug 'territories' have been more or less unremitting since the one percenter clubs first became attracted to the lucrative profits involved in Australia's drug trafficking business in the late 1960s/early 70s. The states of New South Wales, South Australia, Western Australia and Queensland in particular have borne the brunt of OMG rivalries. Occasionally this has led to clashes in public spaces. Most notorious is the 1984 'Milperra Massacre', a gun battle between the Bandidos and the Comancheros involving about 60 members in a hotel parking area in Sydney's west. Seven people died, including a 14-year old female bystander, and 20 others were wounded. Forty-three people were charged with murder and other offenses and the trial was one of Australia's largest criminal cases (Harvey & Simpson, 1989). Since then, and despite changes to gun laws and the introduction of new investigative powers for police, ad hoc violence and 'bikie wars' have posed an ongoing challenge for law enforcement throughout Australia's mainland. Less well understood by the public but concerning to authorities has been an evolution in OMG sophistication, a global phenomenon highlighted by Barker (2007). What were once primarily social groups having some criminal elements—the clubs—have become economic organizations much more focused on material gain—the gangs. There is also a perception within official circles that the gangs are growing in strength and number, and that standard law enforcement measures are having minimal effect in stemming this expansion (Redmond, 2008; Parliamentary Joint Committee on Australian Crime Commission, 2009).

Because of this public profile, OMGs have recently come in for special attention from governments Australia-wide, despite the contention of some experts that their criminal activities constitute only an "incredibly small" proportion of crime in Australia (Veno & van den Eynde, 2008: 9). Laws passed in several Australian states have established a new legislative approach to organized crime groups. These laws, enacted in South Australia, New South Wales, the Northern Territory and Queensland, have broad application to *any* organization, being an incorporated or unincorporated group, however structured, wherever based and wherever its members reside. However, both the political rhetoric surrounding them and the parliamentary debates with respect to the legislation make it clear that the intended targets of the laws were outlaw motorcycle gangs (see for example Rann, 2007; Hansard, 2008). Implementation of the laws has so far been attempted only against OMGs. The laws have come to be known colloquially and collectively as "bikie laws" (or sometimes, more accurately, "anti-bikie laws"), "bikie" being the common term for OMG member in Australia. They are referred to in this article as "OMG laws."

These laws aim to prevent members from planning and engaging in criminal activities through enabling state control over their associations and communications. In effect they are designed to prevent criminal conspiracies by OMG members and to disrupt the criminal activities of OMGs. Courts are empowered to issue, on the application of the police commissioner, civil instruments called control orders limiting or prohibiting communication between members of declared organizations. The breach of an order can attract criminal penalties, including imprisonment. The laws have been widely criticized as unconstitutional and non-compliant with the rule of law and human rights (see for

example Bronitt & McSherry, 2010; Cowdery, 2009; Gray, 2009; Loughnan, 2009). Lawyers and academics have expressed concern about the way in which these laws institute a procedure that enables OMG members to be deprived of some of the liberties available to any ordinary person because of their identity as an OMG member and in the absence of evidence grounding a prosecution for specific illegal conduct, or even for conspiracy. It has also been suggested that the processes from which this deprivation of liberties results involve something less than due process.

This article first situates these laws within the panoply of organized crime laws. It then describes their application to OMG members (with some generalizations, given that four statutes are analysed) and recounts efforts to implement the laws. It discusses whether, in a comparative context, the laws represent a fresh approach to OMGs, and briefly examines their likely effectiveness in the light of some international research about the structures through which OMG members engage in criminal business.

Organized Crime Laws and Australian OMG Laws

There are a number of ways laws can tackle organized crime. As set out in Table 1, the nine jurisdictions within Australia (the Commonwealth, six states and two territories) employ varying combinations of legislative strategies. Police and other law enforcement agencies have been granted powers both to investigate organized crime and to follow up on those investigations (for example, through confiscation of assets). The criminalization of the participation of individuals in organized crime groups is required by the United Nations Convention against Transnational Organized Crime (UNTOC), to which Australia is a party. Participation prohibitions have been enacted in New South Wales (Part 3A, Division 5, *Crimes Act 1900* inserted in 2006) and the Australian Capital Territory (Chapter 6A, *Criminal Code 2002* inserted in 2010). At the federal level, offenses for participation of various kinds have recently been enacted in relation to offenses having a federal aspect (*Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010*). However none of these participation provisions are as expansive as those of the U.S. *Racketeer Influenced and Corrupt Organizations Act* (RICO) (Title 18, United States Code, Sections 1961–1968). RICO, although targeting individuals, makes it possible to bring to a single trial whole criminal groups and families, or "enterprises" (Jacobs, 1999), because it focuses on patterns of activity. OMG members have been successfully prosecuted under RICO (Barker, 2007). Australian participation provisions are still too young to have been properly tested, but without the focus on patterns of activity at the enterprise level, are unlikely to result in the kind of large scale disruption of organized crime groups that has been achieved in the U.S.

Another way to deal with organized crime is to target the groups themselves by focusing on their activities, their objectives, their impacts or their structures (Ayling, 2011). Legislating to deal with criminal organizations rather than simply the individuals that comprise them is a difficult business. It raises thorny policy and drafting issues such as how to define these organizations, how to identify their

Table 1 Legislative powers for combating serious organized crime—Australian jurisdictions (as at February 2011). Based on a table by the Australian Government Attorney-General's Department submitted in December 2009 to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups. Revised by the author for currency and clarity

	Search warrants	Telecomms interception	Controlled operations	Assumed identities	Witness identity protection	Surveillance devices	Coercive powers[a]	Anti-fortification	Proceeds of crime	Unexplained wealth	Control orders
Cth	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y[b]
NSW	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Vic	Y	Y	Y	Y	Y	Y	Y	N	Y	N	N
Qld	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y[c]	Y
WA	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	proposed
SA	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
Tas	Y	Y	Y	Y	Y	Y	N	Y	Y[d]	N	N
ACT	Y	N[e]	Y	Y	Y	Y	N	N	Y	N	N
NT	Y	Y	Y	Y[f]	Y	Y	N	Y	Y	Y	Y

[a] Coercive powers are contained in the *Australian Crime Commission Act 2002* and mirror ACC legislation in the States and Territories. Additionally, legislation in New South Wales, Victoria, Queensland and Western Australia gives certain state agencies coercive powers in relation to serious organised crime.

[b] A person can be subject to a control order if the order substantially assists in preventing a terrorist attack or if the person has trained with a listed terrorist organisation. There are no control orders in relation to organized crime.

[c] Queensland's laws do not include provision for unexplained wealth orders, but do create a statutory presumption that the unexplained portion of a person's wealth is derived from illegal activity, subject to a finding that the person engages in "serious crime-related activity" and to proof of unexplained wealth. The onus is on the respondent to rebut that presumption.

[d] There are no civil confiscation provisions in Tasmania—criminal forfeiture only.

[e] There is no ACT specific legislation. The Commonwealth legislation applies in the ACT to offenses committed against the Commonwealth.

[f] As far as the author can ascertain, the use of assumed identities by police officers is limited to the context of the Territory Witness Protection Program

members, which criminal acts of participants are attributable to organizational membership, what sanctions are appropriate to punish and deter organizational criminal behavior, and how legal responsibility for criminal acts should be distributed between members and organizations (on this last issue, see Harding, 2007). Decisions made on these issues are crucial to the effectiveness of the laws in dealing with the problem they are intended to address.

The new laws passed in Australia over the last three years are an attempt to deal with the problem of OMGs as criminal organizations rather than just with individual member behavior. In 2008 the state of South Australia passed the *Serious and Organised Crime (Control) Act* 2008 (SA Act). The legislative model given birth to in this statute subsequently cascaded through a number of other Australian jurisdictions. On 22 March 2009 a brawl erupted at Sydney domestic airline terminal between long time enemies the Hells Angels and Comancheros, during which a participant, the brother of a Hells Angel, was stabbed and bludgeoned to death with a metal bollard in front of travellers. A few days later his brother who had also participated in the mêlée was shot and seriously wounded outside his home. The media reaction to these events was, of course, immediate and intense. A "moral panic" (Cohen, 1972) ensued and "the 'bikie problem' became discursively constructed as one requiring a swift enhancement of police powers" (Morgan, Dagistanli & Martin, 2010: 586). Together with strengthening the Gang Squad, New South Wales dealt with the OMG problem highlighted by this murder by enacting, only 10 days after the airport incident, the *Crimes (Criminal Organisations Control) Act 2009* (NSW Act). Then in October 2009, the Northern Territory enacted the *Serious Crime Control Act 2009* (NT Act). Queensland followed suit in December 2009 with the *Criminal Organisation Act 2009* (Qld Act). Each of these statutes broadly follows the South Australian model (although it should be noted that the Qld Act represents something of an evolution from the earlier versions). Western Australia also plans to enact similar legislation but has been awaiting the outcome of legal challenges to the SA Act before proceeding (AAP with Sapienza, 2009).

On 16 April 2009, some 3 weeks after the airport murder, the Standing Committee of Attorneys-General (SCAG), a body comprised of all the Attorneys-General in Australia plus the New Zealand Minister of Justice, resolved that: "… organised crime is a national issue requiring a nationally coordinated response by all jurisdictions" (Standing Committee of Attorneys-General, 2009). SCAG agreed that all States and Territories should consider the introduction of specific legislative measures to combat organized crime where such measures were lacking. One of its recommended measures was an offense of 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" (Standing Committee of Attorneys-General, 2009). Despite SCAG's call for a coordinated approach to organized crime across Australia, however, some other states and territories decided not to pass laws along South Australia's model. As an island state with few organized crime problems, Tasmania saw little need for them. Victoria and the Australian Capital Territory (ACT) foresaw potential clashes between such laws and their existing human rights instruments (ACT *Human Rights Act 2004*; Victorian *Charter of Human Rights and Responsibilities Act 2006*), so opted for continued reliance upon existing criminal laws.

The approach adopted in the four states that did enact OMG laws relies on neither criminalization of participation (as required by UNTOC) nor organizational proscription (as is used, for example, in the Hong Kong approach to triads: see *Societies Ordinance*, HKSAR). Instead the approach is to target the underlying structures of OMGs. Rather than outlaw the organization, the state is empowered to impose controls over interactions between and with members of criminal organizations. The primary aim is to prevent members from planning and engaging in criminal activities, and by doing so break up the groups and deter recruits. A South Australian police officer commented that "Legislative reform has focused on the crime as the problem. The alternate view in South Australia is that the criminals' ability to associate in order to build networks, groups and syndicates is the problem, while the commission of crime is the symptom." (Powell, 2009: 20).

The Structure of the Laws

The way the laws operate varies from state to state in their detail, but the basic structure is the same. It consists of two steps:

- the declaration of an organization, and
- the imposition of control orders on members of a declared organization (and, in some cases, persons who associate with them).

Declarations

A designated decision maker (in New South Wales, the Northern Territory and Queensland, this is a judge of the Supreme Court; in South Australia, it is the Attorney-General) is empowered to make a declaration in relation to an organization if he/she is satisfied that (a) members of the organization associate for the purpose of organizing, planning, facilitating, supporting or engaging in serious criminal activity; and (b) the organization represents a risk to public safety and order in the state (NSW Act s.9(1); SA Act s.10(1); NT Act s.18(2); see also Qld Act s.10(1) which has somewhat different wording). Not all the members of an organization need to associate for this purpose; some will suffice, provided that the declaration maker is satisfied that those members constitute a significant group within the organization, either in terms of their numbers or in terms of their capacity to influence the organization or its members (NSW Act s.9(4)(a); SA Act s.10(4)(a); NT Act s.18(5)(a); Qld Act s.10(4)(a) and (5)). When contemplating making a declaration, the designated decision maker must have regard to, amongst other things, any information that suggests that a link exists between the organization or its current or former members and serious criminal activity, any criminal convictions recorded in relation to current or former members, and whether members of an interstate or overseas chapter or branch of the organization associate for the purpose of engaging in or planning serious criminal activity (NSW Act s.9(2); SA Act s.10(3); NT Act s.18(3); Qld Act s.10(2)).

A declaration is of no prohibitive force of itself. It does not make the organization illegal and it does not affect its property or affairs (Mr Justice Bleby in *Totani &*

Anor v The State of South Australia [2009] SASC 301, para 39, commenting on the SA Act). This is the case even in Queensland where the court is empowered to declare an organization "criminal" (Qld Act s.10). However, a declaration does serve as a basis for police-requested, court-imposed control orders.

Control Orders

A police commissioner may in his or her discretion request a court to make a control order with respect to a member of a declared organization.[1] Control orders can do a number of things. In New South Wales, control orders are designed to prevent a controlled person (a member of a declared organization) associating or communicating with another controlled person. In the other states, control orders can also prohibit association between controlled members and members of any declared organization, or between controlled members and other specified persons. Orders may also prohibit the person from entering or being near certain premises, applying for or undertaking certain occupations or possessing specified articles (however, as the associations provisions are the focus of this article, these other prohibitions will not be further discussed here). The result of defiance of a control order can be imprisonment for up to 5 years. The purpose for which the order is breached is irrelevant. Although neither the organization, nor membership in it, is made unlawful by the legislation, the control order itself "creates new norms of conduct, contravention of which is a crime" (Mr Justice Hayne, *South Australia v Totani* [2010] HCA 39 (11 November 2010), para.225).[2]

Legal Process

The OMG laws (particularly those of SA and NSW) have been criticized as draconian and inconsistent with the usual standards for criminal proceedings (see for example Cowdery, 2009). The ire of lawyers, in particular, has been sparked by some evidential and procedural innovations (varying between the different states' laws), such as a requirement for only a civil standard of proof for questions of fact, the removal of any need to give reasons for declaration decisions, the ousting of rights of review for decisions about declarations and control orders, and the reversal of the onus of proof for exemptions from a control order's prohibitions on associations.

However, the most trenchant criticism is reserved for the role that the laws give to "criminal intelligence" as a foundation for declaration and control order decisions. Criminal intelligence is "information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, 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." (SA Act s.3; see also NSW Act s.3(1); NT Act s.6; Qld Act s.59). This information may be provided to the decision maker by the Police Commissioner when applying for a declaration or for a control order,

[1] Under the SA, NT and Qld Acts, control orders can also be imposed on certain persons who associate with members of declared organizations.

[2] Under the Qld Act, a first offense is a misdemeanour; only a later offense is a crime (s.24(2)).

and can constitute a significant factor in its decision. This information cannot be revealed (except to a limited number of officials specified in the Act) and action must be taken to maintain its confidentiality, through, for instance, hearings *in camera* or even absent the parties. This non-disclosure obligation includes disclosure to the defendant and his legal representative. Given OMGs' reputation for witness intimidation, this is understandable. However, as a result, it is possible that a control order could be made without the defendant ever becoming aware of the information upon which the court relies or being given an opportunity to contest it, and this raises questions about compliance with international human rights obligations (such as under Article 14(3) of the *International Covenant on Civil and Political Rights* to which Australia is a party).[3]

Enforcement

Implementation of the legislation has stalled. Only in South Australia and New South Wales has any enforcement action been taken and in both cases legal challenges to the laws have resulted.

The Finks Motorcycle Club was declared under the SA Act in May 2009. Eight Finks' members were then made subject to control orders. The operation of those orders was subsequently stayed pending the outcome of a legal challenge by two Finks to section 14(1) of the Act, which mandated that upon application by the Police Commissioner the court *must* impose a control order on a member of an organization that had been declared by the Attorney-General. In September 2009 the South Australian Supreme Court decided that section 14(1) was invalid because it destroyed the Court's integrity as a repository of Federal jurisdiction (*Totani & Anor v The State of South Australia* [2009] SASC 301). The South Australian government appealed to the High Court of Australia, supported by the federal government of Australia and all state governments (except Tasmania and the ACT). The High Court dismissed the appeal, holding that section 14(1) "impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function" (*South Australia v Totani* [2010] HCA 39 (11 November 2010), French CJ, para. 82). Because this decision relates only to a particular provision of the SA Act which does not have any echo in other states' laws, it is of limited impact, both for the future operation of the SA Act and for other identified issues with the OMG laws overall, such as their human rights implications. At the time of writing the South Australian government has yet to amend its legislation but remains firm in its commitment to ban all bikie gangs (AAP, 2010) and has sought a declaration against the Rebels MC (Owen, 2009).

[3] Only in Queensland has an effort been made to protect the rights of defendants while still dealing with the problem of a leakage of intelligence that might endanger informants. Under the Qld Act, a Criminal Organisation Public Interest Monitor (COPIM) is appointed, whose job it is to test and make submissions to the court about the appropriateness and validity of applications, including applications to declare certain information to be criminal intelligence (Qld Act s 86). The COPIM is usually allowed to see most of the criminal intelligence put before the court (s.77).

Despite the then current legal challenge to the SA Act, in July 2010 New South Wales Police lodged an application for a declaration of the Hells Angels Motorcycle Club under the NSW Act (Jacobsen, 2010). Both the application and the NSW Act itself have now been challenged by the Hells Angels in the High Court on constitutional grounds. This action is expected to delay the New South Wales Supreme Court's consideration of the application (Jacobsen & Kontominas, 2010).

A Fresh Approach?

Just how novel are these laws? The politicians who passed these laws certainly felt they were travelling an untrodden path. One South Australian member of Parliament noted that "I do not think it is sufficient simply to await the commission of a criminal offence we do need to recognise that times have changed and that maybe the answers that we had for problems of old are no longer the right answers because we no longer have the same problems" (Redmond, 2008: 2058, 2062).

Legislative mechanisms to control the associations of suspected criminals do exist in other contexts and other jurisdictions. For example, in the United Kingdom, Serious Crime Prevention Orders (SCPOs) imposed under the *Serious Crime Act 2007* may contain any prohibitions or restrictions on individuals involved in serious crime that the court considers appropriate, such as those relating to their associations. SCPOs can be imposed by a court where it has reasonable grounds to believe the order would protect the public by preventing, restricting or disrupting the person's involvement in serious crime. Additionally, the court must be satisfied that the person has committed a serious crime of which they have been convicted or has, or is likely to have, facilitated the commission of a serious crime.

Similarly, the terrorism laws of both the UK and Australia provide for court-imposed control orders over suspected terrorists. Division 104 of Australia's Criminal Code, for example, allows a court to make a control order where it is satisfied, on the balance of probabilities, that this would substantially assist in preventing a terrorist act or that the defendant has provided training to, or received training from, a listed terrorist organization. Those provisions require the court to be "satisfied either that the person against whom the order was to be made *had engaged* in particular past conduct, or that the order would have an *identified consequence*" (Hayne J, in *The State of South Australia v Totani & Anor* [2010] HCA 39, para. 224). As with the UK provisions referred to above, there must be at least some personal link to identifiable illegal activity, either past or future, on the part of the defendant.

The legislative approach to OMGs adopted in the SA Act and its successors was modelled on the terrorism laws (Redmond, 2008; Loughnan, 2009). With the exception of the Queensland legislation (which differs in detail from that of the other states), the OMG laws do not require the court to find that a member has engaged in illegal activity before imposing a control order upon him. Similarly, in contrast to conspiracy laws, no agreement, or even intention, to commit a specific crime in the future on the part of the defendant needs to be proved. As Justice Hayne stated (*The State of South Australia v Totani & Anor* [2010] HCA 39, para. 215) in relation to the SA Act's application to an OMG member, "the freedom of association of a defendant may be restricted where neither the executive nor the judicial branch has

made any determination about what he or she has done, intends to do, or is likely to do in connection with 'serious criminal activity'."

Not so long ago, Harding (2007: 208) contended that "(c)riminal responsibility attaching to individuals and based on the fact of membership of a 'criminal organisation' is an idea which has been suggested rather than implemented in modern Western criminal law." These laws indicate that this idea's time has come. A member's personal connection to serious criminal activity is relevant but not necessary to a court's decision to impose a control order on him. And because the definition of "member" is inordinately broad,[4] a defendant's connection to the organization or its current members could, at least in theory, be quite tenuous.

Of course, as Schauer and Zeckhauser (2007) point out, the regulation of acts that are merely indicative of other wrongful acts (what they call "regulation by generalization," and Bentham called "evidential" or "presumed" offenses) is quite common in the criminal law. The possession of stolen property is an offense, for example, because it suggests an act of theft, or at least its facilitation, by the offender. Using that argument, control orders might be regarded as just another regulatory tool that reduces the risks of social harm by employing probabilistic inferences.

Unlike the laws to which Schauer and Zeckhauser (2007) refer, however, the Australian OMG laws do not require a criminal act, including a conspiracy, to bring them into play. The fact of membership acts as a proxy for an unacceptable level of risk of the commission of serious offenses, and so is taken to justify early intervention. These laws thus seek to 'pre-empt' crime, rather than to 'prevent' it. Crime prevention in the criminological sense means non-punitive measures involving social and environmental strategies (McCulloch & Pickering, 2009). This response, in contrast, involves coercive state action that can proceed to impose a form of punishment, without the need for prosecution or conviction for any crime, on the basis of imagined future harms. Zedner (2007) refers to this as "pre-crime" or "future law" (see also McCulloch & Pickering, 2009). One problem with such an approach is that prejudice and stereotypes, rather than objective facts, have the scope to animate law enforcement action (McCulloch & Pickering, 2009). Clearly that is the case with the OMG laws discussed here. Prejudice and stereotypes may more easily creep into secret 'criminal intelligence' than into information that must merit the description of 'evidence' for a prosecution by conforming to court rules and proving plentiful and strong enough to withstand testing in a transparent curial process.

Like terrorism laws, then, these serious and organized crime laws raise questions about the appropriate balance between individual liberty and state security. It might be argued that the OMG laws in fact push the boundaries of the terrorism model somewhat further in entrenching membership of a declared organization as a pretext for state action. Australian authorities in some states appear to be increasingly intolerant of the risks associated with the 'dangerous people' that comprise OMGs, and progressively more willing, in the interests of security, to act pre-emptively to forestall imagined harms becoming reality.

[4] Under all four laws, "member" includes not only current members but also associates, prospective and former members and people who simply identify themselves as belonging to the organization or are treated as belonging to it. The Qld Act definition also includes "a person who associates with a member of the organisation for the purpose of engaging in, or conspiring to engage in, serious criminal activity."

The Issue of Effectiveness

The drafting of effective criminal laws requires a sound understanding of the problem, specifically the problem as it surfaces in the relevant jurisdiction. In the 'war on organized crime', a lack of clarity about the problem to be overcome can cloud the vision of legislators, who may misunderstand its true nature, exaggerate its dimensions or attribute responsibility for it to the wrong people, with potentially harmful consequences.

The Australian OMG laws proceed on the basis of a number of assumptions about the nature of OMGs and the threats they pose. These include:

1) that OMGs are comprised of criminals and therefore are 'economic criminal organizations' (von Lampe, 2003);
2) that OMG members associate with each other in order to conspire to commit criminal acts;
3) that if the ability of OMG members to associate with one another is circumvented, they will cease to engage in criminal activity.

Of course each OMG (indeed, each OMG chapter) has a different composition and history, making it difficult to generalize about them. Barker (2007) suggests that OMGs, in structure and activities, are ranged along a continuum between social (club) and economic (gang) organization—in other words, the extent of OMG criminality varies and not all OMGs are 'criminal organizations' per se. Von Lampe (2008: 12–13), too, has argued that:

> "outlaw motorcycle gangs are not necessarily criminal organizations themselves…it is more characteristic that some of their members are engaged in criminal activities, most notably drug trafficking and extortion. Still, being a member of an outlaw motorcycle club provides protection and a web of contacts that can potentially be used for criminal endeavours."

This conclusion is supported by Morselli's (2009) network analysis of the Canadian Hells Angels (the Nomads, their prospects and a puppet club, the Rockers), based on electronic and physical surveillance records submitted as evidence during the trials of 131 individuals following Operation Springtime in 2001. Morselli concluded that the network of (economic) criminal connections he mapped did not perfectly reflect the hierarchy of the club. His analysis indicates that criminals from outside the club were integral to many of the criminal activities at issue in the trials.

Similar structural patterns in the criminal activities of OMG members can be found in Australia. For example, a major investigation in New South Wales in 2001, the work of Strike Force Sibret, uncovered a methamphetamine production and distribution business run by Walsh, the sergeant-at-arms of the Newcastle chapter of the Nomads (an Australian OMG). His wife and non-Nomad associates were involved in cutting, packaging and distributing the drug. The Supreme Court judge hearing the case (*Regina v Walsh and Little* [2005] NSWSC 125 (28 February 2005)) described the business as a "family business" (para. 43) and mentioned the Nomad connection only once when he commented that Walsh's membership of the club indicated that the defendant believed that "he was above the law and could act with

impunity" (para. 53). A more recent Australian example is Operation Hoffman, a multi-agency organized crime investigation led by the Australian Crime Commission and concluded in 2010, which indicated that OMG members had links with corrupt port workers, Italian crime figures and Chinese triads for the conduct of multifaceted drug trafficking operations (ABC News, 2010; McKenzie, 2010).

Thus the picture is probably more complex than the assumptions 1) and 2) would suggest. It appears that the 'dark networks' (Raab & Milward, 2003) through which some OMG members engage in criminal business may not correlate exactly with the 'bright' (legal) networks that are the clubs themselves, and that are the subject of declarations under the Australian OMG laws. These dark networks instead 'hang off' and overlap with the bright networks and use them for support and protection. The clubs both provide and are situated within a network of 'criminally exploitable ties' (von Lampe), or as Spapens (2010) terms it, a 'criminal macro network.' A 'criminal collective' (Spapens, 2010) that springs from these foundations to conduct economic activities is not necessarily limited to the members of a particular OMG, nor are all members of that OMG necessarily involved in it. OMG members that are criminally inclined clearly do conspire with each other (see 2) above) but not necessarily in every instance. They also conspire with others, and these latter relationships are of considerable significance in the conduct of criminal business.

What does this mean for the Australian OMG legislation? The laws target organizations with names and public profiles, which can therefore be declared. More fluid or darker criminal networks lacking such a public face, including criminal collectives comprising OMG and non-OMG members, cannot be declared. However, the legislation is broadly drafted and is able to impact on many different relationships. One issue is that there is a danger of over-reach, in that non-criminal members of OMGs that lie between the extremes of Barker's continuum (discussed earlier) could, by virtue of their membership, be made the subject of control orders and their associations accordingly restricted despite their lack of culpability. As far as OMG members' associations with criminal non-members are concerned, the laws of SA, NT and Qld provide that these can be targeted through control orders. If the criminal intelligence submitted by the Police Commissioner is current, comprehensive, and convincing enough for the court to rely upon, associations by controlled members with criminals outside the club as well as internal associations could be prohibited.

So is it likely that criminal conspiracies will cease and criminal conduct will be disrupted through implementation of this legislation, as suggested by 3) above? The criminal macro network constituted by criminally exploitable ties in which OMGs are situated gives criminally-minded members plenty of scope to form criminal collectives with non-targeted individuals to conduct profit-making business. Practical problems for the police may make properly targeting and enforcing this legislation complex. Maintaining currency in their intelligence about criminal associates of OMG members may prove difficult, particularly if one consequence of the laws is that the criminal activity of OMG members is driven underground, "jeopardising the reasonably effective police intelligence network currently in place" (Findlay & Loughnan, 2009). Moreover, police will need to marshal considerable resources in applying for control orders. Making even a single application requires

substantial work. To do so on a continuous and timely basis as new collectives coalesce from the criminal macro network will be burdensome.

Effectiveness will also depend upon successful enforcement of control orders. Full enforcement would involve continual monitoring and surveillance of controlled members, a tall order for fiscally-challenged police. However, if dedicated resources are not forthcoming, community expectations that OMGs will be dealt a serious blow by these laws may be disappointed and police legitimacy may suffer.

The reactions of Australian OMGs to the laws also suggest that OMGs are prepared to fight for their way of life and expend considerable financial resources doing so. One percenter clubs in four states, despite traditional enmities, have formed 'United Motorcycle Councils' for the purpose of pooling money and ideas, and launching legal actions.[5] This banding together suggests a flexibility and resilience in the face of attack that could bode badly for law enforcement efforts to deal with OMG crime in Australia.

Conclusions and Implications

New laws passed in several Australian jurisdictions to deal with OMGs are modelled on terrorism legislation but further entrench membership of 'undesirable' organizations, those that are perceived as threats to public order, as a ground for coercive state action. In a quest to disrupt and disband OMGs, the state is empowered to engage in pre-emptive strikes to head off criminal conspiracies and activities before they begin by interfering, through the mechanism of control orders, with the everyday liberties of OMG members, including their communications and associations. Underlying this approach is a view that criminality and OMG membership go hand-in-hand, providing a pretext for pre-emptive action. In decoupling criminal intention from proscribed conduct and making other adjustments to legal process, such as allowing the use of secret criminal intelligence, these laws contain elements that are arguably contrary to established criminal law principles. They raise questions about the desirable balance between public safety and individual freedoms and about the direction that criminal law in modern liberal states such as Australia is heading.

From a practical point of view, there are real issues about the reach and likely effectiveness of these laws, given that the primary structures targeted in this legislation, the clubs, are not necessarily the same ones that research suggests are used by OMG members to conduct their criminal business. While there is some scope to disrupt criminal collectives involving OMG members and others through the mechanisms of declarations and control orders, in practice this could be difficult to achieve if, as an unintended consequence of these laws, OMG members become more circumspect about their activities and associations.

That is not to say that these laws cannot work. Australia's experiment with this new approach is one that other countries would do well to monitor. How OMGs react and adapt will be indicative of the vulnerabilities and strengths of their structures, both social and economic. The presentation of a united and well resourced

[5] See http://www.unitedmotorcyclecouncil.com/andlinks.

OMG resistance in Australia suggests that these organizations are resilient. Current legal challenges are unlikely to be the last ones governments will face. This resistance also suggests that 'going underground' may not be the only adaptive strategy used by defiant OMGs confronting coercive state responses. Structural changes in OMGs as a result of these laws need to be closely observed. A study of these developments is likely to reward policy makers and legislatures in other jurisdictions with an expanded evidence base for crafting future law enforcement strategies against OMGs.

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